**[Cite as *Wiegand v. Fabrizi Trucking & Paving Co., Inc.*, 2017-Ohio-363.]**

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| STATE OF OHIO | ) | IN THE COURT OF APPEALS |
| | )ss: | NINTH JUDICIAL DISTRICT |
| COUNTY OF MEDINA | ) | |

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| MARK WIEGAND, et al.<br><br>Appellants<br><br>v.<br><br>FABRIZI TRUCKING & PAVING CO., INC., et al.<br><br>Appellees | C.A. No. 16CA0015-M<br><br>APPEAL FROM JUDGMENT ENTERED IN THE COURT OF COMMON PLEAS COUNTY OF MEDINA, OHIO CASE No. 14CIV0650 |

DECISION AND JOURNAL ENTRY

Dated: January 31, 2017

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MOORE, Judge.

**{¶1}** Plaintiffs-Appellants Mark and Lou Ann Wiegand (collectively "the Wiegands") appeal from the judgment of the Medina County Court of Common Pleas. We affirm.

I.

**{¶2}** On June 18, 2012, around 6:00 p.m., husband and wife, the Wiegands were traveling to a produce auction. Mr. Wiegand was driving and Mrs. Wiegand was the front seat passenger. Mr. Wiegand proceeded south on State Route 58 to the intersection of US Route 224, where he intended to turn left. When the light turned green, he entered the intersection. While in the intersection, Mr. Wiegand's vehicle was struck by a black pick-up truck that was pushed into the Wiegands' vehicle by a yellow 1997 Ford F-800 tool truck traveling west on US Route 224 that ran the red light. The F-800 also struck the Wiegands' vehicle. The F-800 was driven by Defendant-Appellee Scott Steiskal, who was in the course and scope of his employment with Defendant-Appellee Fabrizi Trucking & Paving Co., Inc. ("Fabrizi").

**{¶3}** Prior to the accident, witnesses following the truck driven by Mr. Steiskal observed it swerving across the lane in the miles before the intersection where the accident occurred. The witnesses did not observe any brake lights illuminate on the F-800 at the intersection of the accident. Ultimately, it was determined that the hydraulic brake line for the rear brakes was leaking brake fluid in three places causing a failure of the rear brakes which controlled 70% of the vehicle's braking capacity.

**{¶4}** The Wiegands' suffered serious injuries as a result of the collision and were both life-flighted from the scene. Mr. Wiegand's injuries, which were more serious, included fractures to his left clavicle, left humerus, left wrist, injuries to his left radial nerve, rib fractures, and a fracture to his right knee. Mr. Wiegand was cleared to go back to work in April 2013. Mrs. Wiegand sustained an avulsion fracture to her shoulder and a rotator cuff injury, which was not diagnosed until a couple of months after the accident.

**{¶5}** On June 13, 2014, the Wiegands filed an eight-count complaint against Fabrizi and Mr. Steiskal. Six of the counts sounded in negligence and, in sum, alleged that the negligence of Mr. Steiskal and Fabrizi caused the Wiegands' injuries. The Wiegands also raised two loss of consortium claims. The Wiegands sought compensatory and punitive damages and attorney fees. The complaint was subsequently amended to alter the amount of damages requested.

**{¶6}** In August 2014, Fabrizi and Mr. Steiskal filed a motion to bifurcate the trial into separate phases for compensatory and punitive damages. The Wiegands responded to the motion indicating that, they did "not object to the defendants' Motion to Bifurcate, so long as the [Wiegands] [we]re not restrained from discovering facts relating solely to whether they [we]re entitled to recover punitive damages, and so long as they [we]re only precluded from presenting

evidence during the initial stage of the trial that relates solely to whether they [we]re entitled to recover punitive damages." The trial court subsequently entered an order granting the motion to bifurcate.

**{¶7}** On the day of trial, the trial court noted that the "way we do this generally is, after the jury comes back [with] a compensatory verdict, we take a break and then go on to the issue of punitives." When the trial court asked if anyone had a problem with that, neither side responded. The parties then began to discuss the degree to which Fabrizi and Mr. Steiskal were willing to concede negligence. After jury selection, the trial court stated that Fabrizi and Mr. Steiskal had "conceded that they are negligent – the driver and the owner; that they have conceded that that negligence is a proximate cause of the injuries sustained by both [the Wiegands]." Because of that, the trial court determined that, in the compensatory phase, what could not be admitted as evidence was "evidence that would otherwise go to the punitive nature of the Jury's determination in punitive damages; that is to say, the specifics of the kinds of things that would show aggravation and malice * * *." The trial court then discussed with the parties the areas that could be discussed during the compensatory phase. At the end of this discussion, counsel for the Wiegands noted an exception.

**{¶8}** At the conclusion of the compensatory phase, the jury awarded Mr. Wiegand a total of $151,997.45; $66,997.45 represented his economic loss and $85,000 represented his noneconomic loss. The jury awarded Mrs. Wiegand a total of $60,201.90; $40,201.90 represented her economic loss and $20,000 represented her noneconomic loss.

**{¶9}** The matter then proceeded to the punitive damages phase. When Tim Joyce was called to the stand as a witness for the Wiegands, a juror realized that she knew him. Immediately, the juror brought this information to the trial court, and the trial court held a

meeting in chambers. After the trial court had a discussion with the juror, counsel for the Wiegands asked that the juror be dismissed and replaced with an alternate. The trial court agreed. Counsel for the Wiegands made no additional motions with respect to the juror.

**{¶10}** At the end of the punitive damages phase, the jury found in favor of Fabrizi and Mr. Steiskal and awarded no punitive damages. Thereafter, the Wiegands filed a motion to reopen judgments and order a new trial. Following a hearing, the trial court denied the motion. The Wiegands then appealed, raising eight assignments of error for our review.

II.

**ASSIGNMENT OF ERROR I**

> THE TRIAL COURT ERRED WHEN IT CONTINUED THE BIFURCATION OF THE JURY TRIAL, PURSUANT TO R.C. 2315.21(B), AFTER [FABRIZI AND MR. STEISKAL] CONCEDED THAT THE [WIEGANDS] WERE ENTITLED TO RECOVER COMPENSATORY DAMAGES FROM [FABRIZI AND MR. STEISKAL], AND WHEN THE COURT EXCLUDED EVIDENCE AS TO WHETHER THE [WIEGANDS] WERE ENTITLED TO RECOVER PUNITIVE DAMAGES FROM [FABRIZI AND MR. STEISKAL] IN THE COURSE OF A SINGLE OR UNITARY TRIAL.

**{¶11}** The Wiegands argue in their first assignment of error that the trial court erred in bifurcating the trial into compensatory and punitive phases when Fabrizi and Mr. Steiskal conceded negligence.

**{¶12}** As noted above, prior to Fabrizi and Mr. Steiskal conceding negligence, the Wiegands did not object to Fabrizi's and Mr. Steiskal's motion to bifurcate. While the Wiegands claim they did object to the bifurcation after Fabrizi and Mr. Steiskal conceded negligence, there is nothing in the record that suggests they objected to the bifurcation of the trial. Instead, it appears that the Wiegands' counsel objected to the limits the trial court placed on what evidence could be admitted during each phase of the trial, but not to there being two phases to the trial. Accordingly, we cannot say that the Wiegands preserved this issue for review. *See Goldfuss v.*

*Davidson*, 79 Ohio St.3d 116, 121 (1997). "It is well settled that the failure to timely object to a possible error results in a forfeiture of the issue for purposes of appeal." *Marsico v. Skrzypek*, 9th Dist. Lorain No. 13CA010410, 2014-Ohio-5185, ¶ 6, citing *Goldfuss* at 121. While the Wiegands could still argue plain error on appeal, they have not done so, and we decline to construct an argument on their behalf. *See State v. Anderson*, 9th Dist. Wayne No. 14AP0054, 2016-Ohio-7814, ¶ 12. Further, to the extent that the Wiegands have attempted to challenge the constitutionality of the statute governing bifurcation in their reply brief, we likewise decline to address the merits of that argument. That argument was not raised below, nor have the Wiegands developed a plain error argument on appeal. *See id.*

**{¶13}** The Wiegands' first assignment of error is overruled.

**ASSIGNMENT OF ERROR II**

> THE TRIAL COURT ERRED WHEN IT REFUSED TO ALLOW THE [WIEGANDS] TO READ TO THE JURY THE DEPOSITION TESTIMONY OF [FABRIZI'S AND MR. STEISKAL'S] INDEPENDENT MEDICAL EXAMINER.

**{¶14}** In their second assignment of error, the Wiegands argue that the trial court erred in refusing to allow them to read portions of the deposition testimony of Dr. Barry Greenberg to the jury.

**{¶15}** "In general, '[t]he admission or exclusion of relevant evidence rests within the sound discretion of the trial court.'" *In re Adoption of C.J.C.*, 9th Dist. Wayne No. 15AP0040, 2016-Ohio-4909, ¶ 4, quoting *State v. Sage*, 31 Ohio St.3d 173 (1987), paragraph two of the syllabus. An abuse of discretion "implies that the court's attitude is unreasonable, arbitrary, or unconscionable." *Blakemore v. Blakemore*, 5 Ohio St.3d 217, 219 (1983).

**{¶16}** Civ.R. 32 (A) provides in pertinent part:

> Every deposition intended to be presented as evidence must be filed at least one day before the day of trial or hearing unless for good cause shown the court permits a later filing.
>
> At the trial or upon the hearing of a motion or an interlocutory proceeding, any part or all of a deposition, so far as admissible under the rules of evidence applied as though the witness were then present and testifying, may be used against any party who was present or represented at the taking of the deposition or who had reasonable notice thereof, in accordance with any one of the following provisions:
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> * * *
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> The deposition of a witness, whether or not a party, may be used by any party for any purpose if the court finds: * * * (e) that the witness is an attending physician or medical expert, although residing within the county in which the action is heard * * *.

**{¶17}** Nonetheless, Civ.R. 32(B) states that "[s]ubject to the provisions of subdivision (D)(3) of this rule, objection may be made at the trial or hearing to receiving in evidence any deposition or part thereof for any reason which would require the exclusion of the evidence if the witness were then present and testifying. Upon the motion of a party, or upon its own initiative, the court shall decide such objections before the deposition is read in evidence."

**{¶18}** Dr. Greenberg was retained by Fabrizi and Mr. Steiskal to perform independent medical examinations of the Wiegands. It is apparent from the record that Dr. Greenberg prepared an expert report, as a notice was submitted to the trial court indicating that the report was supplied to the Wiegands; however, it does not appear that the report is in the record on appeal. On September 11, 2015, a few days before the scheduled trial, the Wiegands filed a copy of the deposition of Dr. Greenberg in the trial court. *See* Civ.R. 32(A). However, the Wiegands did not include Dr. Greenberg in their list of proposed witnesses in their trial brief, nor did they mention Dr. Greenberg as a possible witness when asked by the trial court to list their witnesses on the day of trial. However, both Fabrizi and Mr. Steiskal listed Dr. Greenberg in each of their

respective witness lists in their trial brief and mentioned him when asked about their possible witnesses on the day of trial.[1]

**{¶19}** Near the end of the Wiegands' case in the compensatory phase, the Wiegands sought to read portions of Dr. Greenberg's deposition testimony to the jury. Specifically, the Wiegands wanted to read to the jury Dr. Greenberg's acknowledgement that Mr. Wiegand's knee injury would lead to arthritis, his statement that Mr. Wiegand's knee would become so arthritic as to necessitate a total knee replacement, and that the cost of such a replacement would probably be $100,000. Essentially, the Wiegands sought to submit evidence that Mr. Wiegand would have $100,000 in future damages. The deposition consisted only of cross-examination by the Wiegands' counsel. Counsel for Fabrizi and Mr. Steiskal did not question Dr. Greenberg during the deposition. Counsel for Fabrizi and Mr. Steiskal objected to allowing the testimony at trial.

**{¶20}** The trial court declined to allow the testimony noting that, even though the Wiegands did file the deposition transcript before trial, they did not list Dr. Greenberg as a potential witness and thus Fabrizi and Mr. Steiskal were unaware the Wiegands would be seeking to use that testimony in their case. The trial court also stated that it was not clear that Dr. Greenberg's opinions were based upon a reasonable degree of medical certainty.

**{¶21}** The Wiegands have not argued that Dr. Greenberg appeared on their witness list or that they informed the trial court and defense on the first day of trial that he would be a witness in their case in chief. Instead, they maintain that the timely filing of the deposition was sufficient notice that the testimony would be used at trial. They have cited no case law in

[1] Ultimately, neither Fabrizi, nor Mr. Steiskal called Dr. Greenberg as a witness.

support of this proposition, nor have they addressed Civ.R. 32(B) in relation to this issue. *See* App.R. 16(A)(7).

**{¶22}** Given the foregoing, we cannot say that the trial court abused its discretion in refusing to allow the Wiegands to read portions of Dr. Greenberg's testimony.

**{¶23}** The Wiegands' second assignment of error is overruled.

**ASSIGNMENT OF ERROR III**

> THE TRIAL COURT ERRED WHEN IT REFUSED TO SUBMIT WRITTEN INTERROGATORIES TO THE JURY AS TO WHETHER THE [WIEGANDS] SUSTAINED PERMANENT AND SUBSTANTIAL PHYSICAL DEFORMITIES OR LOSSES OF USE OF LIMBS.

**{¶24}** The Wiegands argue in their third assignment of error that the trial court erred in refusing to submit written interrogatories to the jury concerning whether the Wiegands sustained permanent and substantial physical deformities or losses of use of their limbs.

**{¶25}** Civ.R. 49(B) provides in pertinent part that, "[t]he court shall submit written interrogatories to the jury, together with appropriate forms for a general verdict, upon request of any party prior to the commencement of argument. * * * The interrogatories may be directed to one or more determinative issues whether issues of fact or mixed issues of fact and law." "The purpose of an interrogatory is to test the jury's thinking in resolving an ultimate issue so as not to conflict with its verdict. When both the content and the form of a proposed interrogatory are proper, Civ.R. 49 imposes a mandatory duty upon the trial court to submit the interrogatory to the jury. A proper interrogatory is designed to lead to findings of such a character as will test the correctness of the general verdict returned and enable the court to determine as a matter of law whether such verdict shall stand." (Internal citations and quotations omitted.) *Moretz v. Muakkassa*, 137 Ohio St.3d 171, 2013-Ohio-4656, ¶ 79.

**{¶26}** Within their argument addressing this assignment of error, the Wiegands have failed to cite to the record indicating where they objected to the trial court's failure to include the interrogatories or to indicate anywhere in their brief where in the record the interrogatories can be found. *See* App.R. 16(A)(7). Nonetheless, this Court has indeed confirmed that the Wiegands objected to the absence of the interrogatories and the proposed interrogatories are contained in the record.

**{¶27}** The record evidences that the Wiegands sought to introduce interrogatories concerning permanent and substantial physical deformity and loss of use in order to avoid the statutory cap on noneconomic damages found in R.C. 2315.18.

**{¶28}** R.C. 2315.18 "provides a basic procedure for the imposition of damages in certain tort actions. After a verdict has been reached for the plaintiff in one of the specified tort actions, the court (in a bench trial) will enter findings of fact or the jury (in a jury trial) will return a general verdict accompanied by answers to interrogatories. In either case, these findings or interrogatories will specify both the total compensatory damages recoverable by the plaintiff and the portions of those damages representing economic and noneconomic losses." (Internal citations omitted.) *Arbino v. Johnson & Johnson*, 116 Ohio St.3d 468, 2007-Ohio-6948, ¶ 27. "Thereafter, the court must enter judgment for the plaintiff for the amount of economic damages, without limitation, as determined by the trier of fact." *Id.* at ¶ 28. "For noneconomic damages, the court must limit recovery to the greater of (1) $250,000 or (2) three times the economic damages up to a maximum of $350,000, or $500,000 per single occurrence." *Id.* "However, these limits on noneconomic damages do not apply if the plaintiff suffered '[p]ermanent and substantial physical deformity, loss of use of a limb, or loss of a bodily organ system,' or '[p]ermanent physical functional injury that permanently prevents the injured person from being

able to independently care for self and perform life-sustaining activities.'" *Id.*, quoting R.C. 2315.18(B)(3)(a),(b).

**{¶29}** Even if the trial court erred in failing to submit the proposed interrogatories to the jury, we fail to see how the omission prejudiced the Wiegands. *See* Civ.R. 61. The jury awarded Mr. Wiegand $85,000 in noneconomic damages and awarded Mrs. Wiegand $20,000 in noneconomic damages. Those figures do not exceed the statutory cap and the trial court awarded the Wiegands the full amount determined by the jury. Thus, a finding that the Wiegands had suffered a permanent and substantial physical deformity or loss of use of a limb would not have altered the amounts the Wiegands were entitled to recover. Importantly, the Wiegands have not explained how, assuming there was error, the error prejudiced their substantial rights. *See* Civ.R. 61; App.R. 16(A)(7). Given all of the foregoing, we cannot say that the Wiegands have established reversible error.

**{¶30}** The Wiegands' third assignment of error is overruled.

**ASSIGNMENT OF ERROR IV**

THE TRIAL COURT ERRED WHEN IT ALLOWED WITNESSES TO TESTIFY AS TO THE LAW APPLICABLE TO THE CASE.

**{¶31}** In their fourth assignment of error, the Wiegands argue that the trial court erred in allowing several witnesses to testify as to the law applicable to the case during the punitive damages phase. Specifically, the Wiegands appear to challenge portions of the testimony of Thomas Michael, a Motor Carrier Enforcement Inspector with the Ohio State Highway Patrol; Mr. Steiskal; Maria Fearer, vice president and CFO of Fabrizi; and Don Taylor, a safety consultant hired by the Wiegands as an expert witness.

**{¶32}** Before and during the course of the trial, the parties debated whether the F-800 truck involved in the accident was subject to the Federal Motor Carrier Safety Regulations

adopted by the Public Utilities Commission of Ohio ("PUCO"). Essentially, the Wiegands asserted that it was, and Fabrizi and Mr. Steiskal maintained it was not. At trial, much of the focus seemed to be on whether written inspection reports, known as Driver Vehicle Inspection Reports, were required for the F-800 truck based upon the federal regulations adopted by PUCO. Both pre-trip inspection reports and post-trip inspection reports were discussed at trial. There was evidence presented that, while Mr. Steiskal was required by Fabrizi to conduct inspections of his vehicle, he was not required to complete written inspection reports.

**{¶33}** On appeal, the Wiegands assert that Mr. Michael, Mr. Steiskal, Ms. Fearer, and Mr. Taylor improperly testified to the law applicable to the instant matter. The Wiegands assert that this improper testimony taken together was testimony that "the * * * regulations adopted by [] PUCO did not apply to the 1997 Ford F-800 Fabrizi truck on June 18, 2012." As noted above, the Wiegands argued that the regulations did apply to the vehicle, and thus, believed that the contrary testimony would harm their case. Over the Wiegands' objection, Mr. Michael testified that the F-800 truck was not subject to the regulations. Mr. Steiskal indicated over objection that, to his knowledge, pre-trip inspection reports were not required by any governmental agency. Over objection, Ms. Fearer testified as to why she believed that the F-800 truck was not a "for hire" truck. After the trial court overruled an objection, Mr. Taylor testified that there was not a regulation that required a pre-trip inspection form be completed for a vehicle under 26,000 pounds at the time of the accident.[2] Thus, the Wiegands maintain that the testimony amounted to improper testimony about the nature of the law applicable to the case.

[2] There was evidence presented at trial that the gross vehicle weight rating of the F-800 truck was under 26,000 pounds.

**{¶34}** However, irrespective of whether that testimony was properly admitted, we conclude that any error in admitting the foregoing statements was harmless in light of the other admitted testimony not objected to or challenged on appeal. *See* Civ.R. 61. Without objection, Mr. Michael, the Motor Carrier Enforcement Inspector, testified that, at the time of the incident, the F-800 truck would not have needed a pre-trip inspection report. Without objection, Ms. Fearer testified that a Driver Vehicle Inspection Report was not required for the F-800 and that it was her belief that such was not required by PUCO. Mr. Taylor testified without objection that, at the time of the incident, for both pre-trip and post-trip inspections, drivers of vehicles over 26,000 pounds were required to create written reports of their inspections while other drivers only had to conduct the inspections but did not have to complete written reports.

**{¶35}** Moreover, to the extent that any alleged error may not have been harmless, we conclude that the Wiegands failed to meet their burden on appeal to demonstrate error. In their brief, the Wiegands hardly discuss the challenged testimony at all. In fact, the Wiegands fail to even quote the passages they believe were improperly admitted. Further, the Wiegands offer only conclusory statements as to why the testimony was inadmissible; they state that "matters of law are not generally the proper subject for testimony[,]" but they do not analyze the statements individually or explain how these particular statements amount to testimony on "matters of law." The Wiegands spend most of their argument detailing why they believe that the witnesses were incorrect instead of explaining why their testimony was inadmissible. *See* App.R. 16(A)(7). It is not the duty of this Court to construct an appropriate argument for the Wiegands. *See Cardone v. Cardone*, 9th Dist. Summit No. 18349, 1998 WL 224934, *8 (May 6, 1998) ("If an argument exists that can support this assignment of error, it is not this court's duty to root it out.").

**{¶36}** In light of all of the foregoing, we overrule the Wiegands' fourth assignment of error.

**ASSIGNMENT OF ERROR V**

> THE TRIAL COURT ERRED BY DENYING THE [WIEGANDS'] MOTION FOR A DIRECTED VERDICT THAT [FABRIZI] WAS A PRIVATE MOTOR CARRIER FOR-HIRE.

**{¶37}** The Wiegands argue in their fifth assignment of error that the trial court erred in denying their motion for a directed verdict that Fabrizi was a private motor carrier for hire.

**{¶38}** "Under Civ.R. 50(A)(4), a motion for a directed verdict should be granted if 'the trial court, after construing the evidence most strongly in favor of the party against whom the motion is directed, finds that upon any *determinative issue* reasonable minds could come to but one conclusion upon the evidence submitted and that conclusion is adverse to such party.'" (Emphasis added.) *Jones v. MTD Consumer Group, Inc.*, 9th Dist. Medina No. 13CA0093-M, 2015-Ohio-1878, ¶ 21, quoting *Bennett v. Admr., Ohio Bur. of Workers' Comp.*, 134 Ohio St.3d 329, 2012-Ohio-5639, ¶ 14, quoting Civ.R. 50(A)(4). "Because a motion for a directed verdict presents a question of law, appellate review of a trial court's decision on the motion is de novo." *Jones* at ¶ 21, quoting *Bennett* at ¶ 14.

**{¶39}** During the punitive damages phase of the trial, the Wiegands sought a directed verdict that Fabrizi was a private motor carrier for hire on the date of the accident. The only issue for the jury's determination at this time was whether the Wiegands were entitled to punitive damages. "Punitive damages are intended to punish the tortfeasor and to deter other potential tortfeasors from engaging in similar behavior." *Synder v. Singer*, 9th Dist. Wayne No. 99CA0020, 2000 WL 631981, *1 (May 17, 2000). Ohio courts have allowed punitive damages to be awarded in tort actions involving fraud, malice, or insult. *Preston v. Murty*, 32 Ohio St.3d

334, 334 (1987); *see also* R.C. 2315.21(C) (requiring that the acts or omissions of the defendant demonstrate malice or aggravated or egregious fraud to recover punitive damages). Actual malice, the basis of the Wiegands' claim for punitive damages, is "(1) that state of mind under which a person's conduct is characterized by hatred, ill will or a spirit of revenge, or (2) a conscious disregard for the rights and safety of other persons that has a great probability of causing substantial harm." (Emphasis omitted.) *Preston* at syllabus.

**{¶40}** Here, we fail to see how whether Fabrizi was a private motor carrier for hire was a determinative issue in the punitive damages phase of the trial, and thus, we cannot say the issue was appropriate for a directed verdict. *See* Civ.R. 50(A)(4). It appears that the Wiegands believe that if Fabrizi was a private motor carrier for hire, then it and Mr. Steiskal would be subject to the Federal Motor Carrier Safety Regulations adopted by PUCO. It is also apparent that they believe that if Fabrizi and Mr. Steiskal were subject to those regulations and failed to comply with them the jury would have concluded that Fabrizi and Mr. Steiskal acted with actual malice. However, even if Fabrizi was a private motor carrier for hire, Fabrizi and Mr. Steiskal were subject to the regulations, and were found to have failed to comply with the regulations, the jury could still nonetheless conclude that Fabrizi and Mr. Steiskal did not act with actual malice depending on which regulations they found Fabrizi and Mr. Steiskal failed to comply with, and the jury's evaluation of the significance of the failure to comply with the regulations. Accordingly, we fail to see how whether Fabrizi was a private motor carrier for hire on the date of the accident was a determinative issue as contemplated under Civ.R. 50(A)(4). Further, the Wiegands have not provided any authority or argument that would evidence that this issue was a determinative issue appropriate for a directed verdict. *See* App.R. 16(A)(7).

**{¶41}** On that basis, the Wiegands' fifth assignment of error is overruled.

## ASSIGNMENT OF ERROR VI

> THE TRIAL COURT ERRED WHEN IT REFUSED TO INSTRUCT THE JURY ON THE LAW WITH RESPECT TO VEHICLE REPORTS, INSPECTIONS, REPAIRS AND MAINTENANCE.

**{¶42}** In their sixth assignment of error, the Wiegands assert that the trial court erred in failing to instruct the jury with respect to the law on vehicle reports, inspections, repairs, and maintenance.

**{¶43}** It is unclear whether the Wiegands believe the instruction should have been given during the compensatory damages phase or the punitive damages phase. Nonetheless, the Wiegands only objected to the trial court's failure to give the instruction during the punitive damages phase. Given that the Wiegands did not object to the trial court's failure to include the instruction in the compensatory damages phase, they are limited to arguing plain error on appeal. *See White v. Artistic Pools, Inc.*, 9th Dist. Summit No. 24041, 2009-Ohio-443, ¶ 7; Civ.R. 51(A). Moreover, as the Wiegands have not argued plain error on appeal, we will not develop a plain error argument for them with respect to whether the instruction should have been included during the compensatory damages phase. *See Anderson*, 2016-Ohio-7814, at ¶ 12.

**{¶44}** Accordingly, we proceed to analyze whether it was reversible error for the trial court to fail to include the following instruction during the punitive damages phase:

> Prior to June 18, 2012, [PUCO] adopted the Federal Motor Carrier Safety Regulations, and directed all motor carriers operating in intrastate commerce within Ohio to conduct their operations in accordance with those regulations and the provisions of [PUCO]. Motor carriers include all private motor carriers when engaged in the business of private carriage of persons or property, or both, or of providing or furnishing such transportation service, for hire, in or by motor-propelled vehicles over any public highway in Ohio. For-hire means for compensation. A motor carrier includes all officers, agents, representatives, and employees of carriers by motor vehicle responsible for the management, maintenance, operation, or driving of motor vehicles, or the hiring, supervision, training, assigning, or dispatching of drivers of motor vehicles. A commercial motor vehicle means a self-propelled vehicle used on a highway when the vehicle

> has a gross vehicle weight rating, or gross vehicle weight, of 10,001 pounds or more. The Federal Motor Carrier Safety Regulations adopted by [PUCO] provide that every motor carrier shall require its drivers to report, and every driver shall prepare a report in writing at the completion of each day's work on each vehicle operated. The report shall identify the vehicle and list any defect or deficiency discovered by or reported to the driver which would affect the safety of operation of the vehicle or result in its mechanical breakdown. *You will consider whether [Fabrizi] complied with the Federal Motor Carrier Safety Regulations when deciding whether [Fabrizi] was negligent.*
>
> The Defendant [Fabrizi] had a duty to systematically inspect, repair, and maintain, or cause to be systematically inspected, repaired, and maintained, the 1997 Ford F-800 truck operated by the Defendant [Mr.] Steiskal at the time of the collision. *If you find by the greater weight of the evidence that the Defendant [Fabrizi] breached its duty to systematically inspect, repair, and maintain, or cause to be systematically inspected, repaired and maintained, the 1997 Ford F-800 truck operated by the Defendant [Mr.] Steiskal at the time of the collision, and that the breach of the duty was a proximate cause of the collision on June 18, 2012, then your verdict will be in favor of the plaintiffs and against [Fabrizi]*.

(Emphasis added.)

**{¶45}** "A trial court is obligated to provide jury instructions that correctly and completely state the law. The jury instructions must also be warranted by the evidence presented in a case." (Internal citation omitted.) *Cromer v. Children's Hosp. Med. Ctr. of Akron*, 142 Ohio St.3d 257, 2015-Ohio-229, ¶ 22.

**{¶46}** As discussed above, in the punitive damages phase, the issue before the jury was only whether the Wiegands were entitled to recover punitive damages. At that point in time, the negligence of Fabrizi and Mr. Steiskal was already determined. The Wiegands' proposed instruction indicates that the jury should find for the Wiegands if the jury concludes that Fabrizi breached the specified duty and that that breach of duty proximately caused the collision. However, that would only be a finding that Fabrizi was negligent. *See Robinson v. Bates*, 112 Ohio St.3d 17, 2006-Ohio-6362, ¶ 21. "[S]omething more than mere negligence is always required[]" to establish an entitlement to punitive damages. *Preston*, 32 Ohio St.3d at 335.

Additionally, the instruction requires only proof by a preponderance of the evidence. *See In re M.F.*, 9th Dist. Lorain No. 15CA010823, 2016-Ohio-2685, ¶ 7 (preponderance of the evidence defined). However, "[t]he plaintiff bears the burden to establish entitlement to punitive damages by clear and convincing evidence." *Whetstone v. Binner*, 146 Ohio St.3d 395, 2016-Ohio-1006, ¶ 20. "Clear and convincing evidence is that measure or degree of proof which is more than a mere preponderance of the evidence, but not to the extent of such certainty as is required beyond a reasonable doubt in criminal cases, and which will produce in the mind of the trier of facts a firm belief or conviction as to the facts sought to be established." (Internal quotations and citations omitted.) *State ex rel. Pietrangelo v. Avon Lake*, Slip Opinion No. 2016-Ohio-5725, ¶ 14. Accordingly, the instruction, as proposed by the Wiegands would not be a correct statement of the law to determine punitive damages and would more than likely have created confusion for the jury. *See Cromer* at ¶ 22 (stating jury instructions must correctly state the law and be applicable to the case). Therefore, we cannot say the trial court erred in failing to give the requested instruction.

**{¶47}** For the foregoing reasons, the Wiegands' sixth assignment of error is overruled.

**ASSIGNMENT OF ERROR VII**

> THE TRIAL COURT ERRED WHEN IT PERMITTED COUNSEL FOR [FABRIZI AND MR. STEISKAL] TO EXAMINE PARTIES CALLED BY [THE WIEGANDS] AS IF UPON CROSS-EXAMINATION, PURSUANT TO R.C. 2317.07, DURING THE [WIEGANDS'] CASE-IN-CHIEF.

**{¶48}** In their seventh assignment of error, the Wiegands assert that the trial court erred in allowing counsel for Fabrizi and Mr. Steiskal to ask Mr. Steiskal, Emilio Fabrizi, Jr., Mr. Joyce, Ms. Fearer, and James Spencer Kershner questions related to Fabrizi's and Mr. Steiskal's defense when those witnesses were called as if upon cross-examination during the Wiegands'

case-in-chief. We note that the Wiegands only posed an objection to the first of the above listed witnesses to testify, Mr. Steiskal.

**{¶49}** "It is well settled that a trial court has broad discretion to control the proceedings to enable it to exercise its jurisdiction in an orderly and efficient manner." *Loewen v. Newsome*, 9th Dist. Summit Nos. 25559, 25579, 2012-Ohio-566, ¶ 15. Evid.R. 611(A) further provides that "[t]he court shall exercise reasonable control over the mode and order of interrogating witnesses and presenting evidence so as to (1) make the interrogation and presentation effective for the ascertainment of the truth, (2) avoid needless consumption of time, and (3) protect witnesses from harassment or undue embarrassment."

**{¶50}** When the issue the Wiegands now raise came up during trial, the trial court spent a fair amount of time discussing Evid.R. 611(A). It concluded that it had "considered all of the factors in [Evid.R.] 611(A) when making its ruling is this particular case, specifically, the ascertainment of the truth and avoiding needless consumption of time." The trial court further noted that, "[e]vidence rules generally favor[] this procedure because it permits the jury to hear the prompt explanation of earlier testimony."

**{¶51}** The Wiegands have not developed an argument as to how the trial court abused its discretion given the language in Evid.R. 611(A), nor have they explained how the trial court's actions prejudiced them. *See* App.R. 16(A)(7). While the Wiegands have made the general assertion that allowing the testimony in the manner the trial court did provides defendants with an advantage, the Wiegands have not explained how, under the facts of this case, the trial court's ruling prejudiced them. *See* Civ.R. 61; App.R. 16(A)(7).

**{¶52}** Given the foregoing, the Wiegands' seventh assignment of error is overruled.

## ASSIGNMENT OF ERROR VIII

> THE TRIAL COURT ERRED WHEN IT DENIED THE [WIEGANDS'] MOTIONS TO REOPEN THE JUDGMENTS AND ORDER A NEW TRIAL ON COMPENSATORY AND PUNITIVE DAMAGES.

**{¶53}** In their eighth assignment of error, the Wiegands challenge the trial court's ruling denying their motion for a new trial.

**{¶54}** "This Court's standard of review of an order denying a motion for a new trial depends upon the grounds of the motion. Depending upon the basis of the motion for a new trial, this Court will review a trial court's decision to grant or deny the motion under either a de novo or an abuse of discretion standard of review." *Price v. KNL Custom Homes, Inc.*, 9th Dist. Summit No. 26968, 2015-Ohio-436, ¶ 43, quoting *Jackovic v. Webb*, 9th Dist. Summit No. 26555, 2013-Ohio-2520, ¶ 17.

**{¶55}** Pursuant to Civ.R. 59(A):

> A new trial may be granted to all or any of the parties and on all or part of the issues upon any of the following grounds:
>
> (1) Irregularity in the proceedings of the court, jury, magistrate, or prevailing party, or any order of the court or magistrate, or abuse of discretion, by which an aggrieved party was prevented from having a fair trial;
>
> (2) Misconduct of the jury or prevailing party;
>
> (3) Accident or surprise which ordinary prudence could not have guarded against;
>
> (4) Excessive or inadequate damages, appearing to have been given under the influence of passion or prejudice;
>
> (5) Error in the amount of recovery, whether too large or too small, when the action is upon a contract or for the injury or detention of property;
>
> (6) The judgment is not sustained by the weight of the evidence; however, only one new trial may be granted on the weight of the evidence in the same case;
>
> (7) The judgment is contrary to law;

> (8) Newly discovered evidence, material for the party applying, which with reasonable diligence he could not have discovered and produced at trial;
>
> (9) Error of law occurring at the trial and brought to the attention of the trial court by the party making the application.
>
> In addition to the above grounds, a new trial may also be granted in the sound discretion of the court for good cause shown.

**{¶56}** The Wiegands moved for a new trial on several grounds, some of which they mention within this assignment of error. However, as they only discuss the allegation of juror misconduct in any detail, that is the only issue this Court will address on the merits.

**{¶57}** "To obtain a new trial in a case in which a juror has not disclosed information during voir dire, the moving party must first demonstrate that a juror failed to answer honestly a material question on voir dire and that the moving party was prejudiced by the presence on the trial jury of a juror who failed to disclose material information. To demonstrate prejudice, the moving party must show that an accurate response from the juror would have provided a valid basis for a for-cause challenge." *Grundy v. Dhillon*, 120 Ohio St.3d 415, 2008-Ohio-6324, paragraph one of the syllabus. "In determining whether a juror failed to answer honestly a material question on voir dire and whether that nondisclosure provided a basis for a for-cause challenge, an appellate court may not substitute its judgment for the trial court's judgment unless it appears that the trial court's attitude was unreasonable, arbitrary, or unconscionable." *Id.* at paragraph two of the syllabus.

**{¶58}** In the instant matter, during voir dire, counsel for the Wiegands disclosed his list of potential witnesses including Mr. Joyce, who was described as living in Litchfield in Medina County. None of the potential jurors spoke up and indicated any relationship or connection to Mr. Joyce. Mr. Joyce did not testify during the compensatory damages phase of the trial. When Mr. Joyce was called to the stand as a witness for the Wiegands during the punitive damages

phase, a juror realized that she knew him. Immediately, the juror brought this information to the trial court, and the trial court held a meeting in chambers. The juror informed the trial court that she had not heard Mr. Joyce's name mentioned during voir dire and that, if she had, she would have said so at that time. The juror indicated that she was really good friends with Mr. Joyce's daughter and that she saw Mr. Joyce once a week at the bank. Nonetheless, the juror maintained that she could be fair. After this discussion with the juror, counsel for the Wiegands asked that the juror be dismissed and replaced with an alternate. The trial court agreed. Counsel for the Wiegands made no additional motions with respect to the juror.

**{¶59}** On appeal, the Wiegands maintain that the juror failed to disclose during voir dire that she knew Mr. Joyce and that relationship would have provided the Wiegands with a for-cause challenge. They further maintain that prejudice is evidenced by the facts that (1) the juror deliberated with the rest of the jury during the compensatory phase, and (2) the jury did not award all the compensatory damages the Wiegands sought.

**{¶60}** From the transcript of the hearing on the motion for a new trial, it is clear that the trial court did not believe that the juror was being dishonest or withholding information; instead, it is apparent that the trial court believed that the juror simply did not hear Mr. Joyce's name mentioned during voir dire or did not recognize that it was someone she knew. There is nothing in the record which contradicts this. Prior to the attorneys listing their potential witnesses, the trial court instructed the jury as a whole: "You may know who these witnesses are, and so I'm going to ask you, 'Do you know any of those people?'" Each attorney's potential witness list was then read, without pause, to the entire panel and no specific questions were posed to individual jurors on the issue. Given those circumstances, the juror's statement that she did not hear Mr. Joyce's name mentioned, does not appear unreasonable. Further, as Mr. Joyce did not

testify during the compensatory damages phase, the juror's first encounter with Mr. Joyce was when he was called to the witness stand during the punitive damages phase. At that point, the juror immediately brought the issue to the court's attention.

**{¶61}** Under the particular circumstances of this case, we cannot say that the trial court's decision to deny the Wiegands' motion for a new trial based upon juror misconduct was an abuse of discretion. Here, it was not unreasonable for the trial court to conclude that the juror did not fail to honestly answer the question, but rather simply did not hear the name of the witness mentioned or did not make the connection in her mind at that time that she knew him.

**{¶62}** The Wiegands' eighth assignment of error is overruled.

III.

**{¶63}** The Wiegands' assignments of error are overruled. The judgment of the Medina County Court of Common Pleas is affirmed.

Judgment affirmed.

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There were reasonable grounds for this appeal.

We order that a special mandate issue out of this Court, directing the Court of Common Pleas, County of Medina, State of Ohio, to carry this judgment into execution. A certified copy of this journal entry shall constitute the mandate, pursuant to App.R. 27.

Immediately upon the filing hereof, this document shall constitute the journal entry of judgment, and it shall be file stamped by the Clerk of the Court of Appeals at which time the period for review shall begin to run. App.R. 22(C). The Clerk of the Court of Appeals is

instructed to mail a notice of entry of this judgment to the parties and to make a notation of the mailing in the docket, pursuant to App.R. 30.

Costs taxed to Appellants.

CARLA MOORE
FOR THE COURT

CARR, P. J.
HENSAL, J.
CONCUR.

APPEARANCES:

MARK E. STEPHENSON, Attorney at Law, for Appellants.

THOMAS W. WRIGHT, Attorney at Law, for Appellee.

JOHN R. CHRISTIE and THOMAS STEFANIK, Attorneys at Law, for Appellee.