ORIGINAL

No. 2011 11 - 1120
(Related to Pending Notice of Certified
Conflict, Supreme Court Case No. 2011-1097)

In the Supreme Court of Ohio

APPEAL FROM THE COURT OF APPEALS
EIGHTH APPELLATE DISTRICT
CUYAHOGA COUNTY, OHIO
CASE NO. 10-094908

RONALD LURI,
Appellant,

v.

REPUBLIC SERVICES, INC., et al.,
Appellees.

MEMORANDUM IN SUPPORT OF JURISDICTION OF APPELLANT

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I. INTRODUCTION

It has now been three years since a jury found that the three corporate and two individual defendants in this case: (1) fired Plaintiff-Appellant Ron Luri because he objected to age discrimination, and (2) proceeded to falsify evidence in an attempt to cover up their unlawful retaliation. See *Luri v. Republic Services, Inc.* (Oct. 23, 2009), 8th Dist. No. 92152, Appendix ("Appx.") at A-25 ("*Luri I*"); *Luri v. Republic Services, Inc.* (May 19, 2011), 8th Dist. No. 94908, Appx. at A-2 ("*Luri II*").

In May 2011, a unanimous panel of the Eighth District Court of Appeals affirmed liability and the jury's compensatory damage award, but instructed the trial court to reduce the three corporate punitive damage awards to an amount representing "the full amount authorized by the legislature" under R.C. 2315.21 (the punitive damages "cap"), consistent with due process. *Luri II*, Appx. A-20. The panel split on how to calculate the "cap," with the majority concluding that the cap was to be applied after combining the three awards into one, and the dissenting judge concluding that the plain language of the statute called for the cap to be applied to each corporate defendant's punitive damage award. See *Luri II*, Appx. A-16–17, A-22–24.

This case presents numerous *potential* issues worthy of this Courts review; the Court of Appeals, for example, held that "tort reform" damage caps apply to verdicts in employment discrimination cases under R.C. Chapter 4112, and that notwithstanding statutory language to the contrary, defendants can wait until 14 days after judgment has been entered on a jury verdict to first request the application of "caps" as a "remittitur."

In the end, however, the opinion applies various tools that are at the disposal of trial and appellate courts to limit punitive damage awards; defendants have received all of the relief (and more) to which they could possibly be entitled; and it is time for defendants' serial appeals to end. Yet defendants seek a third appeal, having convinced the Eighth District panel to certify a purported "conflict" regarding the constitutionality of Ohio's bifurcation statute (see Appx. A-1 and Sup.Ct. Case No. 2011-1097), even though neither defendants nor Luri challenged the constitutionality of that statute in either the trial court or in either of the two appeals.

This case should not be subjected to the additional and needless delay that would occur if Case No. 2011-1097 were accepted and the case "held." Not only did neither party to this case challenge the constitutionality of Ohio's bifurcation statute, but the "constitutionality" of R.C. 2315.21 will not affect the outcome of the case – any "excessive" punitive damage award allegedly resulting from defendants' own witness injecting net worth evidence into his testimony (*Luri II*, Appx. A-9) was cured by the court's reduction of the corporate punitive damage awards.

But if this Court accepts the "conflict" in Case No. 2011-1097, it should also consider the issue of first impression presented on the proper calculation of the punitive damage "cap" when a jury finds that multiple corporate defendants committed independent malicious acts through its officer and supervisory employees.

II. EXPLANATION OF WHY THIS CASE IS A CASE OF PUBLIC AND GREAT GENERAL INTEREST

The proper calculation of the punitive damage "cap" for awards against multiple corporate defendants presents a statutory interpretation question of first impression and is an issue of public and great general interest.

The majority and dissenting opinions agree that the reprehensibility of the corporate defendants' conduct in this case "speaks to an award of punitive damages in the full amount authorized by the legislature" under R.C. 2315.21(D)(2)(a) (*Luri II*, Appx. A-20), but disagree on how that amount is calculated. The dissent points to the plain language of the statute to conclude that the proper application of the cap is two times the compensatory damages of $3.5 million (i.e., $7 million) for each of the three defendants. Specifically, R.C. 2315.21(D)(2)(a) states that trial courts should not enter judgment for punitive damages "'in excess of two times the amount of the compensatory damages awarded to the plaintiff *from that defendant* * * *.'" *Luri II*, Appx. A-22–23 (citation omitted, emphasis added.) See, also, id. at Appx. A-23, quoting this Court's language in *Arbino v. Johnson & Johnson*, 116 Ohio St.3d 468, 2007-Ohio-6948, ¶86, that the punitive damage cap "'limits punitive damages in tort actions to a maximum of two times the total amount of compensatory damages awarded to a plaintiff *per defendant*.'"

The majority states that "there may be cases" where the plain language of the statute requires application of the cap "per defendant," but not when the plaintiff is an employee "advanc[ing] a single-employer theory of liability to impute wrongdoing to multiple business entities" (*Luri II*, Appx. A-16). Without any explanation as to why the

plain language of the statute is "trumped" by the single employer doctrine, the majority holds that all three corporate defendants are liable for some undefined portion of a single, $7 million punitive damage award.

The single employer doctrine evolved to prevent employers from creating and manipulating corporate structures to evade liability for unlawful acts that harm employees. Far from maintaining that salutary purpose, the majority's interpretation of R.C. 2315.21(D)(2)(a) allows employers to create and manipulate corporate structures to minimize the consequences of malicious acts – first by insisting that the jury individually find malice and award separate punitive damages against multiple corporations committing malicious acts through officers and supervisory employees (as defendants did here), and then by arguing that only a single "cap" applies regardless of the number and amount of those individual corporate punitive awards.

The majority's creation of an unexplained exception to damage cap calculations offers no guidance to courts and sets a perplexing precedent for any court faced with any tort case involving multiple corporate entities. If tort reform damage caps do in fact apply to employment actions under R.C. Chapter 4112, then the employment action must necessarily be considered as any other tort under Ohio law. The plain language of the cap should apply and this Court should accept jurisdiction to resolve that issue of first impression.

III. STATEMENT OF THE CASE AND FACTS

The evidence at trial proved that after Plaintiff-Appellant Ron Luri ("Luri") opposed a corporate plan to engage in unlawful age discrimination, Defendants-Appellees Republic Services, Inc. ("Republic"), Republic Services of Ohio I, L.L.C. ("Republic Ohio"), Republic Services of Ohio Hauling, L.L.C. ("Ohio Hauling"), James Bowen (Area President of Republic Ohio and Luri's direct supervisor), and Ron Krall (Regional Vice-President of Republic and Bowen's direct supervisor), concocted a false paper trail to disguise their retaliatory termination, used the threat of lawsuits to prevent Luri from accepting a similar position with another company, and attempted to deceive the court and jury with fabricated documents and hopelessly conflicting testimony.

During discovery, motion practice, and at trial, defendants relied on their concocted paper trail to assert a fictional, "he didn't conduct enough meetings" basis for terminating one of their top performing managers. After Luri filed this action on August 17, 2007, Defendants added to and altered the concocted paper trail, including a memorandum that was modified and backdated to include an allegedly negative perception of Luri within the company.

A. Defendants' Invocation of Tort Reform Statutes After the Jury Returns Its Verdict.

About a month before the June 23, 2008 trial, defendants filed a motion to bifurcate "pursuant to Rule 42(B) of the Ohio Rules of Civil Procedure and Section 2315.21(B)(1) of the Ohio Revised Code." Defendants argued (emphasis added) that "Rule 42(B) and the policy embodied in the Ohio statutory scheme of tort reform, *read in*

conjunction, provide both the means and justification for granting the requested bifurcation of the punitive damages issue." The trial court denied the motion, properly exercising the discretion necessarily arising from a construction of Rule 42(B) and the policy embodied in R.C. 2315.21(B)(1) "in conjunction."

Other than the motion and a footnoted reference to R.C. 2315.21(B)(1) in defendants' trial brief request for bifurcation pursuant to Civ.R. 42(B), defendants failed to assert the applicability of any tort reform statute to this employment discrimination action before the jury returned its verdict. Defendants did not request jury interrogatories that would separate the jury's economic and non-economic damage awards (R.C. 2315.18(D)). *Luri II*, Appx. A-13–14. Nor did they request jury instructions based on R.C. 2315.18(C) "or even mention R.C. 2315, when proposing instructions." Id., Appx. A-11–13.

Defendants did, however, insist that the jury be instructed to return separate findings of malice as to all five defendants, and make separate awards of punitive damages. On July 3, 2008, the jury returned a verdict in favor of Luri, awarding $3.5 million in compensatory damages and, per defendants' request, separately assessed punitive damages – $21 million against Republic; $10.75 million against Republic Ohio; $10.75 million against Ohio Hauling; $83,394 against Ronald Krall and $25,205 against James Bowen.

Five days later the trial court entered judgment on the jury verdict. While the caps statutes instruct courts not to "enter judgment" in excess of certain amounts, defendants

did not claim to be entitled to any damage "caps" until two weeks *after* judgment was entered on the jury verdicts.

B. *Luri I.*

In addition to hindsight arguments that "tort reform" statutes apply to employment actions under R.C. Chapter 4112, defendants' post-trial motion argued that excessive corporate[1] punitive damage awards violated their due process rights under state and federal constitutions. Based on that claim, and as part of her post-trial rulings, the trial judge entered an order confirming her intent to supplement her journal entry to include "*Barnes*"[2] findings, and granting defendants' request for a two-week extension to file their own proposed *Barnes* findings or respond to Luri's proposed *Barnes* findings. *Luri I*, Appx. A-30–32. On the day before their extended due date, defendants filed a premature notice of appeal. They then instructed the trial judge that she was divested of any jurisdiction to carry out her journalized intent to make *Barnes* findings, while proceeding to argue on appeal that the trial court's "failure" to undertake a *Barnes* analysis constituted reversible error – arguments the Court of Appeals described as "disingenuous at best." *Luri I*, A-34. While defendants' appeal was clearly premature

[1] Defendants did not claim that the individual punitive damage awards were excessive in the trial court or in the court of appeals.

[2] *Barnes v. Univ. Hosps. of Cleveland* (2008), 119 Ohio St.3d 173, adopting the "guideposts" of *BMW N. Am., Inc. v. Gore* (1996), 517 U.S. 559, for analyzing constitutional challenges to punitive damage awards.

(see *Luri I*, Appx. A-38, describing claims to the contrary as "misplaced, and clearly belied by the record"), defendants' vociferous opposition to Luri's motion to dismiss the premature appeal succeeded in deferring the issue to the merits panel. As a result, the premature appeal was fully briefed and scheduled for oral argument before the court finally dismissed it for lack of jurisdiction. Id.

C. ***Luri II.***

Following a remand and the trial judge's entry of her *Barnes* findings, defendants obtained new counsel, who proceeded to allege a different set of errors and issues, requiring new briefing, and more delay. In *neither* appeal did *either* party challenge the constitutionality of Ohio's bifurcation statute, R.C. 2315.21(B)(1). In *Luri I*, defendants' opening brief argued that Luri's purported constitutional challenge to R.C. 2315.21(B) was "waived." Luri responded that he "does not (and Defendants cannot) challenge the constitutionality of R.C. 2315.21(B)." In *Luri II*, defendants changed tactics, arguing that the trial court's allegedly erroneous denial of their motion to bifurcate resulted in the jury hearing inflammatory "net worth" evidence that led to excessive corporate punitive damage awards.

Following its 2006 decision in *Barnes v. Univ. Hosps. of Cleveland*, 8th Dist. Nos. 87247, 87285, 87710, 87903, 87946, 2006-Ohio-6266, ¶34, aff'd in part, rev'd in part on other grounds (2008), 119 Ohio St.3d 173, the Eighth District panel in *Luri II* declined to construe R.C. 2315.12(B) in a manner that would strip trial courts of all discretion to control the order and manner of the preservation of evidence at trial. (Accord *Thompson*

v. Spon (1998), 83 Ohio St.3d 551, 555 ("Courts must liberally construe statutes in order to avoid constitutional infirmities").) Further, because the evidence relating to liability and malice was inextricably entwined – i.e., the concocted paper trail supporting punitive damages was offered by defendants to claim that Luri was terminated for cause – the trial court acted well within its discretion when it denied the motion. *Luri II*, Appx. A-9. Finally, the court noted that while defendants claimed to have been prejudiced by the introduction of net worth evidence, it was Defendant Krall – not Luri – who injected net worth evidence into the trial. Id.

The panel did, however, agree with defendants' claim that the jury's corporate punitive damage awards were excessive, reducing those awards through the application of statutory caps and the *Barnes* due process guideposts. Specifically, the Court of Appeals applied the punitive damage cap in R.C. 2315.21, and held that for purposes of a due process analysis, the reprehensibility of defendants' misconduct supported punitive damages "in the full amount authorized by the legislature" under the caps statute. *Luri II*, Appx. A-20. The majority reduced the three corporate punitive damage awards to a single, $7 million "cap" while the dissent would have applied the $7 million cap to each of the three corporate punitive damage awards. Id., Appx. A-16, 22–24.

Following the issuance of the opinion, defendants latched onto the Court's comment in paragraph 9 that its rejection of the claimed bifurcation error was "further buttressed" by the constitutional analysis in *Havel v. Villa St. Joseph*, 8th Dist. No. 94677, 2010-Ohio-5251 (conflict pending, Supreme Court Case No. 2010-48), to seek certification of the precise question certified in *Havel*:

> Whether R.C. 2315.21(B), as amended by S.B. 80, effective April 7, 2005, is unconstitutional, in violation of Section 5(B), Article IV of the Ohio Constitution, because it is a procedural law that conflicts with Civ.R. 42(B).

Appx. A-1. The Eighth District panel granted the motion (id.) and defendants' Notice of Certified Conflict, Supreme Court Case No. 2011-1097, is awaiting this Court's determination that a conflict does or does not exist.

IV. ARGUMENT

Proposition of Law No. 1

> **Punitive damage awards represent a jury's determination of the amount required to punish and deter a specific defendant's malicious misconduct. Consistent with those jury findings, reviewing courts must consider each defendant's punitive damage award independently for the application of "caps" under R.C. 2315.21(D).**

Although it is not entirely clear, it appears that the majority decision in this case adopted defendants' argument that because the three corporate defendants were jointly and severally liable for compensatory damages under the "single employer doctrine," the

three separate punitive damage awards entered against them must be treated as one for purposes of applying the punitive damages cap in R.C. 2315.21(D). That interpretation of Ohio's punitive damage cap is incorrect because: (1) it conflates the separate issues of liability for compensatory damages (which can be joint and several) and liability for punitive damages (which cannot); (2) it ignores the manner in which this case was tried, including the fact that defendants (a) requested the independent findings of actual malice and separate punitive damage awards entered and (b) took the position at trial (correctly) that single employer status is irrelevant to the issue of punitive damages; and (3) it is contrary to statutory language that limits punitive damages to two times the amount of the compensatory damages awarded to the plaintiff "from that defendant."

The single employer doctrine is a form of joint and several liability. *Armbruster v. Quinn* (C.A.6, 1983), 711 F.2d 1332, 1337 (the single employer doctrine makes "the affiliated corporation * * * jointly responsible for the acts of the immediate employer"), abrogated on other grounds by *Arbaugh v. Y&H Corp.* (2006), 546 U.S. 500. But the application of joint and several liability principles have no bearing on the entirely separate issue of liability for punitive damages. As this Court has repeatedly held, the "focus" in punitive damage awards is on "what it will take to bring about the twin aims of punishment and deterrence *as to that defendant.*" *Dardinger v. Anthem Blue Cross & Blue Shield* (2002), 98 Ohio St.3d 77, 102 (emphasis added, internal quotation omitted). Other states agree. See, e.g., *Coty v. Ramsey Assocs., Inc.* (Vt. 1988), 546 A.2d 196, 206 ("joint and several liability does not attach in the context of punitive damages); *Shields v.*

Martin (Idaho 1985), 706 P.2d 21, 27 ("joint and several liability has no applicability in instances involving damages that are not compensatory"); *Staudacher v. City of Buffalo* (N.Y. App. Div. 1989), 547 N.Y.S.2d 770, 771 ("a lump sum verdict on punitive damages against all defendants is improper since there can be no joint and several liability").

Presumably with this governing law in mind, defendants tried this case in a manner which assured that the jury would make separate findings as to actual malice for each defendant and enter individualized punitive damage awards. After an extensive discussion of the "single employer" instruction that would be given to the jury, the trial court told the parties it intended to submit an interrogatory asking the jury to "state the amount of punitive damages to be awarded to Plaintiff on his retaliation claim against any of the Defendants." Defendants objected and requested separate punitive damage awards. Defendants' position was incorporated into the agreed interrogatories submitted to the jury, which included separate punitive damage verdicts for each of the five defendants.

Far from suggesting any intent to deviate from well-established punitive damage law, R.C. 2315.21(D)(2)(a) incorporates the inherent individuality of punitive damage awards. The statute states that judgment shall not be entered for an amount exceeding "two times the amount of the compensatory damages awarded to the plaintiff from that defendant, as determined pursuant to division (B)(2) or (3) of this section." Thus, the cap itself applies to the punitive damage award "from that defendant." The statutory cross-

references equally support the individual consideration of punitive damage awards for purposes of applying a cap. R.C. 2315.21(B)(2) and (3) require determinations of compensatory damages "recoverable * * * from each defendant."

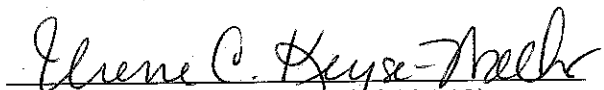
That language is sufficiently broad to account for joint and several compensatory awards while maintaining the appropriate focus of punitive damages on "that defendant." See, also (emphasis added) R.C. 2315.21(C) (punitive damages are available only when "[t]he actions or omissions of *that defendant* demonstrate malice"); R.C. 2315.21(D)(1) (the trier of fact "shall determine the liability of *any defendant*" for punitive damages). As the dissent points out, enforcing the plain language of the statute is further consistent with this Court's decision in *Arbino v. Johnson & Johnson* (2007), 116 Ohio St.3d 468, ¶86 (R.C. 2315.21(D)(2)(a) "limits punitive damages in tort actions to a maximum of two times the total amount of compensatory damages awarded to a plaintiff *per defendant*").

V. CONCLUSION

Plaintiff-Appellant Ron Luri, now three years down the road from judgment on his jury verdict, respectfully submits that the "certified conflict" pending in Supreme Court Case No. 2011-1097 was improperly certified and that it is time for this case to end. But if this Court accepts the "conflict," or any other aspect of this case, then it should consider the issue of first impression presented in the dissenting opinion, reverse the trial court's "conflation" of the three corporate punitive damage awards prior to applying the

damages caps, and remand for the entry of judgment of $7 million in punitive damages against each of the three corporate defendants.

Respectfully submitted,



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A copy of the foregoing has been served this 29th day of June, 2011, by U.S. Mail, postage prepaid, upon the following:

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APPENDIX

Court of Appeals of Ohio, Eighth District

County of Cuyahoga
Gerald E. Fuerst, Clerk of Courts

RONALD LURI

Appellee

COA NO. 94908 | LOWER COURT NO. CP CV-633043

COMMON PLEAS COURT

-vs-

REPUBLIC SERVICES INC., ET AL.

Appellant

MOTION NO. 444855

Date 06/07/11

Journal Entry

MOTION BY APPELLANTS TO CERTIFY CONFLICT IS GRANTED. THIS COURT'S JUDGMENT IN LURI V. REPUBLIC SERVS., INC., CUYAHOGA APP. NO. 94908, 2011-OHIO-2389, IS IN CONFLICT WITH THE FOLLOWING DECISION FROM THE TENTH DISTRICT COURT OF APPEALS OF OHIO: HANNERS V. HO WAH GENTING WIRE & CABLE SDN BHD, FRANKLIN APP. NO. 09AP-361, 2009-OHIO-6481.

THIS COURT HEREBY CERTIFIES THE FOLLOWING QUESTION TO THE OHIO SUPREME COURT PURSUANT TO APP.R. 25(A) AND ARTICLE IV, SECTION 3(B)(4) OF THE OHIO CONSTITUTION FOR RESOLUTION OF THE FOLLOWING ISSUE:

"WHETHER R.C.2315.21(B), AS AMENDED BY S.B.80, EFFECTIVE APRIL 7TH, 2005, IS UNCONSTITUTIONAL, IN VIOLATION OF SECTION 5 (B); ARTICLE IV OF THE OHIO CONSTITUTION, BECAUSE IT IS A PROCEDURAL LAW THAT CONFLICTS WITH CIV.R.42(B)."

THIS ISSUE IS PENDING BEFORE THE SUPREME COURT OF OHIO ON THE CERTIFICATION OF A CONFLICT BY THE COURT OF APPEALS FOR CUYAHOGA COUNTY IN SUPREME COURT CASE NO.2010-2148, HAVEL V. VILLA ST. JOSEPH.

RECEIVED FOR FILING

JUN 07 2011

GERALD E. FUERST
CLERK OF THE COURT OF APPEALS
BY _____ DEP.

Adm. Judge, MARY EILEEN KILBANE, Concurs

Judge SEAN C. GALLAGHER, Concurs

Judge FRANK D. CELEBREZZE, JR.

COPIES MAILED TO COUNSEL FOR ALL PARTIES--COSTS TAXED

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 94908

RONALD LURI

PLAINTIFF-APPELLEE

vs.

REPUBLIC SERVICES, INC., ET AL.

DEFENDANTS-APPELLANTS

JUDGMENT:
AFFIRMED IN PART, REVERSED IN PART,
AND REMANDED

Civil Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CV-633043

BEFORE: Celebrezze, J., Kilbane, A.J., and S. Gallagher, J.

RELEASED AND JOURNALIZED: May 19, 2011

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FRANK D. CELEBREZZE, JR., J.:

Appellants, Republic Services, Inc. ("Republic"), Republic Services of Ohio I, L.L.C. ("Republic Ohio"), Republic Services of Ohio Hauling, L.L.C. ("Ohio Hauling"), James Bowen, and Ronald Krall, appeal from an adverse judgment and the largest retaliatory discharge jury award in Ohio history — over $46 million. We affirm the jury's verdict, but remand for imposition of statutory punitive damage limits.

Ronald Luri was employed as the general manager in charge of the Cleveland division of Ohio Hauling. His direct supervisor, Bowen, was employed by Republic Ohio. Luri also reported to Bowen's supervisor, Krall, who was employed by Republic.

According to Luri, sometime in November 2006, Bowen approached him with an action plan that called for, among other things, the termination of three employees. Luri testified that Bowen instructed him to fire Frank Pascuzzi, George Fiser, and Louis Darienzo, Luri's three oldest employees. Luri testified that he informed Bowen that Pascuzzi had strong performance evaluations, and terminating him without reason could result in a discrimination lawsuit. He also informed Bowen that Pascuzzi had a medical condition that could result in a disability discrimination suit. Luri testified that he refused to fire the three individuals.

Thereafter, Luri's performance evaluations were worse than in previous years, and Bowen instituted "Improvements Directives" for Luri to complete, including conducting weekly meetings and providing more information to Bowen. Appellants claim these directives were not accomplished and, as a result, Luri was terminated on April 27, 2007.

Luri then filed suit on August 17, 2007, alleging claims of retaliatory discharge under R.C. 4112.02(I). After receiving notice of the litigation as a named party, it appears from the evidence presented at trial that Bowen altered at least one piece of evidence to justify Luri's termination. Luri claims as many as three pieces of evidence were altered or fabricated and submitted to him during discovery.

Appellants twice moved to bifurcate the trial pursuant to the Ohio Tort Reform Statutory provisions in R.C. 2315 et seq., as well as Civ.R. 42(B). The court denied these motions, and trial commenced on June 24, 2008. This lengthy trial concluded with a jury verdict finding against all defendants and awarding Luri $3.5 million in compensatory damages, jointly and severally against all defendants, and $43,108,599 in punitive damages.[1] Appellants moved for remittitur, a new trial, and for judgment notwithstanding the verdict. These

[1] The jury awarded punitive damages as follows: $21,500,000 against Republic, $10,750,000 against Republic Ohio, $10,750,000 against Ohio Hauling, $83,394 against Krall, and $25,205 against Bowen.

motions were all denied. Luri sought an award for attorney fees and for prejudgment interest on the compensatory damages from the date of his termination. The trial court awarded Luri over one million dollars in attorney fees and prejudgment interest on the entire compensatory damages award.

Law and Analysis

Bifurcation

Appellants first argue that the trial court "erred by failing to apply R.C. 2315.21(B)(1), which requires mandatory bifurcation." Appellants assert that bifurcation is mandatory upon motion.[2] This court disagrees.

In *Barnes v. Univ. Hosps. of Cleveland*, Cuyahoga App. Nos. 87247, 87285, 87710, 87903, and 87946, 2006-Ohio-6266, ¶34, affirmed in part and reversed in part on other grounds 119 Ohio St.3d 173, 2008-Ohio-3344, 893 N.E.2d 142, we held that a court retains discretion to determine whether bifurcation is appropriate even in the face of R.C. 2315.21(B) and its mandatory language. Generally, a court's jurisdiction is set by the legislature, but as the Ohio Supreme Court noted, "the Modern Courts Amendment of 1968, Section 5(B), Article IV, Ohio Constitution, empowers this court to create rules of practice and

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[2] R.C. 2315.21(B)(1) states, "[i]n a tort action that is tried to a jury and in which a plaintiff makes a claim for compensatory damages and a claim for punitive or exemplary damages, upon the motion of any party, the trial of the tort action shall be bifurcated * * *."

procedure for the courts of this state. As we explained in *Proctor v. Kardassilaris*, 115 Ohio St.3d 71, 2007-Ohio-4838, 873 N.E.2d 872, Section 5(B), Article IV 'expressly states that rules created in this manner "shall not abridge, enlarge, or modify any substantive right."' Id. at ¶17. 'Thus, if a rule created pursuant to Section 5(B), Article IV conflicts with a statute, the rule will control for procedural matters, and the statute will control for matters of substantive law.' Id." *Erwin v. Bryan,* 125 Ohio St.3d 519, 2010-Ohio-2202, 929 N.E.2d 1019, ¶28. Since bifurcation is a procedural matter, the trial court retains discretion in determining if such an action is warranted.

This determination is further buttressed by this court's decision in *Havel v. Villa St. Joseph*, Cuyahoga App. No. 94677, 2010-Ohio-5251[3] where we held that R.C. 2315.21(B)(1) is an unconstitutional usurpation of the judiciary's ability to control procedural matters because it conflicts with Civ.R. 42(B).[4] Id. at ¶9. The Fifth District has agreed with this determination. *Myers v. Brown,* Stark App. No. 2010-CA-00238, 2011-Ohio-892; *Plaugher v. Oniala,* Stark App. No. 2010 CA 00204, 2011-Ohio-1207, ¶19-20. However, the Tenth District, in

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[3] This issue is currently before the Ohio Supreme Court to resolve a conflict between districts. See *Havel v. Villa St. Joseph*, Ohio Supreme Court Case No. 2010-2148.

[4] This rule states, "[t]he court, after a hearing, in furtherance of convenience or to avoid prejudice, or when separate trials will be conducive to expedition and economy, may order a separate trial of any claim, cross-claim, counterclaim, or third-party claim, or of any separate issue or of any number of claims * * *."

Hanners v. Ho Wah Genting Wire & Cable SDN BHD, Franklin App. No. 09AP-361, 2009-Ohio-6481, ¶30, held that R.C. 2315.21 is substantive law in a procedural package. This interpretation deprives courts of the power granted under the constitution of this state. "If then courts are to regard the Constitution; and the Constitution is superior to any ordinary act of the legislature; the Constitution, and not such ordinary act, must govern the case to which they both apply." *Marbury v. Madison* (U.S.Dist.Col. 1803), 5 U.S. (1 Cranch) 137, 178, 2 L.Ed. 60.

Appellants also argue that their motion was unopposed and, therefore, should have been granted whether based on R.C. 2315.21 or Civ.R. 42(B). However, under the above cases, the trial court retains discretion to decide the issue. To constitute an abuse of discretion, the ruling must be unreasonable, arbitrary, or unconscionable. *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 450 N.E.2d 1140.

The *Barnes* court found that "[t]he issues surrounding compensatory damages and punitive damages in this case were closely intertwined. [Appellant's] request to bifurcate would have resulted in two lengthy proceedings where essentially the same testimony given by the same witnesses would be presented. Knowing that bifurcation would require a tremendous amount of

duplicate testimony, the presiding judge determined it was unwarranted." Id. at ¶35.

Here, the malice evidence required for punitive damages was also the evidence used to rebut appellants' arguments that Luri was terminated for cause. The manufacture of evidence was intertwined in arguments relating to both compensatory and punitive damages. Appellants also argue that the trial court should not have allowed testimony about the financial position of appellants, but it was Krall, while on cross-examination, who introduced this line of questioning without prompt from Luri. Therefore, the trial court did not abuse its discretion in denying appellants' bifurcation motion.

Application of Other Ohio Tort Reform Provisions

In their second and third assignments of error, appellants argue that the trial court committed plain error when it failed to apply various provisions of R.C. 2315. First, appellants claim the trial court failed to instruct the jury pursuant to R.C. 2315.18(C).[5] However, appellants never requested such an instruction and specifically agreed to their propriety before submission to the jury.[6]

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[5] Appellants' statement of this error reads, "[t]he trial court erred in failing to submit an instruction regarding noneconomic damages, as required by R.C. 2315.18(C)."

[6] Appellate counsel for appellants would like it known that they were not trial counsel.

We must first determine if these provisions apply to an action based on R.C. 4112. In analyzing whether the punitive damages caps within R.C. 2315.21 applied to a claim of a breach of fiduciary duty under R.C. 1751.09, Ohio's Southern District Court determined that they do not apply based on the language in R.C. 1751.09 and the intent of the legislature. *Kramer Consulting, Inc. v. McCarthy* (Mar. 8, 2006), S.D.Ohio No. C2-02-116. While the same reasoning would appear to apply to claims under R.C. 4112, the same court later held that "an action brought under Ohio Rev. Code 4112 is a 'tort action' as it is 'a civil action for damages for injury or loss to person or property.'" *Geiger v. Pfizer, Inc.* (Apr. 10, 2009), S.D.Ohio No. 2:06-CV-636, quoting *Ridley v. Fed. Express*, Cuyahoga App. No. 82904, 2004-Ohio-2543, ¶89, citing former R.C. 2315.21(A)(1). This finding would include such actions within the umbra of Ohio's Tort Reform provisions.

The Ohio Supreme Court has also noted the types of actions to which R.C. 2315.18 does not apply and found them to include "tort actions in the Court of Claims or against political subdivisions under R.C. Chapter 2744, * * * actions for wrongful death, medical or dental malpractice, or breach of contract. R.C. 2315.18(A)(7) and (H)(1) through (3)." *Arbino v. Johnson & Johnson*, 116 Ohio St.3d 468, 2007-Ohio-6948, 880 N.E.2d 420, fn. 3. Absent from this list are actions based on statutory remedies including, among others, discrimination

suits. When coupled with the holdings above, R.C. 2315 et seq. applies to retaliatory discharge actions brought under R.C. 4112, and the trial court was required to apply its provisions if appropriately asked.

R.C. 2315.18(C) provides that, "[i]n determining an award of compensatory damages for noneconomic loss in a tort action, the trier of fact shall not consider any of the following:

"(1) Evidence of a defendant's alleged wrongdoing, misconduct, or guilt;

"(2) Evidence of the defendant's wealth or financial resources;

"(3) All other evidence that is offered for the purpose of punishing the defendant, rather than offered for a compensatory purpose."

Because appellants never requested instructions based on R.C. 2315.18, we review this assigned error under a plain error analysis. "In appeals of civil cases, the plain error doctrine is not favored and may be applied only in the extremely rare case involving exceptional circumstances where error, to which no objection was made at the trial court, seriously affects the basic fairness, integrity, or public reputation of the judicial process, thereby challenging the legitimacy of the underlying judicial process itself." *Goldfuss v. Davidson*, 79 Ohio St.3d 116, 1997-Ohio-401, 679 N.E.2d 1099, at the syllabus. Therefore, to constitute plain error, the error must be "obvious and prejudicial error, neither objected to nor affirmatively waived," and, "if permitted, would have a material

adverse effect on the character and public confidence in judicial proceedings." *Hinkle v. Cleveland Clinic Found.*, 159 Ohio App.3d 351, 2004-Ohio-6853, 823 N.E.2d 945, ¶78.

Here, appellants collaborated with the court and Luri in crafting the jury instructions given. Several courts of appeals have held that an agreed upon jury instruction that forms the basis for error on appeal is invited error. See *State v. Briscoe*, Cuyahoga App. No. 89979, 2008-Ohio-6276, ¶33 (holding that objection to an agreed jury instruction on appeal constituted invited error, which was not grounds for reversal); *Merkl v. Seibert*, Hamilton App. Nos. C-080973 and C-081033, 2009-Ohio-5473, ¶48, ("Not only did Merkl fail to object to the court's instruction, but she collaborated with the court and defense counsel on its wording and specifically agreed to the instruction as given. Merkl cannot take advantage of an error that she invited or induced the court to make.").

Appellants did not submit such a limiting instruction or even mention R.C. 2315 when proposing jury instructions. Appellants' initial proposed jury instructions for compensatory damages stated, in part, "you will decide by the greater weight of the evidence an amount of money that will reasonably compensate [Luri] for the actual damage proximately caused by the conduct of [appellants]. In deciding this amount, if any, you will consider the nature, character, seriousness, and duration of any emotional pain, suffering or

inconvenience [Luri] may have experienced." The amended proposed instructions are substantially the same. Appellants never raised this issue before the trial court when it could have been addressed, and their oversight should not result in reversal. See *Friedland v. Djukic*, Cuyahoga App. Nos. 94319 and 94470, 2010-Ohio-5777, ¶40.

Similarly, appellants' issue with the failure of the court to provide a jury interrogatory detailing findings on noneconomic damages was invited.[7] The invited error doctrine equally applies here where the jury instructions, verdict forms, and jury interrogatories were approved by appellants, without even suggesting the now complained of error. See *Siuda v. Howard*, Hamilton App. Nos. C-000656 and C-000687, 2002-Ohio-2292.

R.C. 2315.18(D) states that "[i]f a trial is conducted in a tort action to recover damages for injury or loss to person or property and a plaintiff prevails in that action, * * * the jury in a jury trial shall return a general verdict accompanied by answers to interrogatories, that shall specify all of the following: (1) The total compensatory damages recoverable by the plaintiff; (2) [t]he portion of the total compensatory damages that represents damages for economic loss;

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[7] Appellants' assigned error states "[t]he trial court erred by failing to provide the interrogatory required by R.C. 2315.18(D) and by failing to apply the cap on noneconomic compensatory damages in R.C. 2315.18(B)(2)."

(3) [t]he portion of the total compensatory damages that represents damages for noneconomic loss."

In *Faieta v. World Harvest Church*, Franklin App. No. 08AP-527, 2008-Ohio-6959, ¶84-85, the Tenth District noted that "defendants not only failed to object to the jury interrogatories and verdict forms, they invited the alleged error. Defendants drafted verdict forms and interrogatories and submitted them to the trial court. Like those actually submitted to the jury, defendants' drafts asked the jury to determine the amount of damages awarded to 'plaintiffs' collectively, not individually, and they did not ask the jury to apportion each type of damages between each defendant."

In the present case, appellants submitted interrogatories and agreed upon the final versions submitted to the jury. Those interrogatories did not separate past and future economic damages nor economic and noneconomic damages. Appellants' failure to raise the issue and their proffering of the relied upon interrogatories invited the error.

Appellants never sought the application of Ohio Tort Reform provisions during trial apart from bifurcation. It was only in post-verdict motions that appellants asked the trial court for their application. This error on appellants' part should not serve as the basis for obtaining a new trial when it could have so easily been addressed and corrected if properly raised.

By failing to request an interrogatory distinguishing noneconomic damages, the trial court could not apply the damages limits set forth in R.C. 2315.18(B)(2),[8] which appellants requested in their post-trial motions. This failure was precipitated by appellants' submission of interrogatories and jury instructions that did not provide for such details. Appellants failed to raise these issues at the proper time, and their nescience should not result in a new trial. Accordingly, these assignments of error are overruled.

Punitive Damage Caps

Appellants next argue that, when presented with a proper post-trial motion, the trial court "fail[ed] to apply the Ohio Tort Reform provision in R.C. 2315.21(D)(2)(a), which require[d] the trial court to apply a cap on punitive damages equal to twice the amount of compensatory damages."

R.C. 2315.21(D)(2)(a) provides that, "[i]n a tort action, the trier of fact shall determine the liability of any defendant for punitive or exemplary damages and the amount of those damages. * * * Except as provided in division (D)(6) of this section, all of the following apply regarding any award of punitive or exemplary

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[8] "[T]he amount of compensatory damages that represents damages for noneconomic loss that is recoverable in a tort action under this section to recover damages for injury or loss to person or property shall not exceed the greater of two hundred fifty thousand dollars or an amount that is equal to three times the economic loss, as determined by the trier of fact, of the plaintiff in that tort action to a maximum of three hundred fifty thousand dollars for each plaintiff in that tort action or a maximum of five hundred thousand dollars for each occurrence that is the basis of that tort action."

damages in a tort action: (a) The court shall not enter judgment for punitive or exemplary damages in excess of two times the amount of the compensatory damages awarded to the plaintiff from that defendant, as determined pursuant to division (B)(2) or (3) of this section."

Our holding above, that Ohio Tort Reform provisions apply to discrimination actions, means that, upon proper motion, the trial court was required to limit the award of punitive damages to two times the amount of compensatory damages. In this case, the trial court was not prevented from applying this provision by appellants' failure to call it to the court's attention when it had the ability to address such a request. This is because the trial court could apply the limit without engaging in the type of guessing game required in applying the compensatory damage provisions. See *Srail v. RJF Internatl. Corp.* (1998), 126 Ohio App.3d 689, 702, 711 N.E.2d 264. Therefore, the trial court erred in failing to limit the amount of punitive damages to seven million dollars.

Luri argues that the amount of punitive damages should be calculated for each defendant, meaning that each would be subject to punitive damages up to $7 million. While there may be cases where Luri's calculation would apply, that is not the case here, where Luri advanced a single-employer theory of liability to impute wrongdoing to multiple business entities in this case. Because Luri can collect at most $3.5 million in compensatory damages, the trial court should

have limited the amount of punitive damages to $7 million. Its failure to do so necessitates reversal and remand.

Due Process

In appellants' fifth assignment of error, they argue that the award of $43 million in punitive damages violates their due process rights under the federal and state constitutions.[9] While our holding above limits this argument, it does not completely dispose of it.

In *BMW v. Gore* (1996), 517 U.S. 559, 116 S.Ct. 1589, 134 L.Ed.2d 809, the Supreme Court attempted to outline the permissible bounds of punitive damage awards under the Due Process Clause of the Constitution. It recognized that "[p]unitive damages may properly be imposed to further a State's legitimate interests in punishing unlawful conduct and deterring its repetition. In our federal system, States necessarily have considerable flexibility in determining the level of punitive damages that they will allow in different classes of cases and in any particular case. Most States that authorize exemplary damages afford the jury similar latitude, requiring only that the damages awarded be reasonably necessary to vindicate the State's legitimate interests in punishment and deterrence." (Internal citations omitted.) Id. at 568.

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[9] This assigned error states "[t]he trial court erred by failing to reduce the punitive damages because they are violative of the U.S. Constitution and Ohio law."

The Court set forth three factors it used to analyze the punitive damages award before it: The reprehensibility of the conduct, the disparity between the harm or potential harm suffered and the amount of the award, and the difference between the award and the civil penalties authorized or imposed in comparable cases. Id. at 575. See, also, *State Farm Mut. Auto. Ins. Co. v. Campbell* (2003), 538 U.S. 408, 123 S.Ct. 1513, 155 L.Ed.2d 585. The Ohio Supreme Court has directed this court to apply the *Gore* factors to independently determine whether an award is excessive. *Barnes*, supra, at ¶40.

Appellants demonstrated reprehensible conduct in this case. After Luri refused to engage in what he thought was discriminatory conduct, Bowen devised a plan to terminate him, fabricated evidence, and submitted this evidence during discovery to justify his actions. Krall then used this fabricated evidence for the same justification. After terminating Luri from a job in a specialized, consolidated industry, appellants refused to waive the non-compete clause in his employment contract, which further hampered Luri's ability to support himself and his family. This conduct weighs heavily in favor of a large punitive damage award and is the most important factor in the *Gore* analysis. See *Gore* at 575. The trial court also found that this conduct demonstrated a pattern of repeated retaliatory and discriminatory conduct. Nothing in the record demonstrates to this court that this finding was incorrect. From an action

plan calling for the termination or demotion of some of appellants' oldest employees, to fabricating evidence in an attempt to justify Luri's termination, there is evidence in the record supporting a pattern of conduct justifying substantial punitive damages.

The harm suffered by Luri was also significant in this case. Appellants would have this court determine that a ratio of compensatory to punitive damages of one-to-one is appropriate in this case because the harm was economic and Luri was a well-paid executive who was not economically vulnerable. While Luri did earn a substantial salary, as the trial court noted, a "punitive damage award is more about a defendant's behavior than the plaintiff's loss." Citing *Wightman v. Consolidated Rail Corp.*, 86 Ohio St.3d 431, 1999-Ohio-119, 715 N.E.2d 546.

Here, comparable jury verdicts imposed where a pattern of persistent conduct was shown demonstrate that a two-to-one ratio is not beyond the bounds of due process. *Merrick v. Paul Revere Life Ins. Co.* (D.Nev. 2008), 594 F.Supp.2d 1168, 1190; *Burns v. Prudential Secs., Inc.*, 167 Ohio App.3d 809, 2006-Ohio-3550. This court has also upheld a five-to-one ratio in an employment discrimination case. *Griffin v. MDK Food Serv., Inc.*, 155 Ohio App.3d 698, 2004-Ohio-133, 803 N.E.2d 834, ¶49, 57.

In this case, the appellants' behavior speaks to an award of punitive damages in the full amount authorized by the legislature. On remand, the trial court should feel free to enter an amount of punitive damages up to the bounds imposed by R.C. 2315.21.

Pre-Judgment Interest

Appellants finally argue that the trial court erred in awarding pre-judgment interest on the full amount of compensatory damages when that amount included pay Luri would not have yet earned, or "future damages."[10]

R.C. 1343.03(C)(1) states, "[i]nterest on a judgment, decree, or order for the payment of money rendered in a civil action based on tortious conduct and not settled by agreement of the parties, shall be computed from the date the cause of action accrued to the date on which the money is paid if, upon motion of any party to the action, the court determines at a hearing held subsequent to the verdict or decision in the action that the party required to pay the money failed to make a good faith effort to settle the case and that the party to whom the money is to be paid did not fail to make a good faith effort to settle the case."

This statute encourages the "settlement of meritorious claims, and the compensation of a successful party for losses suffered as the result of the failure

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[10] This assigned error states "[t]he trial court erred by awarding prejudgment interest on front-pay compensatory damages."

of an opposing party to exercise good faith in negotiating a settlement." *Lovewell v. Physicians Ins. Co. of Ohio*, 79 Ohio St.3d 143, 147, 1997-Ohio-175, 679 N.E.2d y1119. "Therefore, an injured party in a tort action is, under appropriate circumstances, entitled to recover interest from the date the cause of action accrues." *Andre v. Case Design, Inc.*, 154 Ohio App.3d 323, 2003-Ohio-4960, 797 N.E.2d 132, ¶7.

Appellants did not request that the jury parse the amount of compensatory damages into any categories. As with the application of provisions of Ohio's Tort Reform statutes, appellants invited this error by submitting instructions and interrogatories that did not separate out future damages. Appellants' error will not induce this court "to speculate concerning the specifics of the jury's award." *Srail* at 702. This assignment of error is overruled.

Conclusion

Appellants caused a great many of the supposed errors complained of in this case, which should not result in reversal. However, on proper motion, the trial court should have applied the damages caps set forth in R.C. 2315.21(D)(2)(a). Accordingly, this case must be remanded.

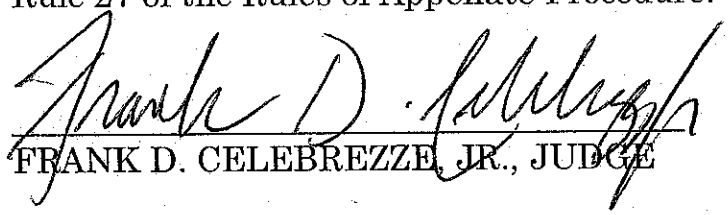
This cause is affirmed in part, reversed in part, and remanded to the lower court for further proceedings consistent with this opinion.

It is ordered that appellants and appellee share the costs herein taxed.

The Court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this court directing the common pleas court to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.



FRANK D. CELEBREZZE, JR., JUDGE

SEAN C. GALLAGHER, J., CONCURS;
MARY EILEEN KILBANE, A.J., DISSENTS (WITH SEPARATE OPINION)

MARY EILEEN KILBANE, A.J., DISSENTING IN PART:

I respectfully dissent from the majority's determination that the trial court should have limited the amount of punitive damages to $7 million. I would conclude that plaintiff is entitled to $7 million in punitive damages *from each defendant,* rather than $7 million in total punitive damages.

R.C. 2315.21(D) sets forth certain limits on punitive damages and provides in relevant part as follows:

> **"(2) Except as provided in division (D)(6) of this section, all of the following apply regarding any award of punitive or exemplary damages in a tort action:**

> **(a) The court shall not enter judgment for punitive or exemplary damages in excess of two times the amount of the compensatory damages awarded to the plaintiff from that defendant, as determined pursuant to division (B)(2) or (3) of this section."**

The defendants maintain that because the trial court determined that they were jointly and severally liable to Luri in the amount of $3.5 million, this is the amount "awarded to the plaintiff." Therefore, defendants claim that plaintiff's recovery of punitive damages is limited to two times this amount or a total of $7 million in punitive damages. This interpretation omits key terms of the statute, however, which calculates the punitive damages as "two times the amount of the compensatory damages awarded to the plaintiff *from that defendant*[.]" *Arbino v. Johnson & Johnson*, 116 Ohio St.3d 468, 2007-Ohio-6948, 880 N.E.2d 420. ("The statute limits punitive damages in tort actions to a maximum of two times the total amount of compensatory damages awarded to a plaintiff per defendant.") The determination of joint and several liability does not alter this analysis, as plaintiff has been awarded compensatory damages "from that defendant." There is no provision for limiting the awards where there are joint and several tortfeasors. I therefore dissent insofar as the

majority has limited plaintiff's recovery to punitive damages in this matter to $7 million.

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 92152

RONALD LURI

PLAINTIFF-APPELLEE

vs.

REPUBLIC SERVICES, INC., ET AL.

DEFENDANTS-APPELLANTS

JUDGMENT:
DISMISSED

Civil Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CV-633043

BEFORE: Kilbane, P.J., Stewart, J., and Boyle, J.

RELEASED: October 23, 2009

JOURNALIZED:

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N.B. This entry is an announcement of the court's decision. See App.R. 22(B) and 26(A); Loc.App.R. 22. This decision will be journalized and will become the judgment and order of the court pursuant to App.R. 22(C) unless a motion for reconsideration with supporting brief, per App.R. 26(A), is filed within ten (10) days of the announcement of the court's decision. The time period for review by the Supreme Court of Ohio shall begin to run upon the journalization of this court's announcement of decision by the clerk per App.R. 22(C). See, also, S.Ct. Prac.R. II, Section 2(A)(1).

MARY EILEEN KILBANE, P.J.,:

Appellants, Republic Services, Inc. ("Republic"), Republic Services of Ohio Hauling, LLC ("Ohio Hauling"), Republic Services of Ohio I, LLC ("Ohio I"), Jim Bowen ("Bowen"), and Ron Krall ("Krall") (collectively known as "appellants"), appeal the July 3, 2008 jury verdict in favor of Ronald Luri ("appellee"), with respect to his retaliation claim stemming from his unlawful termination under R.C. 4112.02(I). The jury awarded Luri 3.5 million dollars in compensatory damages and approximately 43 million dollars in punitive damages.

Appellants argue that the trial court erred by denying their motion for judgment notwithstanding the verdict and their motion for new trial. Appellants claim that the trial court erred in failing to reduce allegedly excessive compensatory and punitive damages awards. Finally, appellants argue that the trial court erred in awarding excessive attorneys' fees and in granting prejudgment interest. Appellants' six assignments of error focus solely on the trial court's rulings on posttrial motions.

Because appellants prematurely filed their notice of appeal, thereby depriving the trial court of its stated intention to issue a final judgment entry supplementing its reasons for denying appellants' motion for new trial or in the alternative for remittitur, we dismiss the instant appeal for lack of a final appealable order under R.C. 2505.02 and Civ.R. 54.

Procedural History

On August 17, 2007, Luri filed the instant lawsuit alleging that he was retaliatorily discharged under R.C. 4112.02(I) after refusing to terminate his three oldest employees. In his complaint, Luri also alleged that appellants discriminated against him because of his age in violation of both R.C. 4112.14(A) and Ohio public policy.

On June 24, 2008, a jury trial commenced on Luri's retaliation claim. At trial, Luri proved that after he refused to fire the three targeted employees on the basis of their age, his supervisors retaliated against him for engaging in protected activity under Ohio's Civil Rights statute, R.C. 4112, et seq., that such retaliation eventually led to his unlawful termination, and that his supervisors attempted to justify their nefarious activity by fabricating evidence and backdating documents in order to create a sham "paper trail" justifying Luri's unlawful termination.

On July 3, 2008, a jury found in favor of Luri.

On July 8, 2008, the trial court entered judgment in Luri's favor.

On July 22, 2008, appellants filed a motion for judgment notwithstanding the verdict, and a motion for new trial or in the alternative for remittitur, alleging that the punitive damage awards against them violated their right to due process.

On September 17, 2008, the trial court faxed an entry to all counsel denying appellants' motion for new trial or in the alternative for remittitur.

On September 18, 2008, the trial court journalized its entry denying the motion for new trial or in the alternative for remittitur without opinion.

On September 19, 2008, the trial court convened a hearing on pending posttrial motions. During this hearing, appellee's counsel, as the prevailing party in accordance with Civ.R. 52 and Loc.R. 19, provided the trial court with a proposed supplemental journal entry to accompany its earlier ruling, augmenting the court's September 18, 2008 entry denying the motion for new trial or in the alternative for remittitur, to include an analysis of the due process "guideposts" elucidated in *BMW of N. Am. v. Gore* (1996), 517 U.S. 559, 116 S.Ct. 1589, 134 L.Ed.2d 809, based upon the Ohio Supreme Court's recent pronouncements in *Barnes v. Univ. Hosps. of Cleveland,* 119 Ohio St.3d 173, 2008-Ohio-3344, 893 N.E.2d 142. (Tr. 1849.)

In *Barnes*, the Ohio Supreme Court held, inter alia, that trial courts are required to analyze a jury's punitive damage award under *BMW of N. Am.* when it stated:

> **"This discretionary appeal was accepted on the issues of whether * * * the trial court is required to analyze the jury's punitive damage award under *BMW of N. Am.*, * * *. We answer yes * * *." *Barnes* at 174.**

Appellants' counsel professed that they never received the court's facsimile denying their motions, yet the court produced a copy of its confirmation sheet faxing the entry to appellants' counsel. During the hearing, appellants' counsel inquired of the court regarding its denial of appellants' motion for new trial or in the alternative for remittitur:

> **"[Counsel for appellants]:**
>
> **But I take it Your Honor did not consider the *Barnes* case in making that determination?**
>
> **The Court:**
>
> **Well, no. You're speculating what I did consider and I think what counsel's asking the Court to do is provide a little bit more edification pursuant to the *Barnes* case. I considered every case that was cited within that.**
>
> *** * ***
>
> **So I basically just ruled on the motions, but I think it is always helpful if the prevailing party wants to submit a more detailed entry for the trial court to look at. That way, I can look through it and see which the Court agrees with and maybe that would provide you the edification you seek.**
>
> *** * ***
>
> **I read them all and I took them all into consideration and I wanted to have them ruled on before today's hearing so that you would know that.**
>
> *** * ***
>
> **So rather than have you come back in a couple of years, should you be appealing this case, and provide edification**

on a case that's not as fresh in my mind, would I mind looking at this? I don't have any issue with that.

[Counsel for appellants]:

Thank you, your honor. Thank you." (Tr. 1852-1853.)

At the conclusion of the hearing, pursuant to appellants' request, the trial court granted appellants a two-week extension or until October 3, 2008, within which to provide an alternative proposed supplemental entry or an opportunity to respond to appellee's proposed supplemental entry.

On September 22, 2008, the trial court memorialized the hearing in the following journal entry, which states in pertinent part:

"Hearing held September 19, 2008 on P1 Ronald Luri's Application for Attorney's Fees and Motion to Tax Costs pursuant to Rule 54 and P1 Ronald Luri's Motion for Prejudgment Interest. On a previous date, court ruled upon defendants' motion for new trial or in the alternative for remittitur [sic]. Plaintiff, the prevailing party, pursuant to Ohio Rule of Civil Procedure 52, and Local Rule 19, submitted proposed findings to the Court. *Defendants' counsel requested until October 3, 2008, to submit proposed findings, without objection.* Request granted. Upon receipt of said findings, Court shall incorporate a set of findings into the record as set forth in the above referenced procedural rules * * * 9/22/08 notice issued." (Emphasis added.)

On September 25, 2008, the trial court journalized an entry granting appellee's motion for attorneys' fees, motion for prejudgment interest, and motion to tax costs without opinion.

On October 1, 2008, instead of presenting the trial court with a supplemental journal entry containing its own proposed findings, appellants filed their notice of appeal. In their brief, appellants argue, inter alia, that the trial court's September 22, 2008 entry was made in error because the trial court did not expressly conduct the *Barnes* analysis in the record, despite the fact that appellants were fully apprised of the trial court's intent to do so based upon their involvement at the posttrial motion hearing.

On October 2, 2008, appellants filed an "opposition" to appellee's proposed supplemental journal entry in common pleas court, arguing, inter alia, that their appeal divested the trial court of jurisdiction from placing its findings in the record. This argument contains incorrect statements of fact, given appellants' prior agreement at the September 19, 2008 hearing that they would submit their own proposed entry to the court by October 3, 2008, pursuant to Civ.R. 52 and Loc.R. 19, so the court could finalize ruling on all posttrial motions. The trial court's subsequent journal entry states explicitly that it will conclude its ruling on posttrial motions when it states:

> **"Defendants' counsel requested until October 3, 2008, to submit proposed findings, without objection. Request granted. Upon receipt of said findings, Court shall incorporate a set of findings into the record." See, 9/22/09 journal entry, supra.**

On November 5, 2008, appellee filed a motion to dismiss, or in the alternative for limited remand. Appellee argues that the trial court's September 22, 2008 posttrial order expressly states the trial court's intent to finalize ruling on appellant's motion for new trial or in the alternative for remittitur. We agree.

On November 18, 2008, appellants filed a brief in opposition to appellee's motion to dismiss the instant appeal in this court. Appellants refer to the trial court's September 19, 2008 hearing and the trial court's September 22, 2008 journal entry, arguing that "[a]mong the trial court's errors was its failure to heed the Ohio Supreme Court's recent decision in *Barnes* [supra], which requires trial courts to explain their reasoning for upholding punitive damages in the face of constitutional challenges." Based upon the above-cited exchange between the court and appellants' counsel in which the trial court stated that it considered *Barnes*, the trial court's subsequent entry stating its intention to provide a written *Barnes* analysis at the parties' joint request, and finally, the trial court's acquiescence to appellants' request for a two-week extension to provide the court with its own proposed supplemental entry for the court's consideration in the final judgment entry, we find this argument to be disingenuous at best.

Analysis

When an order contemplates further action, and the judge does not certify any part of the order as final under Civ.R. 54(B), it is not final under R.C.

2505.02. See *Nwabara v. Willacy*, Cuyahoga App. Nos. 79416 and 79717, 2002-Ohio-1279, at 4, citing *Vanest v. Pillsbury Co.* (1997), 124 Ohio App.3d 525, 534, 706 N.E.2d 825, 831.

A review of the record indicates that appellants deprived the trial court of the opportunity to issue a final order by prematurely filing the instant appeal. The trial court's September 22, 2008 journal entry granted appellants' request to supplement the trial court's findings regarding its previous entry denying the motion for new trial or for remittitur by October 3, 2008. Instead of doing so, appellants prematurely filed their notice of appeal on October 1, 2008, arguing solely that the trial court erred in ruling on posttrial motions, despite the fact that appellants were engaged with the trial court in clarifying, and ruling on, those same motions.

In their brief in opposition to appellee's motion to dismiss, appellants argue they were concerned about the losing their 30 days within which to file an appeal under App.R. 4(A), because under App.R. 4(B)(2),[1] the trial court's September 25, 2008 order on the posttrial motions for attorneys' fees, prejudgment interest, and the motion to tax costs decided "all remaining post-trial motions." Inexplicably, appellants argue that no party requested findings

[1]App.R. 4(B)(2), provides: "In a civil case * * *, if a party files a timely motion for * * * a new trial under Civ.R. 59(B), * * * the time for filing a notice of appeal begins to run as to all parties when the order disposing of the motion is entered."

of fact and conclusions of law under Civ.R. 52, and as a consequence, the tolling provision within App.R. 4(B)(2) is inapplicable. We find this argument unavailing, given appellants' own request for an extension to provide a supplemental journal entry on the September 22, 2008 orders, which were clearly not yet final based upon the record cited above.

Under App.R. 4(A), a party has 30 days to appeal a final judgment. In a civil case, however, when certain postjudgment motions are filed, the time for filing a notice of appeal does not begin to run until the order disposing of all postjudgment motions is entered. App.R. 4(B)(2). One type of postjudgment motion that tolls the time for appeal is a motion for findings of fact and conclusions of law under Civ.R. 52. The parties invoked Loc.R. 19 and Civ.R. 52 on the record. Both rules allow the prevailing party in a civil action to request findings of fact and conclusions of law. As the trial court and appellee's counsel stated at the September 19, 2008 hearing:

> **"The Court:**
>
> **"I was actually going to say that the prevailing party would have the ability to present the Court with a more detailed entry and that's what you're doing here today?**
>
> **[Counsel for appellee]:**
>
> **I believe that's right your Honor, yes. Yes, your honor. It's our –**

The Court:

You're citing Rule 19 for some reason I thought it was another Rule of Civil Procedure in our court. Is that maybe -

[Counsel for appellee]:

Local rule 19.

The Court:

Oh. Local rule. (Tr. 1850).

*** * ***

The Court:

I was going to ask you, in my mind it's somewhere in the 50s, maybe 52, I think, that says that * * *. (Tr. 1855.)

*** * ***

[Counsel for appellee]:

Your Honor, pursuant to that rule [Civ.R. 52], it's my understanding that the Defendants have an opportunity to submit their own journal entry to you as well or comment on ours. So perhaps we could set a time frame for you to do so before you provide us that edification.

The Court:

How much time would you like, Counsels?

[Counsel for appellants]:

Your Honor, two weeks, please.

The Court:

Okay. No problem. I'll hold it. (Tr. 1856-1857.)

Based upon the statements of appellants' counsel at tr. 1855-1857, their arguments about the propriety of App.R. 4(B)(2) are misplaced, and clearly belied by the record.

The September 22, 2008 order obviously contemplates further action; it is not final under R.C. 2505.02. The trial judge did not include any language certifying any part of the order as final under Civ.R. 54(B) and was deprived of including such findings in the record when appellants brought the instant appeal. The parties were in the midst of arguing posttrial motions when appellants sought an extension to provide a proposed supplemental entry clarifying one of those motions. Instead of so doing, appellants prematurely filed the instant appeal. We therefore dismiss the appeal for lack of a final appealable order. Appellee's motion to dismiss is granted.

Appeal dismissed.

It is ordered that appellee recover from appellants costs herein taxed.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

Mary Eileen Kilbane

MARY EILEEN KILBANE, PRESIDING JUDGE

MELODY J. STEWART, J., and
MARY J. BOYLE, J., CONCUR