ORIGINAL

No. 2011-1120
(Related to Supreme Court Case No. 2011-1097)

IN THE SUPREME COURT OF OHIO

Ronald Luri,	:	**On Appeal from the Cuyahoga**
	:	**County Court of Appeals,**
Plaintiff-Appellee,	:	**Eighth Appellate District**
	:	
v.	:	
	:	**Court of Appeals**
Republic Services, Inc., et al.,	:	**Case No. 10-094908**
	:	
Defendants-Appellants.	:	

MERITS BRIEF OF APPELLEES REPUBLIC SERVICES, INC., REPUBLIC SERVICES OF OHIO HAULING LLC, REPUBLIC SERVICES OF OHIO I, LLC, JAMES BOWEN, AND RONALD KRALL

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INTRODUCTION

This appeal involves the application of the tort reform cap on punitive damages in a multi-defendant, single-employer employment termination case. Plaintiff-Appellant Ronald Luri tried his case on the theory that the three corporate defendants are "all the same corporate entity" and "are a single employer," and the trial court—at his request—gave the jury an instruction on the single-employer doctrine. The jury returned a single compensatory verdict against all defendants[1] in the amount of $3.5 million and the largest punitive damages verdict in an employment case in Ohio history—a stunning $43 million.

The issue in this case is whether Luri, having obtained a verdict on liability against the three corporate affiliates on the basis of the single-employer theory of liability, can then change his theory and have them treated as separate and distinct entities for purposes of increasing the maximum permissible amount of punitive damages. While the resolution of this issue does not depend on the particular facts of this case, the facts nonetheless serve to confirm why the General Assembly found it necessary to enact a cap and why adopting the interpretation urged by Luri would undermine the General Assembly's intent "to restore balance, fairness, and predictability to the civil justice system." Am.Sub.S.B. No. 80 § 3(4)(a), 125th General Assembly (2005); Appx. 111 (hereinafter referred to as S.B. 80).

Although the jury found the defendants liable for retaliatory discharge, only a few factual issues were actually disputed. The facts establish that this was a close case on liability and that a valid basis existed for terminating Luri's employment. Under these circumstances, it could not

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[1] Defendants-Appellants are Republic Services, Inc.; two of its subsidiaries, Republic Services of Ohio I, LLC ("Republic Ohio") and Republic Services of Ohio Hauling, LLC ("Republic Hauling"); Ronald Krall; and James Bowen (collectively, "Republic").

be clearer that Luri's position—that the punitive damages cap should be construed to permit multiple punitive awards of twice the amount of the compensatory award for all defendants who are jointly and severally liable—would thwart the General Assembly's intent to restore balance, fairness, and predictability in the awarding of punitive damages.

II

STATEMENT OF THE FACTS

A. Luri's Employment With Republic

Luri joined Republic Hauling in 1998 and thereafter became the General Manager of the Cleveland Division. (Tr. 563; Supp. 8). Eight years later, in August 2006, he applied for the position of Area President. (Tr. 573-574; Supp. 9-10). Defendant-Appellant James Bowen, another Republic employee, also applied for that position. Bowen was the top performer among general managers in Republic's Eastern Region in 2005 and 2006. (Tr. 1179, 1182; Supp. 66, 69; Exs. T, U; Supp. 252, 255). By contrast, Luri was consistently ranked among the worst general managers in the region. In 2003, Luri was ranked 13 out of 13; in 2004, he was ranked 12 out of 13; in 2005, he was ranked 12 out of 13; and in 2006, he was ranked 10 out of 11. (Tr. 1174-1175, 1180-1183; Supp. 63-64, 67-70; Exs. R, S, T, U; Supp. 248, 249, 252, 255). Luri's poor rankings in 2003, 2004, 2005, and 2006 were the result of his repeated failure to follow company rules and fulfill his obligations as manager. After reviewing the records of Bowen and Luri, Ronald Krall, Region Vice President, selected Bowen to be the new Area President. (Tr. 573-574; Supp. 9-10).

In his new position as Area President, Bowen became Luri's supervisor. After Bowen's promotion, Luri's work performance continued to be unsatisfactory. Luri admitted at trial that he failed to generate any business from non-municipal customers and could not recall having even one meeting with a single customer—municipal or otherwise. (Tr. 644-645; Supp. 14-15). He

further admitted that he was not holding the required weekly staff meetings or attending the required monthly safety meetings when Bowen became his manager in August 2006. (Tr. 645-646; Supp. 15-16). Indeed, his performance was so poor that employees who worked in the Cleveland Division believed that Luri's assistant, Al Marino, was the General Manager instead of Luri. (Tr. 974; Supp. 53). As Mr. Marino testified at trial, Luri was an "absentee manager" and a "ghost." (Tr. 971-972; Supp. 50-51).

Bowen met with Luri several times to discuss ways to improve his performance. (Tr. 582-583; Supp. 11-12; Ex. 12; Supp. 168). Following a meeting held on December 22, 2006, Bowen sent an "Action Plan" to Luri, providing specific direction on each of the problems that management had identified. (Ex. 12; Supp. 168). In responding to the Action Plan on January 3, Luri admitted that he had failed to conduct required staff meetings, committed to immediately "implement[ ] the Action Plan," and promised to keep Bowen apprised of his progress. (Ex. 14; Supp. 172).

Luri, however, did not fulfill his commitment to improve. He failed to conduct a single staff meeting over the next month. (Tr. 679-681; Supp. 26-28). When he did hold one, he failed to invite all of the required personnel. (Id.). He did not immediately require his sales manager to conduct weekly meetings, as the Action Plain required, and he could recall having attended only two such meetings in all of 2007. (Tr. 681; Supp. 28). Luri even failed to submit weekly planners at the end of the week, even though Bowen had directed him to do so. (Tr. 684-685; Supp. 31-32).

Luri's failure to follow the Action Plan negatively impacted the Cleveland Division. An employee survey rated the management of the Cleveland Division among the worst in the company. (Tr. 686-687; Supp. 33-34; Ex. JJJ; Supp. 266). Still, Bowen remained committed to

working with Luri to improve his performance. On February 7, 2007, Bowen provided Luri with a memorandum "to ensure you understand what will be expected from you as the General Manager of our Cleveland Operation." (Tr. 688-691; Supp. 35-38; Ex. 18; Supp. 179). The February 7 memorandum restated the expectations of the Action Plan. (Ex. 18; Supp. 179).

Bowen made "crystal clear" in the February 7 memorandum that Luri's job would be in jeopardy if he failed to adhere to the Action Plan. (Tr. 690-691; Supp. 37-38). Luri responded with a short note, again promising to conduct weekly staff meetings, to attend weekly sales meetings, and to attend safety meetings. (Tr. 691; Supp. 38; Ex. 19; Supp. 183). In that note, Luri gave no hint that he felt Bowen's actions were in any way retaliatory or unreasonable. (Ex. 19; Supp. 183). Rather, Luri understood that, if he did not adhere to the Action Plan, it could result in his discharge. (Tr. 691).

Yet again, Luri failed to fulfill his obligations. He conducted just five staff meetings over the first four months of 2007, attended only two safety meetings, and sent no meeting agenda or planners to Bowen. (Tr. 689-693, 698; Supp. 36-40, 41; Exs. FF, GG, HH, II, and JJ; Supp. 259, 260, 262, 264, 265). Left with little other choice, the decision was made to discharge Luri. (Tr. 1243-1245; Supp. 75-77).

On April 23, 2007, Bowen met with Luri, an at-will employee, and informed him that he was suspended pending termination. (Tr. 615; Supp. 13). Bowen explained to Luri that he had failed to meet the Action Plan objectives. Luri acknowledged his failures. (Tr. 698, 1454; Supp. 41). Following the meeting, Luri sent an e-mail to President and Chief Operating Officer Mike Cordesman, asking that he reverse the decision to terminate him. (Ex. 25; Supp. 185). Tellingly, Luri said nothing in his e-mail about Bowen's actions being in any way discriminatory or

retaliatory. (Id.). On April 27, 2007, Luri was informed that his discharge had become final. (Tr. 1240-1241; Supp. 73-74).

At the time his employment was terminated, Luri had acknowledged that his job performance had been substandard. In appealing his job termination to Mike Cordesman, Luri did not make any allegations or suggestions that his job had been terminated for retaliatory purposes. In fact, at no time during his employment with Republic Hauling, LLC did Luri ever make a written accusation that action was being taken against him in retaliation for anything.

B. The Lawsuit

In the face of this record, almost four months after his position had been terminated, Luri decided to try to shift the responsibility for his shortcomings by initiating this lawsuit and alleging that his discharge was retaliatory. Luri filed a complaint against Republic Services, Inc., two of its subsidiaries, Republic Ohio and Republic Hauling, and two of his superiors, Ronald Krall and James Bowen, alleging that he had been retaliatorily discharged under R.C. 4112.02(I) for refusing to fire three employees who were over 40 years of age.

According to Luri, Bowen directed him in the fall of 2006 to fire division safety manager Lou Darienzo, industrial supervisor George Fiser, and division controller Frank Pascuzzi. Luri now alleges that, because these individuals were over 40 years old, he was concerned about discrimination and possible lawsuits. Luri further claims that Republic terminated his employment because he refused to fire these three individuals.

After Luri filed suit, Bowen regrettably added additional material to a memorandum he had previously written. The information added concerned the negative perception of Luri within Republic and his failure to hold meetings. While this additional information was nothing new, it was nonetheless not written contemporaneously.

The actual facts tell a very different story from that portrayed by Luri. In point of fact, Bowen never directed Luri to fire *anyone*. Under cross-examination, Luri was forced to admit that Bowen did not tell him to fire Darienzo. (Tr. 652; Supp. 18). Rather, Bowen told him that he wanted to eliminate the safety director position throughout the entire area (Darienzo was only one of several safety directors) because he believed that responsibility should be placed at a higher level. (Tr. 474; Supp. 7). Luri admitted that Bowen wanted Darienzo to remain in the company and proposed that Darienzo be given the position of residential manager after his current position was eliminated. (Tr. 652-653; Supp. 18-19).

Nor did Bowen instruct Luri to fire Fiser. (Tr. 670, 1431-1432; Supp. 25, 80-81). Instead, Bowen asked Luri to consider making Fiser a full-time dispatcher, which Luri himself agreed would be a better position for Fiser. (Tr. 669-670; Supp. 24-25). Likewise, Bowen never instructed Luri to fire Pascuzzi. (Tr. 407-408, 658; Supp. 5-6, 21). In fact, Luri stated that he personally encouraged Pascuzzi to take the new position because his wage and benefits would not change. (Tr. 660; Supp. 23). Luri also admitted that Bowen never raised the issue of age when discussing any of these proposed employment decisions. (Tr. 654, 658, 670; Supp. 20, 21, 25).

At the time of trial, all three of these individuals continued to work for Republic: Darienzo was the Operations Supervisor for the residential line of business (Tr. 1463; Supp. 82); Fiser was doing the exact same job he did when Luri was general manager (Tr. 1463; Supp. 82); and, although Pascuzzi had given his retirement notice, Republic had asked him to stay on and assist the company (Tr. 1100-1101; Supp. 59-60).

It is not surprising, then, that Luri never mentioned "discrimination" or "retaliation" to anyone at Republic. This fact is perhaps best illustrated by Luri's bare-all memorandum to

President and COO Mike Cordesman, in which he never once mentioned Bowen's supposed discrimination or retaliation. (Tr. 710; Supp. 45; Ex. 25; Supp. 185). Luri had an obligation to report any discrimination under Republic's anti-discrimination policies, which he had reviewed and signed. (Tr. 708-712; Supp. 43-47). Yet he never reported this "discrimination" to anyone—not anyone in the company, not to an attorney, not even anonymously through the company's alert line, which was specifically created to prevent discrimination. (Id.).

Despite these facts, the jury found all five defendants liable for retaliatory discharge and awarded Luri $3.5 million in compensatory damages jointly and severally against them. It further awarded approximately $43 million in punitive damages: $21.5 million against the parent company, Republic Services, Inc.; $10.75 million against wholly-owned subsidiary Republic Ohio; $10.75 million against wholly-owned subsidiary Republic Hauling; $83,394 against Krall; and $25,205 against Bowen. (7/3/2008 Journal Entry).

C. Procedural Aspects of the Case

Following the jury's verdict, Republic moved for a new trial and, alternatively, to apply the punitive damages cap under R.C. 2315.21. The trial court summarily denied the motions without opinion. (09/18/08 Journal Entry).

After the trial court's post-trial rulings and the dismissal of a prematurely filed appeal, Republic retained new counsel who prosecuted an appeal to the Eighth District Court of Appeals. In this appeal, Republic raised six assignments of error, three of which are germane to this appeal: (*i*) the trial court erred by failing to apply the Ohio tort reform provision in R.C. 2315.21(B)(1), which requires mandatory bifurcation of a trial upon the motion of a party; (*ii*) the trial court erred by failing to apply the Ohio tort reform provision in R.C. 2315.21(D)(2)(a), which requires the trial court to cap punitive damages at twice the amount of compensatory damages; and

(*iii*) the trial court erred by failing to reduce the punitive damages award under the Due Process Clauses of the U.S. and Ohio Constitutions.

The Eighth District rendered its decision on May 19, 2011. It held the bifurcation provision in R.C. 2315.21(B) to be unconstitutional on the ground that the provision is procedural rather than substantive and conflicts with Ohio Rule of Civil Procedure 42(B). In a split decision, the Eighth District capped the punitive award at two times the compensatory damages, or $7 million, pursuant to R.C. 2315.21(D)(2)(a). As the Court of Appeals explained:

> 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.

(Court of Appeals Opinion at pp. 13-14 (emphasis added)). The Court of Appeals further held that, as reduced, the punitive damages are not unconstitutionally excessive.

Republic filed a motion to certify a conflict regarding the constitutionality of the mandatory bifurcation provision in R.C. 2315.21(B) pursuant to Ohio App. R. 25 and Ohio S.Ct. Prac. R. 4.1 with the Eighth Appellate District Court of Appeals on May 27, 2011. The Eighth District granted the motion on June 7, 2011, certifying a conflict between its decision in this case and the Tenth District Court of Appeals' decision in *Hanners v. Ho Wah Genting Wire & Cable SDN BHD*, 10th Dist. No. 09AP-361, 2009-Ohio-6481.

Republic proceeded to file a Notice of Certified Conflict with this Court on June 28, 2011. Three days later, June 30, 2011, Luri filed a Notice of Appeal and a Memorandum in Support of Jurisdiction, asserting a single proposition of law regarding the application of the punitive damages cap. The same day, Republic submitted a Notice of Cross-Appeal. On July 29, 2011,

Republic submitted a combined memorandum (*i*) in response to Luri's Memorandum in Support of Jurisdiction, and (*ii*) in Support of Jurisdiction for Republic's Cross-Appeal asserting various propositions of law, including a proposition of law regarding the constitutionality of the mandatory bifurcation provision in R.C. 2315.21(B).

On October 5, 2011, this Court issued two orders. *First*, in Case No. 2011-1097 (the certified conflict appeal), this Court determined that a conflict does exist regarding the constitutionality of R.C. 2315.21(B) and "held" the cause for *Havel v. Villa St. Joseph*, Case No. 2010-2148. *Second*, in Case No. 2011-1120 (this discretionary appeal), the Court accepted Luri's appeal regarding the punitive damages cap and Proposition of Law No. 1 of Republic's cross-appeal regarding the constitutionality of R.C. 2315.21(B). It then held Proposition of Law No. 1 in Republic's cross-appeal for *Havel* and stayed the briefing schedule on that issue.

Therefore, the subject of this brief is the single proposition raised by Luri regarding the application of the punitive damages cap. This brief is being submitted prior to the Court's decision in *Havel* because of the procedural schedule. If this Court upholds the constitutionality of the bifurcation statute in *Havel*, then a new trial is mandatory in this case. Consequently, where Republic discusses any amounts that might be due to Luri under the proper interpretation of the punitive damages cap, it does so only hypothetically and without prejudice to its position that no amount is owed and a new trial is required.

III

ARGUMENT

Counter-Proposition of Law: Where defendants are found jointly and severally liable under a single-employer theory, the cap on punitive damages in R.C. 2315.21(D)(2)(a) applies once as to those defendants and thus limits the punitive damages award to twice the amount of compensatory damages for which the defendants are jointly and severally liable.

R.C. 2315.21(D)(2)(a) provides that "[t]he 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 . . . ." This provision is part of the tort reform statutes enacted by the General Assembly in S.B. 80, effective April 7, 2005. This Court upheld the constitutionality of the tort reform statutes, including the punitive damages cap, in *Arbino v. Johnson & Johnson*, 116 Ohio St.3d 468, 2007-Ohio-6948.

The tort reform statutes apply to "tort actions," which are defined as "a civil action for damages for injury or loss to person or property," with the exception of breach-of-contract actions and other exceptions not relevant here. R.C. 2315.18(A)(7); R.C. 2315.21(A)(1). This retaliatory discharge case under R.C. 4112 is a "tort action" within the meaning of R.C. 2315.[2]

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[2] *See Ridley v. Fed. Express*, 8th Dist. No. 82904, 2004-Ohio-2543, ¶ 89 (applying the punitive damages provisions in R.C. 2315.21 to a sexual harassment claim under R.C. 4112); *Geiger v. Pfizer, Inc.*, S.D.Ohio No. 2:06-CV-636, 2009 WL 1026479, at *1 (Apr. 15, 2009) (applying the bifurcation provision and the punitive damage provisions in R.C. 2315.21 to a R.C. 4112 claim); *McIntyre v. Advance Auto Parts,* N.D.Ohio No. 1:04 CV 1857, 2007 WL 120645, at *81-84 (Jan. 10, 2007) (applying the punitive damages provisions in R.C. 2315.21 to a retaliation claim under R.C. 4112); *McCombs v. Meijer, Inc.*, 395 F.3d 346, 355-356 (6th Cir.2005) (applying the punitive damages provisions in R.C. 2315.21 to a sexual harassment under R.C. 4112); *Waddell v. Roxane Laboratories, Inc.*, 10th Dist. No. 03AP-558, 2004-Ohio-2499, ¶ 44 (applying the punitive damages provisions in R.C. 2315.21 to a racial discrimination claim under R.C. 4112); *Waters v. Allied Machine & Engineering Corp.*, 5th Dist. Nos. 02AP040032, 02AP040034, 2003-Ohio-2293, ¶ 113 (applying the punitive damages provisions in R.C. 2315.21 to a sexual harassment claim under R.C. 4112). Although several of these cases did not apply the 2005 Ohio tort reform statutes (which became effective on April 7, 2005), Section 2315.21 included the same definition of "tort action" when these cases were decided.

In uncodified Section 3(4) of S.B. 80, the Ohio General Assembly explained that it imposed the punitive damages cap because "[r]eform to the punitive damages law in Ohio is urgently needed to restore balance, fairness, and predictability to the civil justice system." Am.Sub.S.B. No. 80 § 3(4)(a). The General Assembly determined that "[t]he absence of a statutory ceiling upon recoverable punitive or exemplary damages in tort actions has resulted in occasional *multiple awards* of punitive or exemplary damages . . . *that have no rational connection to the wrongful actions or omissions of the tortfeasor.*" Am.Sub.S.B. No. 80 § 3(4)(b)(ii) (emphasis added). This case presents the type of "multiple awards of punitive damages . . . that have no rational connection to the wrongful action[]" that the General Assembly sought to limit in the tort reform statutes.

Against this backdrop, the Eighth District Court of Appeals held that where, as here, a plaintiff tries the defendants on a single-employer theory which results in a joint and several compensatory award, the punitive damages cap applies collectively to all defendants. For the reasons set forth below, this Court should affirm the Court of Appeals' decision on this issue.

A. Because Luri Tried This Case On The Single-Employer Theory, Both The Doctrine Of Judicial Estoppel And, More Generally, Principles Of Fair Play Dictate That He May Not Multiply His Punitive Damages Recovery By Treating The Three Republic Entities Separately For Purposes Of The Punitive Damages Cap.

Luri's case was premised on a "single employer" theory, pursuant to which he asked the jury to impute the actions of one corporate defendant to another. The single-employer doctrine is a form of joint and several liability applicable in employment actions. The doctrine makes the "affiliated corporation . . . jointly responsible for the [discriminatory] acts of the immediate

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The relevant issue is not whether the *tort reform statutes* were in R.C. 2315 when these cases where decided but, rather, whether Chapter 4112 claims *fell within the definition of "tort action"* in R.C. 2315.

employer." *Armbruster v. Quinn*, 711 F.2d 1332, 1337 (6th Cir.1983), abrogated on other grounds, *Arbaugh v. Y&H Corp.*, 546 U.S. 500 (2006). As the U.S. Court of Appeals for the Second Circuit has explained:

> A single employer situation exists where *two nominally separate entities are actually part of a single integrated enterprise* . . . . In such circumstances, of which *examples may be parent and wholly-owned subsidiary corporations*, or separate corporations under common ownership and management, the *nominally distinct entities can be deemed to constitute a single enterprise.* There is well-established authority under this theory that, in appropriate circumstances, an employee, who is technically employed on the books of one entity, which is deemed to be part of a larger "single-employer" entity, may impose liability for certain violations of employment law not only on the nominal employer but also on another entity comprising part of the single integrated employer.

Arculeo v. On-Site Sales & Marketing, LLC, 425 F.3d 193, 198 (2d Cir. 2005) (internal quotations omitted).

Based on the single-employer theory, and at Luri's behest, the jury found all of the defendants jointly and severally liable for the compensatory damages. Having proceeded on the single-employer theory, Luri should not be allowed to switch horses in midstream and take the opposite approach to multiply the punitive damages award. The doctrine of judicial estoppel forbids a party from taking a position inconsistent with one successfully and unequivocally asserted by the same party. *Greer-Burger v. Temesi*, 116 Ohio St. 3d 324, 2007-Ohio-6442, ¶ 25. The core purpose of the judicial estoppel doctrine is to preserve the integrity of the courts by preventing a party from achieving success on one position and then taking the opposite position to suit an exigency of the moment—in other words, from attempting to have it both ways.[3] *Id.*

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[3] As Luri himself states, "parties 'must decide their issues, incorporate them into their strategy, and be responsible for the results[.]'" (Appellant Merits Brief, at 22 (citing *Dardinger v. Anthem Blue Cross & Blue Shield*, 98 Ohio St.3d 77, 2002-Ohio-7113, ¶ 148.)).

The judicial estoppel principle applies here. In no uncertain terms, Luri's counsel argued at trial that the jury should treat the defendants as one entity: "[Y]ou have heard plenty of testimony about Republic Services, Inc., Republic Services of Ohio I, and Republic Services of Ohio Hauling. As Mr. Bowen explained, ***they're all the same corporate entity. They just share a bunch of functions and operate together.***" (Tr. 1606; Supp. 117 (emphasis added).) Luri's counsel added in closing: "I submit to you [the jury] that ***these three corporate entities are a single employer*** and that they are liable for the termination of my client." (Tr. 1737; Supp. 154 (emphasis added).)

The trial court and counsel discussed the single-employer theory for *57 pages* of the record. (Tr. 1544-1567, 1623-1624, 1631-1636, 1665-1669, 1694-1710, 1713-1716; Supp. 86-109, 123-152). In requesting a jury instruction on the single employer doctrine, Luri stated to the trial court: "In this case, the evidence is that the . . . 'employer' of Mr. Luri was Republic Services of Ohio Hauling, LLC. However, ***the operations of the company and the parent corporations are so interrelated . . . [and] the doctrine of single employer applies.*** (Tr. 1546-1547; Supp. 88-89 (emphasis added)). As Luri explained, "[t]he single employer doctrine permits the Plaintiff to establish that ***the parent company and its subsidiaries are a quote, 'single employer,' unquote, for purposes of discrimination laws.***" (Tr. 1703; Supp. 145 (emphasis added)). It was at Luri's request that the trial court agreed to give the single employer instruction. (Tr. 1694; Supp. 136 ("Plaintiff asked yesterday for the Single Employer Doctrine to be used.").

Luri elicited evidence to establish that all three corporate affiliates were a single employer. On cross examination of Mr. Bowen, Luri's counsel elicited the following:

> Q. So Republic Services of Ohio Hauling, LLC employs all of the people working in the division and rolls up to Republic Services of Ohio I, LLC, correct?

MR. POSNER: Objection.

THE COURT: Overruled.

A. I believe so.

Q. You roll up and report to Mr. Krall, who is an employee of Republic Services, Inc., correct?

MR. POSNER: Objection.

THE COURT: Overruled.

A. I believe so, yes.

Q. ***And so from a corporate standpoint, all of these entities essentially operate together from a supervisory standpoint?*** You seek human resource advice from Republic Services, Inc. employees like Mr. Nichols?

MR. POSNER: Objection. Foundation.

THE COURT: Overruled.

A. ***Yes.***

(Tr. 1478; Supp. 85 (emphasis added)).

Then, during discussions with the trial judge, Luri asserted:

The reason that the Plaintiff believes that the single employer doctrine is appropriate is because there are three corporate Defendants currently in this case. The first is Republic Services of Ohio Hauling, LLC. The evidence yesterday on cross-examination of Mr. Bowen is that that is the corporate entity that employed Mr. Luri. However, Mr. Luri directly reported to James Bowen, who is the area president, and who ultimately was one of the individuals who made the decision to terminate Mr. Luri. Mr. Bowen is not an employee of Republic Services of Ohio Hauling, LLC. He is an employee, by his own admission, of Republic Services of Ohio I, LLC and he then reports to and must receive approval from Ron Krall, the regional vice president of Republic Services, Inc. Mr. Bowen testified he can make no termination (sic) to terminate without first getting the approval of Ron Krall, who is a Republic Services, Inc. employee and the support from corporate human resources, in this case being Craig Nichols, who is the vice president of human resources for Republic Services, Inc. ***The evidence in this case is that Republic Services, Inc. is the parent of Republic Services of Ohio, LLC and Republic Services of Ohio Hauling. The single employer doctrine permits the Plaintiff to establish that the parent company and its subsidiaries are a quote, "single employer," unquote, for purposes of discrimination laws.***

***

> ***Testimony in this case was that the financial performance of Republic Services of Ohio Hauling rolled up into the financial performance of Republic Services of Ohio I, LLC and then rolled up into the financial performance of Republic Services, Inc., which then reported to its shareholders.*** Ultimately the jury instruction, which was just faxed to you, Your Honor, says that the analysis ultimately focuses on the question of whether the parent corporation was a final decision-maker in connection with the employment matter underlying the litigation. It is undisputed that Republic Services, Inc. was involved in the final decision-making in this case because Ron Krall testified that he approved the decision, he participated in the termination meeting and it was reviewed by Mr. Nichols and purportedly supported.
>
> So, Your Honor, a single employer instruction is appropriate, Your Honor, because of the evidence in this case, so that there is no confusion from the jury as to the various corporate entities and their role in this matter.

(Tr. 1702-1704; Supp. 144-146 (emphasis added)).

Luri's counsel told the jury in closing argument:

> ***You will have a jury instruction back there when you go back into the jury room that talks about single employer, that talks about where there is mutual control, identical labor and management relations, that these corporate entities can be held as a single employer.*** I submit to you, ladies and gentlemen of the jury, that Republic Services, Republic Services of Ohio, I, LLC and Republic Services of Ohio Hauling, LLC were all intimately involved in the acts directed at Mr. Luri, and, in fact, the testimony from Mr. Krall was clear that Republic services is the parent corporation, and Mr. Bowen confirmed for you yesterday ***how those subsidiary corporations report up to Republic Services.***

(Tr. 1728; Supp. 153 (emphasis added)).

The trial court then gave the single-employer instruction. (Tr. 1694; Supp. 136 ("Plaintiff asked yesterday for the Single Employer Doctrine to be used."), Tr. 1708; Supp. 150 ("I am going to give the single employer instruction."), Tr. 1758-1759; Supp. 160-161). The trial court's single-employer instruction was as follows:

> "***In determining whether the Defendant parent company and its subsidiary, are a single employer under Ohio law, you must consider four factors: Interrelation of operations, centralized control of labor or employment decisions, common management and common ownership or financial control.*** The analysis ultimately focuses on the question of ***whether the parent***

corporation was a final decision maker in connection with the employment matter underlying this litigation. A parent company is a company owning more than 50 percent of the voting shares of another company, called the subsidiary. A subsidiary corporation is one that is run and owned by another company which is called the parent. Plaintiff Ronald Luri commenced this lawsuit on August 17, 2007, alleging he was discharged by the Republic Services corporate Defendants. They are Republic Services, Inc., Republic Services of Ohio I, LLC and Republic Services of Ohio hauling, LLC, James Bowen and Ronald Krall (Hereinafter referred to as Defendants) in retaliation for engaging in an activity protected under Ohio law."

(Tr. 1758-1759; Supp. 160-161 (emphasis added)).

It was precisely because Luri successfully argued for a single-employer theory, and the trial judge gave a single-employer instruction, that the jury rendered a joint and several compensatory award that did not distinguish among defendants. The verdict form for compensatory damages simply lumped all of the defendants together as a single entity:

Compensatory Damages

We, the Jury in this case, being duly impaneled and sworn, upon the concurrence of the undersigned Jurors, being not less than three-fourths of the whole number thereof, do find for plaintiff RONALD LURI in the sum of $ 3,500,000.00 and against the Defendant(s), as compensatory damages on plaintiff's retaliation claim, as decided in Interrogatory #3.

1. _____ FOREMAN/FOREWOMAN
2. Laura Walker
3. Donna Harrison
4. Renee A Rooper
5. Frances B Lobster
6. _____
7. Jamil Shihadeh
8. Matthew J McPherson

(Compensatory Damage Verdict Form, July 3, 2008).

Luri also took advantage of the single-employer concept in establishing liability for punitive damages. Indeed, absent this concept, it is certain that he never could have proven that Republic Hauling had acted with the requisite "actual malice" (see R.C. 2315.21), because there was no evidence that Republic Hauling was involved in Luri's termination; Krall and Bowen, the supervisors to whom Luri attributed his termination, worked for the other corporate defendants. Furthermore, in light of the emphasis that Luri placed on the document supplemented by Bowen after-the-fact to establish malice, it is highly probable that the jury imputed malice from Bowen's action to all the defendants without regard to which company actually employed Bowen.

Furthermore, Luri used the single-employer concept in connection with the amount of punitive damages. Luri's counsel referred to the *consolidated* net worth of the corporate defendants in closing argument, not the individual net worth of each corporate entity. (Tr. 365-366, 1607, 1742-1743; Supp. 2-3, 118, 155-156).[4]

In short, Luri sought to prove at trial that the three corporate entities were in fact acting as one, and the jury so found. It is precisely because the compensatory damages treated the defendants as a single employer that the damages are not apportioned and therefore should not be tied individually to the punitive damages awards. Having achieved success in arguing that the

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[4] The effect of the single-employer approach was not ameliorated by the separate interrogatories on malice and the amount of punitive damages for each defendant. In view of the instruction, as well as Luri's argument, to treat the three corporate defendants as a single employer, the jury could not rationally have found malice as to some but not all corporate defendants. "Malice" with respect to a corporation is established through the malice of natural persons acting on its behalf. *Ayat v. Societe Air Fr.*, N.D.Cal. No. C 06-01574 JSW, 2007 U.S. Dist. LEXIS 48350, at *3 (June 27, 2007) ("Because 'corporations are legal entities which do not have minds capable of recklessness, wickedness, or intent to injure or deceive[, a]n award of punitive damages against a corporation therefore must rest on the malice of the corporation's employees.'" (quoting *Cruz v. Homebase*, 83 Cal. App. 4th 160, 167, 99 Cal. Rptr. 2d 435 (2000))). Here the jury was instructed not to distinguish among corporate defendants when evaluating the conduct at issue.

defendants should be treated as a single entity, Luri is judicially estopped from treating the three companies separately for purposes of the cap.[5]

The same conclusion is compelled by principles of fundamental fairness. Where, as here, a plaintiff has successfully tarred multiple defendants with the same brush throughout the trial to obtain joint and several liability for compensatory damages, justice dictates that they only be subjected to a single punitive award capped at twice the amount of the compensatory damages.

B. Luri's Interpretation Of The Cap Statute Runs Counter To The Intent Of The General Assembly And Is Fundamentally Unfair.

In addition to Luri's inconsistent positions, his interpretation of the cap statute runs afoul of the core objective of statutory interpretation—to discern and carry out the intention of the General Assembly. *State v. Massien*, 125 Ohio St. 3d 204, 2010-Ohio-1864, ¶ 18; *see also Summerville v. City of Forest Park*, 128 Ohio St. 3d 221, 2010-Ohio-6280 ¶ 24 ("[W]e must resort to statutory interpretation and construe the statutes so as to give effect to the legislature's intent."); *Brookwood Presbyterian Church v. Ohio Dep't of Educ.*, 127 Ohio St. 3d 469, 2010-Ohio-5710, ¶ 26 ("Where statutory language is susceptible of more than one meaning, the rules of statutory interpretation must be applied to determine the true intent of the legislature.").

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[5] Luri cites *Pang v. Minch*, 53 Ohio St.3d 186, 559 N.E.2d 1313 (1993) for the proposition that a joint and several award against multiple defendants is an award of the entire compensatory amount from each defendant to the plaintiff justifying using the entire compensatory award for the punitive cap against each individual defendant. That case *undermines*, rather than *supports*, Luri's argument. Luri quotes the Restatement (2d) of Torts, which this Court quoted in the text of *Pang*. The sentence just before the one Luri quotes provides that a defendant should not "escape liability merely because the harm which he has inflicted has combined with similar harm inflicted by other wrongdoers, and the nature of the harm itself has made it necessary that evidence be produced before it can be apportioned." *Id.* at 198. It was Luri, however, who demanded that Republic be treated as a single defendant. Thus, Luri foreclosed apportionment, which would have ensured a total punitive cap of $7 million. He should not be heard now to demand an additional $14 million in punitive damages—for the same wrongful conduct—because he requested and was granted application of the single-employer doctrine, thereby preventing any apportionment of compensatory damages among the defendants.

The purpose behind the cap—and tort reform generally—was to rein in arbitrary and excessive awards and provide more predictability. Indeed, the General Assembly explained that a principal reason behind the cap was to prevent "multiple awards of punitive or exemplary damages that have no rational connection" to the tort committed. S.B. 80 § 3(A)(4)(b)(ii) (emphasis added). Interpreting the cap statute to limit punitive damages to twice the amount of the compensatory damages for which related defendants are jointly and severally liable furthers those goals. To the contrary, interpreting the statute to allow plaintiffs to obtain multiple punitive awards by simply suing multiple members of the same corporate family would undermine them.

Under Luri's theory, trial courts should focus not on the harm caused to the plaintiff (as represented by the compensatory damages award), but rather on the amount of money that each individual defendant could theoretically be required to pay. This flies in the face of the General Assembly's stated intent to ensure that punitive damages awards have a "rational connection to the wrongful actions or omissions of the tortfeasor." S.B. 80 § 4(b)(ii). It is the compensatory damages award that quantifies the harm stemming from wrongful conduct. Luri's position subverts the General Assembly's intent by severing the link between the compensatory award to the plaintiff and the corresponding punitive damages cap.

Luri's argument would also frustrate the legislature's intent in defining "employer" in R.C. 2315.21(A)(4) without regard to corporate formalities. That provision defines an "employer" to include "a parent, subsidiary, affiliate, division, or department of the employer." R.C. 2315.21(A)(4). In defining "employer" in this way, the General Assembly made clear that the punitive damages cap should not hinge on corporate formalities. Rather, it should be calculated viewing the employer as a whole. Thus, in determining the cap, the awards against

the "employer" should be considered as one. Otherwise, a $21 million punitive award would impermissibly constitute three separate punitive awards against the same "employer." Given that it defined "employer" without regard to corporate formalities, the General Assembly did not intend to permit a plaintiff to invoke those same corporate formalities to circumvent the punitive damages cap.

This is further illustrated by the use of the term "employer" in the definition of "small employer." "Small employer" means "an employer who employs not more than one hundred persons on a full-time permanent basis . . . ." R.C. 2315.21(A)(5). The punitive damages cap applicable to small employers has protections that are not available to other employers. R.C. 2315.21(D)(2)(b) provides that "[i]f the defendant is a small employer . . . , the court shall not enter judgment for punitive or exemplary damages in excess of the lesser of two times the amount of the compensatory damages awarded to the plaintiff from the defendant or ten percent of the employer's . . . net worth when the tort was committed up to a maximum of three hundred fifty thousand dollars, as determined pursuant to division (B)(2) or (3) of this section."

Republic Ohio had eight employees when Luri's employment terminated. If Republic Ohio were treated as a separate defendant for purposes of the cap, its punitive damages would be capped at the lesser of $350,000 or ten percent of its net worth. There was no evidence of Republic Ohio's net worth or number of employees put in at trial because the three corporate entities are treated as one by the cap statute. For purposes of the cap statute, Republic Ohio does not qualify as a "small employer" because it is not a stand-alone entity: the legislature defined "employer" to include the entire corporate family. R.C. 2315.21(A)(4). It would be incongruous, and fundamentally unfair, to aggregate a small corporation such as Republic Ohio together with its parent corporation to determine whether it qualifies for the "small employer" cap in

R.C. 2315.21(D)(2)(b), but then disaggregate the corporations when applying the cap in R.C. 2315.21(D)(2)(a). The canon that statutory language must be interpreted *in pari materia* and harmonized whenever possible, *State v. Cook*, 128 Ohio St. 3d 120, 2010-Ohio-6305, ¶ 45, dictates instead that all members of a corporate family should be treated as one for purposes of the punitive damages cap.

Moreover, it is a well-settled canon of statutory construction that statutes should be construed to avoid absurd results. *State ex rel. Asti v. Ohio Dep't of Youth Servs.*, 107 Ohio St. 3d 262, 267 (2005); *State ex rel. Dispatch Printing Co. v. City of Columbus*, 90 Ohio St. 3d 39, 42 (2000) ("[I]t is an axiom of judicial interpretation that statutes be construed to avoid unreasonable or absurd consequences.").

That canon of interpretation compels rejection of the notion that the maximum amount of punitive damages should turn on corporate formalities. There is only one corporate decision at issue in this case. It was merely a happenstance of corporate structure that the individuals who are parties in this case (Luri, Bowen, and Krall) were employed by three different affiliates within the same corporate family. That happenstance is hardly justification for allowing $21 million in punitive damages rather than $7 million.

To hold otherwise would evade the statutory caps by imposing multiple awards on members of a corporate family. Under Luri's theory, whether the cap applies once or multiple times would depend on a coincidence of corporate structure; those with multiple subsidiaries could be assessed with punitive awards that dwarf the statutory cap, while those that simply have divisions within a single corporate entity could not. To subject companies with multiple subsidiaries to two, three, or more times the amount of punitive damages that can be imposed on

companies that simply have divisions would be inconsistent with the single-employer theory, the General Assembly's intent, and common sense.

In this case, two of the three corporate defendants—Republic Ohio and Republic Hauling—are wholly owned subsidiaries of the third (the parent, Republic Services, Inc.). The parent company is ultimately subjected to any award of punitive damages because it either pays the amounts owed by the subsidiaries or because of the diminution in value of its subsidiaries if they pay it. Allowing Luri to recover twice the compensatory damages from each of the three affiliated corporate entities would amount to a *triple* penalty against the corporate parent, in direct contravention of the cap. It is neither fair nor consistent with the purposes of the General Assembly to allow a plaintiff to triple the amount of punitive damages merely by dissecting the defendant into its constituent parts.

Luri's theory also would create absurd and undesirable incentives. Construing the cap statute as Luri urges would discourage companies from creating separate subsidiaries, discourage those with separate subsidiaries from allowing employees of one subsidiary to make decisions impacting on employees of other subsidiaries, and encourage plaintiffs to sue every possible corporate affiliate in every case in an effort to hike the total amount of punitive damages.

To avoid the incongruous results of Luri's theory, the statute should be interpreted to construe the term "that defendant" as a *limiting* mechanism, not an *inflating* one. This phrase is meant to ensure that no one defendant has its cap measured by the aggregate compensatory award against all defendants. For example, suppose a case in which three defendants are found liable for different conduct leading to compensatory damages: the first in the amount of $1 million; the second in the amount of $2 million; and the third in the amount of $3 million. Suppose further that each is found liable for $5 million in punitive damages. Without the phrase

"that defendant" in R.C. 2315.21(D), the punitive damages cap for each of the defendants would balloon to *$12 million* (twice the sum of $1 million + $2 million + $3 million). To prevent this absurdity, the General Assembly added the phrase "that defendant" to limit punitive damages awards—not to increase them.

Variations on this hypothetical further illustrate the point. Suppose that the jury in the present case had broken up the $3.5 million compensatory award among the defendants (such that each was severally liable for only a part of the $3.5 million). In these circumstances, the sum of each defendant's separate compensatory liability would still equal $3.5 million, and the punitive damages cap would be $7 million inclusive of all defendants. In a joint and several liability case involving the *exact same injury*, however, Luri argues that R.C. 2315.21(D)(2)(a) demands an additional $14 million. Given that the General Assembly made the injury (the compensatory damages) the basis for the punitive damages cap, the cap should not be interpreted to change so dramatically between cases that involve the *exact same injury*.

Finally, suppose the jury had imposed a compensatory award of $3.5 million against each of the defendants severally but not jointly. Such a jury verdict would mean that each defendant *alone* caused $3.5 million in damage and—if there are five defendants, as here—the plaintiff would have suffered $17.5 million in compensatory damages ($3.5 million times the 5 defendants). Although the compensatory damages would be five times more than in this case, under Luri's theory *the punitive damages cap is exactly the same* ($7 million for each defendant). In making the punitive damages cap a function of the compensatory damages, the General Assembly did not intend to limit punitive damages to the same amount in two cases where the compensatory damages are so drastically different.

Each of these illustrations demonstrates that Luri's interpretation of the statute would increase unpredictability, thereby undermining, not furthering, the General Assembly's intent. The Court of Appeals' interpretation, by contrast, enhances both predictability and fairness—by ensuring that the maximum amount of punitive damages does not turn on happenstances of corporate structure and the number of related companies the plaintiff decides to sue.

Moreover, Luri's reliance on the "that defendant" language is ultimately self-defeating. A $7 million cap for each defendant in this case is not twice the compensatory damages "awarded to the plaintiff." Luri's theory posits that each defendant will ultimately pay the full compensatory damages award, even though he can collect the $3.5 million only once. For example, if the parent company, Republic Services, Inc., were to pay the entire $3.5 million compensatory award, and the subsidiaries and individual defendants each pay nothing, then $7 million is not twice the compensatory damages for *four of the five* defendants. Similarly, if Republic Services, Inc. were to pay $2.5 million of the compensatory award, the subsidiaries each were to pay $500,000, and the individual defendants were to pay nothing, then $7 million is not twice the compensatory damages for *any* of the defendants.

The United States Court of Appeals for the Eighth Circuit recognized this precise problem in *Grabinski v. Blue Springs Ford Sales, Inc.*, 203 F.3d 102 (8th Cir.2000). There, the Eighth Circuit concluded that, when examining the relationship between punitive and compensatory awards in the due process context, a court should be careful not to "assume[] [the] impossibility" that jointly and severally liable defendants will each pay the full compensatory verdict. *Id.* at 1026. The Eighth Circuit held that courts must divide the compensatory award by the number of defendants to identify their *pro rata* share. *Id.*

Thus, under Luri's logic (in which courts should look at the theoretical liability of each defendant, rather than the actual amount received by the plaintiff), each defendant in this case would have a $700,000 pro rata share of the $3.5 compensatory award. That amount would then be doubled for the three defendants that were subjected to punitive damages in excess of the cap. Each of the three corporate defendants would then owe $1.4 million in punitive damages, or a total of $4.2 million—less than the $7 million cap upheld by the Court of Appeals.

In sum, the intent of the General Assembly is fulfilled by interpreting the phrase "that defendant" to be a limiting mechanism. Indeed, in Section 4 of its uncodified "statement of findings and intent," the General Assembly stated that R.C. 2315.21(D)(2)(a) is a cap on the amount "awarded to the plaintiff" *with no reference to "that defendant."* S.B. 80 § 4(b) ("In prohibiting a court from entering judgment for punitive or exemplary damages in excess of the two times the amount of compensatory damages awarded to the plaintiff" (emphasis added).) The punitive damages cap should be applied once—to the $3.5 million awarded to Luri. Two times that amount is $7 million, which is the maximum punitive damages award permitted under R.C. 2315.21(D)(2)(a).

C. Any Increase In The Punitive Damages Award Upheld By The Court Of Appeals Would Violate The Due Process Clauses Of The U.S. And Ohio Constitutions.

Finally, any increase in the punitive damages upheld by the Court of Appeals would violate the Due Process Clauses of the U.S. and Ohio Constitutions. If this Court were to agree with Luri and construe the statute to allow each defendant to be penalized for twice the amount of compensatory damages for which all defendants are jointly and severally liable, it would have to remand the matter to the Court of Appeals for it to reconsider Republic's contention that the total amount of punitive damages is unconstitutionally excessive.

Republic raised the due process argument in the Court of Appeals. After capping the punitive damages at $7 million for all of the defendants, the Court of Appeals concluded that the resulting $7 million award was constitutional. The Court of Appeals, however, expressly did not address whether a higher amount of punitive damages would be constitutional, stating only that "[o]n remand, the trial court should feel free to enter an amount of punitive damages up to" $7 million. (Court of Appeals Opinion at p. 17).

It is no answer to say that, if this Court applies the cap to each defendant, then the punitive-to-compensatory ratio will be 2:1 for *each defendant*. Such an approach would be to compare apples to oranges by using each defendant's allocated share of punitive damages as the numerator and the entire compensatory award as the denominator. In another case in which the plaintiffs received separate punitive awards against three members of the same corporate family and two employees, a federal court calculated the ratio by comparing the aggregated punitive award against the compensatory award for which all of the defendants were held jointly and severally liable. *See Farm Bureau Life Ins. Co. v. Am. Nat'l Ins. Co.*, D. Utah No. 2:03 CV 646(TC), 2009 WL 361267, *9-10 (Feb. 11, 2009). There, as here, aggregating the punitive damages for purposes of the excessiveness review is a constitutional imperative because the punishment ultimately will fall entirely on the parent corporation one way or another.

In addition, as discussed above, the U.S. Court of Appeals for the Eighth Circuit concluded in *Grabinski* that, to calculate the punitive-to-compensatory ratio in the due process context, the defendants' *pro rata* shares of the compensatory award should be compared to their punitive damages:

> *Calculating the relevant ratios in cases where the defendants are jointly and severally liable is a matter of some difficulty, because it is not always possible to determine what each defendant will ultimately pay in compensatory damages.* Ms. Grabinski urges us to divide each individual punitive damages award by the entire

> actual damages award. *This method assumes an impossibility, however, because it posits that each defendant will ultimately pay the full compensatory damages award.*
>
> *We believe, instead, that the more appropriate way of calculating the ratios is to divide the individual punitive damages awards by the individual pro rata shares of the actual damages.* Our method is preferable, we think, because the constitutionality of a punitive damages award against a particular defendant depends partly on the amount of actual damages payable by that defendant.

203 F.3d at 1026 (emphasis added).

Under the approach enunciated in *Grabinski*, each defendant in this case would have a $700,000 *pro rata* share of the $3.5 compensatory award. When that $700,000 *pro rata* share is compared to the $7 million cap that would apply to each corporate defendant under Luri's interpretation of the statute, the ratio for each of the three corporate defendants would be 10:1. The Court of Appeals made no determination about whether such a ratio is constitutional.

The US Supreme Court, however, has ruled that where, as here, the compensatory damages are substantial, a 1:1 ratio "can reach the outermost limit of the due process guarantee." *State Farm Mut. Auto Ins. Co. v. Campbell*, 538 U.S. 408, 425 (2003); *see, also, Exxon Shipping Co. v. Baker*, 128 S.Ct. 2605, 2625, 2627 (2008) (holding that a 1:1 ratio of punitive to compensatory damages is the maximum under federal maritime law). Although Republic has not been given the opportunity to brief that issue before this Court (the Court declined jurisdiction over Republic's proposition of law regarding the Due Process Clause), suffice it to say that there are serious constitutional questions about whether 10:1 ratios are constitutional in cases—such as this one—where there was no physical harm, no reckless disregard for health or safety, and no pattern of retaliatory discharges.

Accordingly, if this Court were to agree with Luri's interpretation of the cap statute, it would have to remand the matter to the Court of Appeals to determine whether punitive awards of $7 million against each of the three Republic entities—yielding punitive-to-compensatory

ratios of 10:1—are constitutional under the Due Process Clauses of the U.S. and Ohio Constitutions.

IV

CONCLUSION

For the foregoing reasons, assuming that the Court needs to reach the issue after resolving the bifurcation issue in related Supreme Court Case No. 2011-1097, it should affirm the Eighth District Court of Appeals' decision capping punitive damages pursuant to R.C. 2315.21(D)(2)(a) at twice the compensatory damages, for a total of $7 million.

Respectfully submitted,

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A copy of the foregoing was served via regular U.S. Mail this 30th day of December 2011 upon:

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