No. 14-1789

In the Supreme Court of Ohio

APPEAL FROM THE COURT OF APPEALS
EIGHTH APPELLATE DISTRICT
CUYAHOGA COUNTY, OHIO
CASE NO. 13-100539

RONALD LURI,
Plaintiff-Appellant,

v.

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

MEMORANDUM IN SUPPORT OF JURISDICTION OF PLAINTIFF RONALD LURI

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APPENDIX

I. EXPLANATION OF WHY THIS CASE IS A CASE OF PUBLIC OR GREAT GENERAL INTEREST

This appeal presents an important opportunity for this Court to reconcile conflicting statements in its own jurisprudence on the proper standard of review of a final judgment when a pretrial (or trial) ruling deprives a party of a "substantive" statutory right.

Here, a jury concluded in 2008 that Defendants: (1) retaliated against Ron Luri for refusing to commit age discrimination; and (2) created and altered evidence to conceal the retaliation. Following a tortured appellate course, a newly assigned trial judge was tasked with applying *Havel v. Villa St. Joseph,* 131 Ohio St.3d 235, 2012-Ohio-552 to the prior judge's denial of a pretrial motion to bifurcate. The judge concluded that because *Havel* found "mandatory" bifurcation protects a "substantive" right, the pretrial error by the previous judge required a new trial.

The Eighth District affirmed, confusing error affecting a "substantive" right with error materially affecting the "substantial rights" of the adverse party, and even though (as the concurring judge acknowledged): (1) the Defendants had not shown any prejudice from the unbifurcated trial, and (2) "[a] rule of law that "a judgment cannot accomplish substantial justice when a substantive right has been denied * * * [is] equivalent to telling parties who have bifurcation requests denied that they can proceed to trial and get an automatic do over of the trial if they lose."(App. Op. ¶¶ 17-18, 22, Appx. at 11, 13 (Stewart, J., concurring).).

The confusion stems from this Court's Modern Courts Amendment jurisprudence and an overbroad syllabus in a 1928 decision. *See Taylor v. Schlichter*, 118 Ohio St. 131, paragraph two of the syllabus (1928). Neither limits this Court's seminal 1967 decision rejecting a rule of mandatory reversal and requiring *all* appellants to show prejudice to set aside a judgment. *Smith v. Flesher*, 12 Ohio St.2d 107, paragraph one of the syllabus (1967). This Court should accept jurisdiction to clarify its harmless error jurisprudence.

The judgment on Luri's 2008 jury verdict has been exhaustively tested and affirmed in post-trial and appellate proceedings. This case remains alive because shortly before the 2008 trial, and consistent with controlling Eighth District law at the time, the trial judge denied a motion for bifurcation under Civ.R. 42(B) and the "policy" embodied in R.C. 2315.21(B)(1). After the court of appeals affirmed the judgment (as modified to apply punitive damage caps), this Court reversed and remanded for application of *Havel*. Upon remand, the new trial judge held harmless error principles do not apply because "mandatory" bifurcation protects a "substantive right"; and, alternatively, that because net worth evidence was admitted in an unbifurcated trial, he "cannot say that the Defendants were not prejudiced[.]" (Tr. Op., Appx. 20-22.) The last holding flowed from a belief that Defendants did not have to prove prejudice because they were denied a "substantive" right. (*Id.*, Appx. 21.)

The Eighth District properly recognized its obligation to apply harmless error principles, noting *Havel* was "procedurally distinguishable" because Defendants "failed to immediately appeal the bifurcation and a full trial has taken place." (App. Op. ¶ 7, Appx. 6.) But the panel affirmed based on an analysis that departed markedly from the required affirmative showing of prejudice, concluding only that the "failure to bifurcate *likely impacted a substantial right* of the appellees[.]" (App. Op. ¶ 14, Appx. 9 (emphasis added).) Judge Stewart's "reluctant" concurrence showed this conclusion rested on confusion as to the standard for setting aside a jury verdict based on the denial of a "substantive" right. (App. Op. ¶¶ 16-22, Appx. 10-13.) She noted Defendants "fail[ed] to show how they were prejudiced" by the error (*id.*, ¶ 17, Appx. 10), but expressed uncertainty as to the required analysis (*id.*, ¶¶ 21-22, Appx. 12-13).

While this Court recently addressed harmless error (*Hayward v. Summa Health Sys./Akron City Hosp.*, 139 Ohio St.3d 238, 2014-Ohio-1913), this appeal poses questions not addressed in *Hayward*: whether and how harmless error principles apply to a claimed denial of a "substantive" right conferred by statute. The attached trial court and appellate decisions graphically demonstrate continuing confusion on this point, generated by contradictory statements in the syllabus law of two decisions of this Court. *Compare Smith*, 12 Ohio St.2d 107, paragraph one of the syllabus ("In order to support reversal of a judgment, the record must show affirmatively not only that error intervened but that such error was to the prejudice

of the party seeking such reversal.") *with Taylor*, 118 Ohio St. 131, paragraph two of the syllabus ("Substantial justice cannot be accomplished by entering a judgment which denies the party against whom the judgment operates substantive rights guaranteed to him by the law and the Constitution.").

Only this Court has the power to reconcile *Smith* and *Taylor*, and clarify the distinction between (1) a "substantive right" under this Court's Modern Courts Amendment jurisprudence and (2) prejudicial denial of "the substantial rights of the adverse party," necessary to reverse a judgment. Reconciling prior opinions is a core function of this Court's review; failure to do so "create[s] an impossible situation for courts that are supposed to follow [this Court's] decisions and for lawyers who must base their advice to clients on decisions which [it] render[s]." *State ex rel. Canada v. Phillips*, 168 Ohio St. 191, 199 (1958), *overruled in part on other grounds, City of Rocky River v. State Emp. Relations Bd.*, 43 Ohio St.3d 1 (1989). This Court should accept jurisdiction to provide clear guidance on: (1) an appellant's burden to show from the record error that (2) prejudiced their substantial rights.

First, the Court should confirm that in appeals addressing a claimed "substantive" right, as in other appeals, the burden to show prejudice remains on the party seeking reversal. *Smith*, 12 Ohio St.2d at 110. The panel majority skipped this step (App. Op. ¶¶ 9-10, Appx. 6-7); the trial court flat-out refused to follow it

(Tr. Op. p. 6, Appx. 21). As Judge Stewart's concurrence shows, Defendants could not meet this burden. (App. Op. ¶¶ 17-18, Appx. 10-11.)

Second, the reviewing court must determine whether the error caused prejudice — i.e., whether it materially affected the substantial rights of the adverse party. *Smith*, 12 Ohio St.2d at 110-111. To determine whether a failure to follow a statutory directive caused prejudice, a reviewing court must carefully analyze the underlying "right" the statute protects. *See State ex rel. Pizza v. Rayford*, 62 Ohio St.3d 382, 385 (1992) (statutory duty to hold hearing "within ten days" of application for preliminary injunction "confer[red] a right * * * to have the matter resolved in a timely manner"). The court must then inquire whether the error prejudiced this right. *Id.* at 385-386 ("neither party was prejudiced" because "the length of time Rayford was excluded from his property would not have changed").

Here, the panel misinterpreted the underlying "right" protected by statutory bifurcation. The right is not an entitlement to delay admission of net worth evidence. (App. Op. ¶ 12, Appx. 7-8.) Different tort reform provisions *anticipate* net worth evidence will come in during the compensatory damage phase and provide safeguards Defendants never invoked. *Compare* R.C. 2315.18(C) *and* R.C. 2315.19(A)(1)(b) *with Luri v. Republic Servs., Inc.*, 193 Ohio App.3d 682, 2011-Ohio-2389, ¶¶ 13-28, *rev'd on other grounds by* 132 Ohio St.3d 316 (2012). Rather, the "procedural wrapping" of bifurcation protects a "right to ensure that *evidence of misconduct* is not inappropriately considered by the jury in its assessment of

liability and its award of compensatory damages." *Havel*, 2012-Ohio-552, ¶ 32 (emphasis supplied).

After years of appeals, it is clear the same evidence of employer misconduct would have come in during the compensatory damages phase of trial, even if it were bifurcated. (App. Op. ¶ 17, Appx. 10 (Stewart, J., concurring) ("As the majority and both sides note, the taint of appellees' malicious conduct evidence is not at issue in this appeal.").) Any error could not have prejudiced Defendants' "right" to ensure misconduct evidence was not improperly considered.

This case is an ideal vehicle to clarify the harmless error doctrine. It comes to this Court on a full trial record, and six years of appeals have narrowed the issues to a single error and a conclusory allegation of prejudice. (App. Op. ¶ 18, Appx. 10-11 (Stewart, J., concurring) ("The appellees state in their brief that the record makes clear that they were prejudiced * * * but nowhere does Republic point to the clarity of this prejudice.").) There will not be a better case to address how harmless error principles apply to the denial of a "substantive right." This Court should accept jurisdiction and provide the requested guidance.

II. STATEMENT OF THE CASE AND FACTS

Three corporate entities and two individuals orchestrated Ron Luri's unlawful termination: 1) his direct employer, Republic Services of Ohio Hauling, LLC ("Ohio Hauling"); 2) his direct supervisor, Area President James Bowen, and the corporate entity that employed Bowen, Republic Services of Ohio I, LLC ("Ohio I");

and 3) Bowen's direct supervisor, Regional Vice President Ron Krall, and the entity that employed him, Republic Services, Inc. ("Republic") (collectively, "Defendants").

Luri is a career waste management industry employee who worked in the Cleveland area. He served as General Manager for three of Defendants' facilities from 1998 until his unlawful termination. All three showed continuous financial improvement under his stewardship, and were on track for their best financial performance ever in 2007.

The events leading up to Luri's unlawful termination began in August 2006, when Defendants implemented an "action plan" targeting older workers for termination. In November 2006, Luri was told to fire his three oldest workers. He refused, explaining that firing an older worker for no reason, "and then replacing him with a younger employee would put the company in a bad position or possible lawsuit." After this refusal, "all of a sudden" there were problems with Luri's "communication skills" and "management style." Defendants created a false paper trail to assert a fictional, "he didn't conduct enough meetings" basis for terminating a top performing manager.

In February 2007, Luri received a memorandum purporting to "recap" a non-existent discussion the day before, falsely stating that he and his supervisor collectively decided to "flip flop" the positions of his oldest employee (Frank Pascuzzi) and a much younger employee, and instructing Luri to make sure Pascuzzi "voluntarily" sought re-assignment "as soon as possible." Interpreting this as a

suggestion to create a pretext for termination, Luri instead worked with Pascuzzi so he could keep working with no change in pay. Luri also responded to the recent complaints about his management style (receiving no response), and followed Defendants' numerous "directives" and "action plans" to the best of his ability throughout February, March, and April. During this time, no one criticized his performance or followed up on his progress.

On April 12, 2007, Defendants decided to terminate Luri, copying a Human Resources Manager on an e-mail "to make sure that we're not missing anything here." Shortly thereafter, Luri was summoned and terminated. One of the Defendants blurted out the real reason for his termination ("'Plus you didn't fire Frank Pascuzzi'"), and cut off Luri when he attempted to challenge his discharge.

On August 17, 2007, Luri sued, alleging unlawful retaliation in violation of R.C. 41102.02(I). Defendants continued to alter and fabricate documents, produce them in discovery, and rely on them in depositions. Computer forensics revealed that after suit was filed, an October 2006 memorandum had been supplemented and backdated by Defendant Bowen to make it appear that Luri had performance problems before he opposed age discrimination. In addition, while this case was pending, Defendants created and back-dated a set of handwritten notes to support alleged survey results; drafted and back-dated a memo to create subsequently abandoned grounds for termination; and created notes of an alleged meeting that could not have occurred as recited.

About a month before trial, Defendants moved for bifurcation under Civ.R. 42(B) and the "policy embodied in" R.C. 2315.21(B)(1). Consistent with controlling Eighth District precedent at the time, the trial court exercised discretion and denied the motion. *See Barnes v. Univ. Hosps. of Cleveland*, 8th Dist. Nos. 87247, 87385, 87710, 87903, 87946, 2006-Ohio-6266, ¶ 34, *affirmed in part and reversed in part on other grounds*, 119 Ohio St.3d 173, 2008-Ohio-3344.

Trial did not go well for Defendants, whose witnesses were caught in fatally inconsistent stories regarding their fabricated reasons for termination. On July 3, 2008, following eight days of trial presenting 16 witnesses, the jury returned a $3.5 million joint and several compensatory award against all Defendants and separate punitive damage awards against Republic ($21.5 million), Ohio I ($10.75 million), Ohio Hauling ($10.75 million), Ronald Krall ($83,394), and James Bowen ($25,205). The trial court entered judgment on the jury's verdict five days later.

Post-trial proceedings ensued and Defendants for the first time during the litigation decided that a panoply of "tort reform" statutes applied to Luri's employment claim, seeking application of damage caps on that basis and a new, "bifurcated" trial. Gamesmanship by Defendants to avoid an order detailing their reprehensible conduct caused substantial delay in the final resolution of post-trial motions and led to dismissal of a premature appeal. *See Luri v. Republic Servs., Inc.*, 8th Dist. No. 92152, 2009-Ohio-5691 ("*Luri I*," Appx. 48-62).

Following remand, the trial court issued a "*Barnes*"[1] analysis of the punitive damage award that finally resolved Defendants' post-trial motions. Defendants changed counsel and filed a new appeal, arguing the trial court should have instinctively known Luri's retaliation claim was governed by tort reform statutes and erred when it did not unilaterally give tort reform instructions and interrogatories. The Eighth District held that Defendants' failure to seek the application of tort reform statutes until after the verdict made it impossible to apply tort reform statutes post-trial, with one exception — it concluded the trial court could and should have applied the punitive damage cap to the corporate punitive damage awards in post-trial proceedings. *See Luri v. Republic Servs., Inc.*, 193 Ohio App.3d 682, 2011-Ohio-2389, *rev'd by* 132 Ohio St.3d 316 (2012) ("*Luri II*," Appx. 29-43.)

Regarding bifurcation, the Eighth District ruled that the trial court did not abuse its discretion in denying bifurcation where malicious conduct evidence was relevant to both liability and damages, buttressed its conclusion with its recent *Havel* decision deeming R.C. 2315.21(B)(1) to be unconstitutional, and rejected Defendants' claim that they were prejudiced by the premature introduction of net worth evidence. *Id.* at ¶¶ 9-12 (Appx. 31-33). *Havel* had already been certified to this Court based on a conflict with a Tenth District decision. Defendants asked the panel to certify the question certified in *Havel*; the panel agreed and this Court

[1] *Barnes v. Univ. Hosps. of Cleveland*, 119 Ohio St.3d 173, 2008-Ohio-3344.

accepted the certified conflict, holding it, briefing stayed, for *Havel*. This Court also accepted Luri's discretionary appeal from the manner in which the Eighth District applied the punitive damages cap.

On February 15, 2012, this Court issued its opinion in *Havel*, answering the certified question "in the negative" and upholding Ohio's bifurcation statute as constitutional. *Havel*, 2012-Ohio-552, ¶ 5. About six months later, this Court issued a "per curiam" opinion in this case, answering the same certified question in the negative, declaring Luri's appeal to be "moot" and remanding for the "application" of *Havel*. *Luri v. Republic Services, Inc.*, 132 Ohio St.3d 316, 2012-Ohio-2914 (Appx. 24-25.) Upon remand, the trial court issued a Journal Entry and Opinion finding Defendants were entitled to a new trial under *Havel* and "no just cause for delay." (Tr. Op., Appx. 22.) The Eighth District Court of Appeals affirmed. (App. Op. ¶ 15, Appx. 9.)

III. ARGUMENT IN SUPPORT OF PROPOSITION OF LAW

Proposition of Law:

> **Harmless error principles enshrined in R.C. 2309.59 apply to errors that deny a party a statutory right. The party claiming error must show prejudice to the right the statute protects. (*Smith v. Flesher*, 12 Ohio St.2d 107, paragraph one of the syllabus (1967), followed; *Taylor v. Schlichter*, 118 Ohio St. 131 (1928), distinguished and limited.)**

R.C. 2309.59 specifies that, "[i]n every stage of an action, the court shall disregard any error or defect in the pleadings or proceedings which does not affect the substantial rights of the adverse party." Civil Rule 61 has an analogous

command. *See* Civ.R. 61 ("The court at every stage of the proceeding must disregard any error or defect in the proceeding which does not affect the substantial rights of the parties."). This rule recognizes a party is not entitled to perfect proceedings, but only substantial justice. *See* R.C. 2309.59 (where "substantial justice has been done to the party complaining as shown by the record," all trial errors are disregarded).

Absent prejudice, an error does not affect a party's substantial rights. "It is an elementary proposition of law that an appellant, in order to secure reversal of a judgment against him, must not only show some error but must also show that that error was prejudicial to him." *Smith v. Flesher*, 12 Ohio St.2d 107 (1967). To show prejudice from the failure to follow a statutory directive, the party claiming error must prove harm to the underlying right the statute protects. *State ex rel. Pizza v. Rayford*, 62 Ohio St.3d 382, 385-386 (1992).

Here, the Eighth District erred by: (1) failing to place the burden of proof on Defendants to show prejudice (App. Op. ¶¶ 14, 16-19, Appx. 9, 10-11); and (2) misconstruing the underlying right protected by R.C. 2315.21(B) as a right to "exclude evidence of the defendant's wealth or net worth from the compensatory damages phase * * *." (*Id.* at ¶ 12, Appx. 8.)

The first error stems from confusion caused by *Taylor v. Schlichter*, 118 Ohio St. 131 (1928). *Taylor* involved a withdrawal of a contested issue of fact from the jury and other fact-driven errors. *Id.* at 135-44. Although this Court's opinion identifies no "substantive" right at issue, the syllabus includes a statement that

"[s]ubstantial justice cannot be accomplished by entering a judgment which denies the party against whom the judgment operates substantive rights guaranteed to him by the law and the Constitution." *Id.* at paragraph two of the syllabus. This Court cited no precedent for this statement of law, which was unnecessary to resolve the fact-driven errors addressed.

Taylor should be limited to its facts. This Court's ruling in *Smith*, requiring a showing of prejudice even when an "absolute right" is denied (12 Ohio St.2d at 112-14), makes eminent sense. *Smith* correctly explained that "[i]t might be error to deny a party [an] absolute right * * * but it does not necessarily follow that such error would be prejudicial so as to require a reversal[.]" *Id.* at 113. Whether a trial court has *discretion* is distinct from the *effect* of failing to follow a mandatory directive:

> In our opinion, if this court had intended to make such an important departure from the 'substantial justice' policy * * * or from the general rule that an error will not require a reversal if it is not affirmatively shown to be prejudicial, there would at least have been something said in the opinion, if not in the syllabus, about doing so.

Id. at 113-14. Because nothing in *Havel* suggests an intent to "depart[] from the 'substantial justice' policy (*id.*), Defendants were required to show prejudice.

The second error stems from the Eighth District's failure to examine the reason mandatory bifurcation was upheld as constitutional. *Havel* upheld R.C. 2315.21(B) as constitutionally-permissible substantive law based on "findings and statements by the General Assembly [that] demonstrate[d] its intent to create a

substantive right to ensure that evidence of misconduct is not inappropriately considered by the jury in its assessment of liability and its award of compensatory damages." 2012-Ohio-552, ¶ 32; *see also id.* at ¶ 44 (McGee Brown, J., dissenting) ("To the extent that the majority undertakes an analysis of R.C. 2315.21(B), it apparently concludes that the statute creates a substantive right for defendants to limit the introduction of evidence of misconduct when juries consider compensatory damages.").

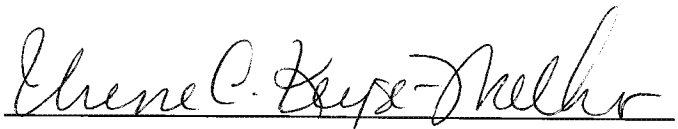
Instead of examining the right recognized by *Havel*, the Eighth District looked to federal authorities addressing *discretionary* bifurcation under the federal analogue to Civ. R. 42(B). (App. Op., ¶ 12, Appx. 8.) These authorities were irrelevant. A prior Eighth District panel found no abuse of discretion in the denial of discretionary bifurcation. *Luri II*, 2011-Ohio-2389, ¶¶ 10-12. The sole remaining issue was whether the failure to adhere to R.C. 2315.21(B) prejudiced Defendants.

There was no harm to Defendants' "substantive right" to limit misconduct evidence during the compensatory damage phase, as Judge Stewart's concurrence recognized. (App. Op. ¶ 17, Appx. 10 (Stewart, J., concurring).) The panel should have remanded with instructions to enter judgment in Luri's favor consistent with the Eighth District's prior opinion in *Luri II*, remitting the punitive damage award to the limits proscribed by tort reform.

IV. CONCLUSION

A jury determined Defendants fabricated evidence to conceal intentional retaliation for Luri's refusal to engage in age discrimination. Six years of appeals establish this verdict comports with substantial justice. This Court should accept jurisdiction, reverse and remand with instructions to enter judgment in Luri's favor.

Respectfully submitted,



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PROOF OF SERVICE

A copy of the foregoing was served on October 15, 2014 per S.Ct.Prac.R. 3.11(B) by mailing it by United States mail and electronically by e-mail to:

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APPENDIX

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 100539

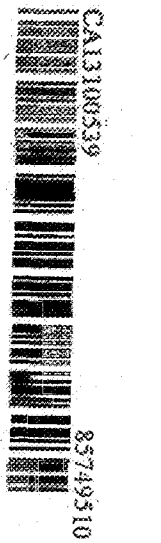
RONALD LURI

PLAINTIFF-APPELLANT

vs.

REPUBLIC SERVICES, INC., ET AL.

DEFENDANTS-APPELLEES



JUDGMENT:
AFFIRMED

Civil Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CV-07-633043

BEFORE: Celebrezze, J., Boyle, A.J., and Stewart, J.

RELEASED AND JOURNALIZED: September 4, 2014

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FRANK D. CELEBREZZE, JR., J.:

{¶1} Appellant, Ronald Luri, brings this appeal from the trial court's decision to grant appellees, Republic Services, Inc. ("Republic"), Republic Services of Ohio Hauling, L.L.C. ("Ohio Hauling"), Republic Services of Ohio I, L.L.C. ("Ohio I"), Jim Bowen ("Bowen"), and Ron Krall ("Krall") (collectively known as "appellees"), a new trial. On remand from the Ohio Supreme Court for the application of its decision in *Havel v. Villa St. Joseph*, 131 Ohio St.3d 235, 2012-Ohio-552, 963 N.E.2d 1270 (*"Havel"*), the trial court found that bifurcation on motion was required and ordered a new trial. Luri claims that the trial court erred when it found the Ohio Supreme Court's decision required a new trial. After a thorough review of the record and law, we affirm the trial court's decision.

I. Procedural History

{¶2} This court has previously recited the factual and procedural posture of this case in *Luri v. Republic Servs.*, 193 Ohio App.3d 682, 2011-Ohio-2389, 953 N.E.2d 859 (8th Dist.). After our decision, appellees appealed to the Ohio Supreme Court for review of our holding that the mandatory bifurcation provision in R.C. 2315.21 was unconstitutional. Luri separately appealed this court's application of punitive damages caps. The Ohio Supreme Court accepted review of both appeals and stayed briefing for its decision in a pending case dealing with the same bifurcation statute, *Havel*. On July 3, 2012, the Ohio

Supreme Court remanded the case to the trial court for application of its decision in *Havel*. The court also dismissed Luri's appeal as moot.

{¶3} The trial court allowed the parties to brief the impact of *Havel* on the case and held a hearing. The court issued a decision and entry on October 4, 2013. There, the court found that bifurcation on motion was required and its prior failure to grant appellees' motion required a new trial. It also addressed Luri's arguments that any error was harmless or invited. The trial court found that the error was neither.

{¶4} Luri then filed the instant appeal assigning one error:

> I. The trial court erred when it vacated the 2008 judgment on a jury verdict and ordered a new trial.

II. Law and Analysis

A. Standard of Review

{¶5} This court reviews the trial court's decision to grant a new trial following remand differently based on the type of decision. If the determination is a matter of law, this court's review is de novo. However, if the decision calls for the exercise of the court's discretion, it is reviewed for an abuse of that discretion. *Rohde v. Farmer*, 23 Ohio St.2d 82, 262 N.E.2d 685 (1970), paragraphs one and two of the syllabus. A de novo standard of review gives no deference to the lower court's determination, while an abuse of discretion standard recognizes that the trial court is in the best position to resolve the issue

and gives deference to the court's decision absent an arbitrary, unconscionable, or unreasonable exercise of discretion. *Blakemore v. Blakemore*, 5 Ohio St.3d 217, 450 N.E.2d 1140 (1983). Here, the trial court determined that it had no discretion because bifurcation was mandatory. So, as a matter of law, a new trial was required. It also determined, as a matter of law, that the error was not harmless. *See Hayward v. Summa Health Sys.*, 139 Ohio St.3d 238, 2014-Ohio-1913, 11 N.E.3d 243, ¶ 23 (whether an error prejudices a substantial right is a question of law).

B. Application of *Havel*

{¶6} The Ohio Supreme Court determined that bifurcation as outlined in R.C. 2315.21(B) created a substantive right, which takes precedence over the discretionary bifurcation provision in Civ.R. 42(B). *Havel* at the syllabus. It held that R.C. 2315.21(B) "does more than set forth the procedure for the bifurcation of tort actions: it makes bifurcation mandatory." *Id.* at ¶ 25.

{¶7} This court has previously addressed the bifurcation requirement after *Havel*. *Flynn v. Fairview Village Retirement Community Ltd.*, 8th Dist. Cuyahoga No. 95695, 2013-Ohio-569, ¶ 6. Applying the holding in *Havel*, this court held, "the trial court erred in denying appellants' motions to bifurcate. Under R.C. 2315.21(B), the trial court has no discretion to deny a motion to bifurcate the punitive damages issue in a tort case when a party files a motion requesting bifurcation." As Luri points out, this does not end the inquiry in this

case. Luri claims that a new trial was not mandated by the decision in *Havel* because it is procedurally distinguishable from the present case. In many of the cases dealing with the constitutionality of R.C. 2315.21(B) decided by courts of appeals, the appeal was taken from an order denying or granting a motion to bifurcate. *See, e.g., Havel.* Luri distinguishes the present case by pointing out that appellees failed to immediately appeal the bifurcation decision and a full trial has taken place.

{¶8} Luri argues that Republic invited the error by moving the court for bifurcation under both the discretionary Civ.R. 42(B) and the mandatory statute. Often motions are made with alternative arguments. The fact that Republic moved under both provisions for bifurcation did not invite any error.

{¶9} Parties are not guaranteed a trial free from error. Only errors that prejudicially affect a substantial right are reversible. *Hayward,* 139 Ohio St.3d 238, 2014-Ohio-1913, 11 N.E.3d 243, at ¶ 24. "Under the concept of harmless error, it is neither prudent nor appropriate for this court to order a trial court to remedy an error that does not affect the outcome of the case; i.e., 'this court may not reverse the trial court unless a substantive right is affected.'" *Children's Hosp. Med. Ctr. of Akron v. S. Lorain Merchs. Assn. Health & Welfare Benefit Plan & Trust*, 9th Dist. Summit No. 22881, 2006-Ohio-2407, ¶ 7, quoting *Kelley v. Cairns & Bros., Inc.*, 89 Ohio App.3d 598, 608, 626 N.E.2d 986 (9th Dist.1993), citing *Leichtamer v. Am. Motors Corp.*, 67 Ohio St.2d 456, 474-475, 424 N.E.2d

568 (1981). Therefore, even though bifurcation was mandatory, a new trial is not required where the error is harmless.

{¶10} The trial court must and did analyze whether the failure to bifurcate was harmless error. *See* Civ.R. 61; R.C. 2309.59. Republic argues that no such analysis is required based on the Ohio Supreme Court's holding in *Havel*. If the trial court's duty was simply to order a new trial, the Ohio Supreme Court could have easily remanded the case for a new trial. It did not. The court remanded the case to the trial court for application of *Havel* — a procedurally different case that did not address whether the failure to bifurcate caused harm. Therefore, this court must determine whether the failure to bifurcate prejudicially impacted a substantial right.

{¶11} The evidence introduced at trial that appellees argued should have been reserved for the punitive damages phase falls into two categories — evidence of wealth and evidence of malice. Evidence that Republic employees fabricated evidence in an attempt to establish that Luri was terminated for cause was introduced to demonstrate malice. This evidence of malice is so intertwined with appellees' defense that it cannot feasibly be left out of the compensatory damage phase. This evidence was used by Luri to rebut appellees' arguments that Luri was terminated for cause.

{¶12} Evidence of wealth was also the subject of testimony during trial. Luri's cross-examination of a Republic executive brought forth, at first

unsolicited, information about Republic's value as a company. Without prompt, the executive offered that the company was worth $3 billion. As a follow-up, Luri's attorney inquired if Republic earned $300 million in profits last year. Luri then relied on this information in closing arguments. The trial court found this constituted harm enough to grant Republic a new trial. In fact, "[t]he most common reason for bifurcating is to exclude evidence of the defendant's wealth or net worth from the compensatory damages phase * * *." *Cain v. Pittsburgh Corning Corp.*, 9th Cir. Nos. 90-16668, 90-16802, 90-16669, 90-16803, 1992 U.S. App. LEXIS 8568, 3-4 (Apr. 20, 1992). *See also S.S. v. Leatt Corp.*, N.D.Ohio No. 1:12 CV 483, 2014 U.S. Dist. LEXIS 12192 (Jan. 31, 2014).

{¶13} In *Volpe v. Heather Knoll Retirement Village*, 9th Dist. Summit No. 26215, 2012-Ohio-5404, the Ninth District applied *Havel* to a decision by the trial court denying bifurcation and found that it was unnecessary to disturb a jury award after trial. In that case, the jury had awarded significant compensatory damages, but declined to award any punitive damages. The court held that the trial court's refusal to bifurcate "the trial and giving an instruction on punitive damages was harmless because it did not affect [the defendants'] substantial rights." *Id.* at ¶ 20. This was because the complained of error, an improper jury instruction on punitive damages, was normally remedied by vacation of the punitive damages award. There was no punitive damages award in that case. The lack of prejudice that runs through *Volpe* is not present here.

Luri was awarded significant compensatory and punitive damages where evidence of wealth and jury instructions on both types of damages were presented in a single trial after motion for bifurcation. According to the holding in *Havel*, Republic was entitled to have those issues tried separately, and this court cannot say that the error did not affect the outcome. Luri solicited some of this evidence and relied upon it forcefully during closing arguments.

III. Conclusion

{¶14} The trial court properly applied the holding in *Havel* on remand from the Ohio Supreme Court. The failure to bifurcate likely impacted a substantial right of the appellees, requiring a new trial.

{¶15} Judgment affirmed.

It is ordered that appellees recover from appellant costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate be sent to said 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

MARY J. BOYLE, A.J., CONCURS;
MELODY J. STEWART, J., CONCURS WITH SEPARATE OPINION

MELODY J. STEWART, J., CONCURRING:

{¶16} I reluctantly concur with the majority decision to affirm the trial court's granting of a new trial in this case. Although I agree fully with the majority's conclusions that (1) the remand from the Supreme Court to apply *Havel* does not automatically require a new trial but requires a harmless error analysis; and (2) that the appellees did not invite error by alternatively moving the trial court for bifurcation pursuant to Civ.R. 42(B), I am not as sure about the majority's conclusion that the "failure to bifurcate likely impacted a substantial right of the appellees." Ante at ¶ 15. But I concur nonetheless.

{¶17} As the majority and both sides note, the taint of appellees' malicious conduct evidence is not at issue in this appeal. The appellees' position is solely that because evidence of their size, wealth, and net worth was improperly put before the jury, they were prejudiced. But the appellees fail to show how they were prejudiced. Like the Ninth District found in *Volpe*, the appellees' assertion in this matter is really "purely speculative." However, I understand the practical reasons for excluding this kind of information from the compensatory phase of a trial.

{¶18} The appellees state in their brief that the record makes clear that they were prejudiced by the failure to bifurcate and consequently the introduction of evidence relating to the company's wealth, size, and profits during the liability phase of the trial, but nowhere does Republic point to the

clarity of this prejudice. Republic merely asserts that the evidence relating to their wealth, size, and profits "resulted in the largest employment verdict ever in Ohio." This contention, however, does nothing to show the nexus between the evidence and its generating "the largest employment verdict ever." To say that the amount of the award, in and of itself, speaks to the prejudice caused by the evidence is merely a statement of a post hoc ergo propter hoc relationship. The appellees point to nothing in the record or make any kind of cogent argument of how the wealth-net worth information impacted the jury's decision regarding liability and compensatory damages; especially with the jury knowing that it had the ability to award punitive damages if indeed it found liability.

{¶19} To be sure, evidence of the appellees' profits or net worth is completely irrelevant to the issue of liability and compensatory damages, but the erroneous admission of evidence that is not relevant does not mean that the evidence was necessarily considered, nor does it automatically demonstrate prejudice. *See Canterbury v. Skulina*, 11th Dist. Portage No. 2000-P-0060, 2001-Ohio-8768, *8-9. But I agree that, to the extent the jury may have relied on the evidence at all when deciding the award for compensation, such reliance would be improper.[1]

[1]It could certainly be argued that, to the extent that the financial information impacted the jury verdict at all, it appears that the impact is demonstrated in the punitive damages award where the evidence would have properly been considered. And if the malicious conduct evidence was improperly before the jury at the liability phase of the trial, the appellees would certainly have a stronger argument regarding

{¶20} Although the trial court opined that the failure to bifurcate was not harmless, it rendered its decision primarily based on the fact that the Supreme Court in *Havel* found that R.C. 2315.21(B) creates a substantive, enforceable right to have evidence of compensatory damages and punitive damages presented separately. The trial court therefore concluded that the deprivation of this substantive right is a denial of substantial justice. The court relied on paragraph two of the syllabus to *Taylor v. Schlichter*, 118 Ohio St. 131, 144, 160 N.E. 610 (1928), that states: "a judgment does not and cannot accomplish substantial justice when the record makes clearly manifest the fact that substantive rights guaranteed by the law and the Constitution have been denied the party against whom the judgment operates." In other words, this quote suggests that the denial of a substantive right alone is enough to deny substantial justice and no further analysis need take place.

{¶21} In *Taylor*, during a trial on an alleged breach of a promise to marry, the trial court withdrew all questions of fact from the jury's consideration and decided them itself. After the jury returned a verdict in an amount the court found excessive, it remitted the amount. In affirming the trial court, the court of appeals found that the trial court's judgment accomplished substantial justice. The Supreme Court reversed.

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taint. But as previously mentioned, that is not the case here.

{¶22} If the position in *Taylor*, that a judgment cannot accomplish substantial justice when a substantive right has been denied the party against whom the judgment operates, is controlling law of this state, then it is more perplexing that the Supreme Court did not simply remand this case to the trial court for a new trial instead of the more ambiguous mandate to apply *Havel*. Not doing so suggests that an after-trial review of the trial court's denial of a motion to bifurcate is indeed subject to a harmless error analysis — as we have applied in this case, and as did the Ninth District in *Volpe*. To apply the language in *Taylor* to this case would be equivalent to telling parties who have bifurcation requests denied that they can proceed to trial and get an automatic do over of the trial if they lose. This would be so even if minimal or no prejudicial evidence of any kind was presented in the compensatory phase of the trial. I submit that this outcome would contravene "substantial justice."

The State of Ohio, Cuyahoga County, } ss.

I, ANDREA F. ROCCO, Clerk of the Court of Appeals within and for said County, and in whose custody the files, Journals and records of said Court are required by the laws of the State of Ohio, to be, kept, hereby certify that the foregoing is taken and copied from the Journal entry dated on 09/04/2014 CA 100539 of the proceedings of the Court of Appeals within and for said Cuyahoga County, and that the said foregoing copy has been compared by me with the original entry on said Journal entry dated on 09/04/2014 CA 100539 and that the same is correct transcript thereof.

In Testimony Whereof, I do hereunto subscribe my name officially, and affix the seal of said court, at the Court House in the City of Cleveland, in said County, this 4th day of September A.D. 20 14

ANDREA F. ROCCO, Clerk of Courts

By _____ Deputy Clerk

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IN THE COURT OF COMMON PLEAS
CUYAHOGA COUNTY, OHIO

EDP NI

RONALD LURI
Plaintiff

REPUBLIC SERVICES INC. ET AL
Defendant

Case No: CV-07-633043

Judge: MICHAEL ASTRAB

JOURNAL ENTRY

THE COURT FINDS THAT THE DEFENDANTS ARE ENTITLED TO A NEW TRIAL IN THIS MATTER. THERE IS NO JUST CAUSE FOR DELAY. OSJ.

Judge Signature 10/4/13 Date

RECEIVED FOR FILING

OCT 04 2013

CUYAHOGA COUNTY
CLERK OF COURTS
By: Deputy

IN THE COURT OF COMMON PLEAS
CUYAHOGA COUNTY, OHIO
CIVIL DIVISION

RONALD LURI	][	CASE NUMBER: CV-07-633043
	][	
PLAINTIFF	][	**JUDGE MICHAEL ASTRAB**
	][	
v.	][	
	][	**JOURNAL ENTRY AND OPINION**
REPUBLIC SERVICES INC., ET AL.	][	
	][	
DEFENDANTS	][	

This Court has been tasked with determining whether or not the ruling of the Ohio Supreme Court in **Havel v. Villa St. Joseph** (2012-Ohio-552) requires a new trial in the instant matter.

The Court finds that the Ohio Supreme Court has ordered this Court to apply the ruling in Havel – that R.C. 2351.21, which requires a court to grant a motion to bifurcate, is constitutional – to this case. This Court finds that the error of denying the motion to bifurcate prior to trial was neither invited error nor harmless error. Defendants, as such, are entitled to a new, bifurcated trial.

The Court's Opinion follows.

OPINION OF THE COURT

BACKGROUND

The present case was filed on August 17, 2007 on a claim for wrongful discharge. On June 3, 2008 the trial court (not the present Judge) denied Defendants' *Motion to Bifurcate*. On July 3, 2008 a jury rendered a verdict in favor of Plaintiff for $3.5 million dollars in compensatory damages, and $43,108,599.00 in punitive damages. On August 12, 2008 the Court stayed execution of the judgment pending post-judgment motions and any appeal and for approval of supersedeas bond. On September 18, 2008 the trial court denied Defendants' *Motion for New Trial, or in the Alternative for Remittitur*, and Defendants' *Motion for Judgment Notwithstanding the Verdict*. On September 25, 2008 the court granted Plaintiff $1,058,612.00 in attorney's fees and $37,838.78 in litigation expenses and costs. On March 29, 2010 the Defendants appealed the judgment to the Eighth District Court of Appeals. Defendants claimed six assignments of error, including (1) the trial court committed reversible error by failing to bifurcate the trial as required by the tort reform provision in R.C. 2315.21(B)(1), and (2) and failed to apply the punitive damages cap in the tort reform provision n R.C. 2315.21 (D). The Eighth District ruled that R.C. 2315.21 (B)(1) was unconstitutional and therefore did not apply, but ruled in favor of a punitive damages cap.

On June 28, 2011, Republic filed with the Supreme Court of Ohio a Notice of Certified Conflict concerning the constitutionality of the mandatory bifurcation statute. On October 5, 2011, the Supreme Court of Ohio recognized the conflict existed and "held" the certified question for *Havel v. Villa St. Joseph*. **Havel v. Villa St. Joseph**, 963 N.E.2d 1270 (Ohio 2012).

The **Havel** Court determined that the mandatory bifurcation statute was constitutional. On July 3, 2012, the Supreme Court of Ohio answered the certified conflict in favor of Defendants, sustained the Defendants' first proposition of law and reversed the Court of Appeals and remanded for application of **Havel**.

LAW AND OPINION

The issue before this Court from the Ohio Supreme Court is application of **Havel v. Villa St. Joseph**, 131 Ohio St. 3d 235, 2012 Ohio 552, 963 N.E.2d 1270, on the present case. The Ohio Supreme Court in **Havel** held that,

> R.C. 2315.21(B) creates a substantive right to bifurcation in tort actions when claims for compensatory and punitive damages have been asserted. Thus, R.C. 2315.21(B) creates, defines, and regulates a substantive, enforceable right to separate stages of trial relating to the presentation of evidence for compensatory and punitive damages in tort actions and therefore takes precedence over Civ.R. 42(B) and does not violate the Ohio Constitution, Article IV, Section 5(B). **Id.** at 245.

Defendants' position is that they are entitled to a new trial where the presentation of evidence for compensatory damages and punitive damages are separate. Plaintiff's position is that Defendants are not entitled to a new trial because if that was the Supreme Court's intent, it would have stated such. Further, they allege that failure to bifurcate the claims was invited and thus harmless error.

Defendants argue that **Havel** makes bifurcation under R.C. 2315.21(B) mandatory. Bifurcation is a substantial right and therefore not subject to the harmless error analysis. The Ohio Supreme Court reversed and remanded the Court of Appeals decision for the lower court to apply the holding in **Havel**. **Havel** requires bifurcation of the trial into two separate stages so that evidence relating to a claim for punitive damages is not presented to the jury while they are deciding liability and claims for compensatory damages. The **Havel** Court found that R.C. 2315.21(B) eliminated judicial discretion and "creates a concomitant right to bifurcation." **Id.** at 242. Defendants argue that analysis under the invited error or harmless error rules is irrelevant as **Havel** did not address either.

Plaintiffs propose that the Court is to analyze the application of **Havel** under the rules of "invited error" and "harmless error." A new trial may be granted in the sound discretion of the court for good cause shown, including an error of law occurring at the trial and brought to the attention of the trial court. *See* Civ. R. 59(A). However, Civ. R. 61 states that no error in any ruling or order of the court is grounds for granting a new trial or disturbing an order unless refusal to take such action "appears to the court inconsistent with substantial justice," and the

court should disregard any error which does not affect the "substantial rights" of the parties. Plaintiffs argue that Defendants invited the error that was the denial of the motion to bifurcate, and also that said error was harmless.

The Court finds that the effect of the Ohio Supreme Court's ruling in **Havel** is to require a new trial in the present case. The Supreme Court reversed the Eighth District's ruling that R.C. 2315.21(B) was unconstitutional, and remanded the case to the lower court to apply the ruling in **Havel**.

Havel held that "by eliminating judicial discretion, R.C. 2315.21(B) creates a concomitant right to bifurcation: because the court cannot deny a request for bifurcation under the specified circumstances, the statute turns a request into a demand for or an entitlement to bifurcation by controlling the outcome. We have previously recognized that a statute may create a right when it contains mandatory language and restricts judicial or agency discretion." **Id.** At 242. Based on this language, the Court is presently without the discretion to find otherwise than that the Defendants are entitled to a bifurcated trial. Even if the Court were to apply the invited and harmless error rules, the Court believes that it would still find that Defendants are entitled to a new trial, as discussed in more detail infra. The **Havel** Court proceeded to find that the statute creates a "substantive, enforceable right." It is this Court's interpretation that the denial of a "substantive right" is contrary to "substantial justice," so is therefore not subject to the harmless error rule. Even further, it cannot be said that such an error did not prejudice the Defendants.

INVITED ERROR

Plaintiff contends that Defendants invited the error and, as such, should not be granted a new trial. The argument of the Plaintiff is essentially that the Defendants moved the Court to bifurcate the claims pursuant to Civ.R. 42(B) and R.C. 2315.21 (B) and in essence invited the Court to use its discretion in deciding whether to bifurcate. Plaintiff argues that the Court, in its discretion, denied the motion, thus foreclosing the Defendants from relying on that error to obtain a new trial. Plaintiff also argues that Defendants failed to provide the Court with guidance as to how to feasibly bifurcate the issues. Defendants argue that they had properly moved for bifurcation, citing both R.C. 2315.21(B) and Civ.R. 42(B). In addition, Defendants are

of the position that they did not need to provide a "roadmap" for bifurcation because R.C. 2315.21(B) *mandates* bifurcation.

Plaintiff also states that Defendants may not attempt to argue that evidence of net worth was wrongfully admitted during the liability portion of the trial because a witness on cross-examination injected the company's net worth without prompting from Plaintiff. When asked whether Republic Services is a large corporation, the witness for the Defendant answered that it was a "small corporation, $3 billion." (Tr. 362-63, Appx.II 211). Defendants counter this argument by pointing out that while the company's net worth was put in front of the jury, Plaintiff's attorney's question told the jury of the profit amount when counsel asked the witness, "$330 million in net profit last year?" Defendants didn't object to the question because the issues hadn't been bifurcated.

The Court finds that the Defendants did not invite the error of denying the motion to bifurcate. They timely and correctly filed the motion to bifurcate pursuant to both R.C. 2315.21(B) and Civ.R. 42(B). The motion was denied, so Defendants could not have prevented the admission of the company's worth. Therefore, Defendants did not invite the error.

HARMLESS ERROR

The general rule regarding "harmless error" is that to warrant a reversal, an error must have been prejudicial to the substantial rights of the party complaining of it. See **Wagner v. Roche Lab.**, 85 Ohio St. 3d 457, 1999 Ohio 309, 709 N.E.2d 162. "It is an elementary proposition of law that appellant, in order to secure reversal of a judgment against him, must not only show some error but must also show that that error was prejudicial to him." **Smith v. Flesher**, 12 Ohio St. 2d 107, 110, 233 N.E.2d 137. It is well-established law that a judgment does not and cannot accomplish substantial justice when the record makes clearly manifest the fact that substantive rights guaranteed by the law and the Constitution have been denied the party against whom the judgment operates. **Taylor v. Schlichter**, 118 Ohio St. 131, 144, 160 N.E. 610. The Ohio Supreme Court reversed and remanded for a new trial a case where inadmissible evidence had been allowed in at trial. *See* **Cappara v. Schibley**, 85 Ohio St. 3d 403, 1999 Ohio 278, 709 N.E.2d 117. Although the question in **Cappara** was the admissibility of evidence and not a motion to bifurcate, the Court pointed out that is not known that the jury

would have reached the same conclusions had the evidence not been admitted. **Id.** at 408. The Court went on to apply the "harmless error" analysis: "Generally, in order to find that substantial justice has been done to an appellant so as to prevent reversal of a judgment for errors occurring at the trial, the reviewing court must not only weigh the prejudicial effect of those errors but also determine that, if those errors had not occurred, the jury or other trier of the facts would probably have made the same decision." **Id.** citing **Hallworth v. Republic Steel Corp.** *(1950), 153 Ohio St. 349, 41 Ohio Op. 341, 91 N.E.2d 690.* The **Cappara** Court found that because the jurors may have reached a different decision with respect to the negligence claim and the claim that appellees acted with a conscious disregard for the rights of others, substantial justice was not done and the error was not harmless. **Id.**

Plaintiff takes the position that the denial of the motion to bifurcate was harmless, therefore a new trial is not proper. Plaintiff argues that there is no "mandatory reversal rule" simply because a mandatory statute may create an absolute right. *See*, **Smith v. Flesher** at 114. Defendants must still show they were prejudiced. Plaintiff further relies on case law to say that it is Defendants' burden to show they were prejudiced and that substantial justice was not received. However, those cases were dealing with motions for a new trial under Civ. R. 59, and the present case is before this Court on a mandate from the Ohio Supreme Court to apply the holding in **Havel**. Therefore Defendants do not carry the burden to prove they are entitled to a new trial as they would under Civ.R. 59 motion for a new trial.

Plaintiff argues that substantial justice was achieved and the Defendants were not prejudiced. According to Plaintiff, Defendants should have sought an immediate appeal after their *Motion to Bifurcate* was denied. Although the Ohio Supreme Court confirmed Defendants' strategic decision to appeal after a verdict was rendered does not constitute a waiver, Plaintiff argues that Defendants, in waiting for a verdict, failed to do everything procedurally possible to preserve their rights and effectively agreed to the trial that took place. *See* **Marks v. Swartz**, 174 Ohio App. 3d 450 fn. 3 (2007). Plaintiffs also contend that the Defendants failed to ask the Court to give the jury charge that the jury was not to consider the evidence of Defendants' wealth or financial resources in determining compensatory damages for noneconomic loss.

Plaintiff's arguments are not persuasive. As Defendants point out, the Supreme Court confirmed that they were entitled to wait until the conclusion of the trial to file an appeal. Further, Defendants argue that no jury instruction or interrogatory could ensure that the jury's findings were not tainted. Defendants put forth that many times throughout the trial the value of the Defendant company was stated. Due to the fact that the *Motion to Bifurcate* was denied, Defendants could not object to the admission of such comments and testimony.

In reviewing whether substantial justice was achieved, the Court must consider whether the jury would have reached the same conclusion if not for the admission of such evidence. Given the fact that inadmissible punitive evidence was admitted during the compensatory liability phase, the Court cannot find that the jury would probably have reached the same decision.

CONCLUSION

Application of **Havel** on the present case requires a new trial. The **Havel** Court upheld R.C. 2315.21(B) which mandates bifurcation. To be consistent with **Havel**, this Court is required to grant Defendants a new trial. **Havel** held that the statute creates a substantive right to bifurcation. Denial of Defendants' *Motion to Bifurcate* was a denial of their substantive right. The Court cannot say that the Defendants were not prejudiced because it is not clear that the jury probably would have found the same despite presentation of evidence relating to the claim for punitive damages. Therefore the error was not harmless error. Defendants shall be granted a new trial consistent with the law established in **Havel**.

IT IS SO ORDERED.

THERE IS NO JUST CAUSE FOR DELAY.

JUDGE MICHAEL K. ASTRAB

10/4/13
DATE

CERTIFICATE OF SERVICE

A copy of the foregoing was sent via facsimile and First-Class U.S. Mail, postage pre-paid, this 4th Day of **October, 2013**, upon the following individual(s):

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JUDGE MICHAEL K. ASTRAB

10/4/13
DATE

LURI, APPELLEE AND APPELLANT/CROSS-APPELLEE, *v.* REPUBLIC SERVICES, INC. ET AL., APPELLANTS AND APPELLEES/CROSS-APPELLANTS.

[Cite as *Luri v. Republic Servs., Inc.*, 132 Ohio St.3d 316, 2012-Ohio-2914.]

Court of appeals' judgment reversed and cause remanded for application of Havel v. Villa St. Joseph.

(Nos. 2011-1097 and 2011-1120—Submitted June 19, 2012—Decided July 3, 2012.)

APPEAL and CROSS-APPEAL from and CERTIFIED by the Court of Appeals for Cuyahoga County, No. 94908, 193 Ohio App.3d 682, 2011-Ohio-2389.

Per Curiam.

{¶ 1} The certified question in case No. 2011-1097 is answered in the negative, and the cross-appellants' first proposition of law in case No. 2011-1120 is sustained. Appellant's discretionary appeal in case No. 2011-1120 is moot. The judgment of the court of appeals is reversed, and the cause is remanded for application of *Havel v. Villa St. Joseph*, 131 Ohio St.3d 235, 2012-Ohio-552, 963 N.E.2d 1270.

Judgment reversed and cause remanded.

O'CONNOR, C.J., and PFEIFER, LUNDBERG STRATTON, O'DONNELL, LANZINGER, CUPP, and MCGEE BROWN, JJ., concur.

Tucker, Ellis & West, L.L.P., Irene C. Keyse-Walker, and Benjamin C. Sassé, for appellee in case No. 2011-1097 and for appellant and cross-appellee in case No. 2011-1120.

Squire, Sanders & Dempsey, L.L.P., Robin G. Weaver, Stephen P. Anway, and Trevor G. Covey, for appellants in case No. 2011-1097 and for appellees and cross-appellants in case No. 2011-1120.

[Cite as *Luri v. Republic Servs., Inc.*, 193 Ohio App.3d 682, 2011-Ohio-2389.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 94908

LURI,

APPELLEE,

v.

REPUBLIC SERVICES, INC. ET AL.,

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

Haber Polk Kabat, L.L.P.,
Shannon J. Polk, and Richard C. Haber;
Tucker Ellis & West, L.L.P.,
Irene C. Keyse-Walker, and Benjamin C. Sasse;
And Pierce Stronczer Law, L.L.C., and
Michelle Pierce Stronczer, for appellee.

Squire, Sanders & Dempsey, L.L.P.,
Stephen P. Anway, and Robin G. Weaver,
for appellants.

FRANK D. CELEBREZZE Jr., Judge:

{¶ 1} 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.

{¶ 2} Appellee 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.

{¶3} 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.

{¶4} 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 that these directives were not accomplished, and as a result, Luri was terminated on April 27, 2007.

{¶5} 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 had altered at least one piece of evidence to justify Luri's termination. Luri claims that as many as three pieces of evidence were altered or fabricated and submitted to him during discovery.

{¶ 6} 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 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 $1 million in attorney fees and prejudgment interest on the entire compensatory-damages award.

Law and Analysis

Bifurcation

{¶ 7} 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.

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[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.

[2] R.C. 2315.21(B)(1) states, "In 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 * * *."

{¶ 8} 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 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 whether such an action is warranted.

{¶ 9} This determination is further buttressed by this court's decision in *Havel v. Villa St. Joseph*, Cuyahoga App. No. 94677, 2010-Ohio-5251,[3] in which 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 Court of Appeals 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 *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 the 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* (1803), 5 U.S. (1 Cranch) 137, 178, 2 L.Ed. 60.

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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*, 127 Ohio St.3d, 1530, 2011-Ohio-376, 940 N.E.2d 985.

[4] This Civil 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 * * *."

{¶ 10} 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.

{¶ 11} *Barnes* 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., 2006-Ohio-6266, at ¶ 35.

{¶ 12} 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 prompting from Luri. Therefore,

the trial court did not abuse its discretion in denying appellants' bifurcation motion.

Application of Other Ohio Tort Reform Provisions

{¶ 13} 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. Chapter 2315. First, appellants claim that 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]

{¶ 14} We must first determine whether 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. 1701.59 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. 15, 2009),

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[5] Appellants' statement of this error reads, "The trial court erred in failing to submit an instruction regarding noneconomic damages, as required by R.C. 2315.18(C)."

S.D.Ohio No. 2:06-CV-636, 2009 WL 1026479, 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.

{¶ 15} The Ohio Supreme Court has also noted the types of actions to which R.C. 2315.18 does not apply and held 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, ¶ 27, 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.

{¶ 16} R.C. 2315.18(C) provides, "In determining an award of compensatory damages for noneconomic loss in a tort action, the trier of fact shall not consider any of the following:

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

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

{¶ 18} "(2) Evidence of the defendant's wealth or financial resources;

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

{¶ 20} 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* (1997), 79 Ohio St.3d 116, 679 N.E.2d 1099, 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.

{¶ 21} 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 (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").

{¶22} Appellants did not submit such a limiting instruction or even mention R.C. Chapter 2315 when proposing jury instructions. Appellants' initial proposed jury instructions for compensatory damages stated, "[Y]ou 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.

{¶ 23} 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.

{¶ 24} R.C. 2315.18(D) states, "If 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; (3) [t]he portion of the total compensatory damages that represents damages for noneconomic loss."

{¶ 25} In *Faieta v. World Harvest Church*, Franklin App. No. 08AP-527, 2008-Ohio-6959, ¶ 84-85, the Tenth District Court of Appeals 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

[7] Appellants' assigned error states, "The 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

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."

{¶ 26} 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.

{¶ 27} Appellants never sought the application of Ohio tort-reform provisions during trial, apart from bifurcation. It was only in postverdict 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.

{¶ 28} 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 posttrial motions. This

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compensatory damages in R.C. 2315.18(B)(2)."

[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

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

{¶ 29} Appellants next argue that, when presented with a proper posttrial 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."

{¶ 30} R.C. 2315.21(D)(2)(a) provides, "In 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 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."

{¶ 31} Our holding above, that Ohio tort reform provisions apply to discrimination actions, means that upon proper motion, the trial court was

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of five hundred thousand dollars for each occurrence that is the basis of that tort action."

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 $7 million. 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

{¶ 32} In their fifth assignment of error, appellants 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.

{¶ 33} 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 United States Constitution. It recognized, "Punitive 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." (Citations omitted.) Id. at 568.

{¶ 34} The court set forth three factors it used to analyze the punitive-damages award before it: The reprehensibility of the conduct, the

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

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*, 2006-Ohio-6266, at ¶ 40.

{¶35} 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 noncompete 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*, 517 U.S. 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.

{¶ 36} 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, citing *Wightman v. Consol. Rail Corp.* (1999), 86 Ohio St.3d 431, 715 N.E.2d 546, a "punitive damages award is more about a defendant's behavior than the plaintiff's loss."

{¶ 37} 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.

{¶ 38} In this case, 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.

Prejudgment Interest

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

{¶40} R.C. 1343.03(C)(1) states, "Interest 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."

{¶41} This statute encourages the "settlement of meritorious claims, and the compensation of a successful party for losses suffered as the result of the failure of an opposing party to exercise good faith in negotiating a settlement." *Lovewell v. Physicians Ins. Co. of Ohio* (1997), 79 Ohio St.3d

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

143, 147, 679 N.E.2d 1119. "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.

{¶ 42} 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*, 126 Ohio App.3d at 702. This assignment of error is overruled.

Conclusion

{¶ 43} 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.

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

Judgment affirmed in part

and reversed in part,

and cause remanded.

GALLAGHER, J., concurs.
KILBANE, A.J., concurs in part and dissents in part.

KILBANE, A.J., concurs in part and dissents in part.

{¶ 45} 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.

{¶ 46} R.C. 2315.21(D) sets forth certain limits on punitive damages and provides:

> (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.

{¶ 47} 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*." (Emphasis added.) *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