No. 2022-0583

In the Supreme Court of Ohio

APPEAL FROM THE COURT OF APPEALS
NINTH APPELLATE DISTRICT
LORAIN COUNTY, OHIO
CASE NOS. 19CA011563 AND 20CA011632

GIBSON BROS., INC., et al.,

Plaintiffs-Appellees,

v.

OBERLIN COLLEGE, et al.,

Defendants-Appellants.

MEMORANDUM IN SUPPORT OF JURISDICTION ON PROPOSITIONS OF LAW III AND IV OF *AMICUS CURIAE* THE OHIO ASSOCIATION OF CIVIL TRIAL ATTORNEYS

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THIS CASE RAISES ISSUES OF PUBLIC OR GREAT GENERAL INTEREST

The Court of Appeals created **two new rules of Ohio law on punitive damages awards** by:

- **allowing trials to proceed to the punitive damages stage after a jury has conclusively determined in the compensatory damages phase that there was no actual malice and therefore no basis for punitive damages or attorneys' fees** and
- **failing to base the punitive damages cap calculation on the "recoverable" actual capped compensatory damages award**.

By (1) allowing relitigation of already-resolved issues and (2) failing to interpret the damages caps statutes according to their plain meaning and the Legislature's intent, the Court of Appeals' decision **will lead to further confusion** among Ohio courts on the **calculation of punitive damages**. These issues are of public or great general interest and of particular interest to *amicus curiae* The Ohio Association of Civil Trial Attorneys ("OACTA"). If this Court does not clarify that: (1) constitutional actual malice required for a finding of compensatory damages cannot be retried in the punitive damages phase of a bifurcated proceeding and (2) punitive damages can be awarded only on capped compensatory damages, **the statute requiring that the same issue can be decided only once by a jury and the very purpose of the statutory damages caps will be gutted. Defendants in similar tort actions will be punished with unfair damages judgments, untethered from rationality, which the Legislature clearly tried to end**.

Mandatory bifurcation does not require courts to abdicate ultimate responsibility for orderly and fair non-duplicative proceedings.

This Court should clarify that **when a cause of action requires the plaintiff to prove constitutional malice (or a similar mental state) and the plaintiff fails to prove it, there is no further need to consider or determine punitive damages. The plaintiff does not get a second bite at the same apple** regardless of whether a defendant requests bifurcation. If the same mental state is required to be established for compensatory damages award and a punitive damages award, once the proof fails in the liability phase, that is the end of the road for plaintiffs on the relevant claims. **Allowing** the contrary practice that the Court of Appeals has endorsed **will lead to inconsistent and unjust results**.

Juries "determine" damages, but courts "award" them after applying relevant caps.

The Legislature was clear that juries act as fact-finders to determine pre-reduction compensatory damages as best they can, especially where they are evaluating such hard-to-value non-economic damages as emotional distress or damage to reputation. In imposing statutory compensatory and punitive damages caps, the Legislature understood that juries do their best to be fair in their estimations of what a deeply personal injury may be worth. But **different juries bring diverse individual values and experiences, or come from different parts of the state, or may face plaintiffs' and defense lawyers of different skill sets, which often leads to major variations in damages calculations**, with disproportionate economic consequences for defendants. Therefore, as a matter of law, **only courts** "**award" damages that are actually "recoverable" after applying the statutory caps.** R.C. 2315.21(D)(2).

STATEMENT OF INTEREST OF *AMICUS CURIAE*

The Ohio Association of Civil Trial Attorneys ("OACTA") is a statewide organization whose wide array of members consists of attorneys, supervisory or managerial employees of insurance companies, and executives of other corporations who devote a substantial portion of their time to the defense of civil damage lawsuits and the management of insurance claims brought against individuals, corporations and governmental entities. For over fifty years, OACTA has been a voice in the ongoing effort to ensure that the civil justice system is fair and efficient by promoting predictability, stability, and consistency in Ohio's constitutional safeguards, statutory laws, and legal precedents.

OACTA's mission is to provide a forum where its members can work together and with others on common problems to propose and **develop solutions that will promote and improve the fair and equal administration of justice in Ohio**. OACTA **strives for stability, predictability and consistency in Ohio's case law and jurisprudence**. On issues of importance to its members, OACTA has filed *amicus curiae* briefs in significant cases before federal and state courts in Ohio, advocating and promoting public policy and sharing its perspective with the judiciary on matters that will shape and develop Ohio law.

The **legal questions** presented in this case **on punitive damages issues directly concern OACTA and its members. The outcome may defeat the goals of fairness, reasonableness, consistency and predictability** as they relate to **the civil justice system as a whole and tort action damages awards in particular.** This may return Ohio **to the times of unchecked damages, unreasonable increases in costs**

for Ohio businesses and the resulting disappearance of Ohio jobs, increased costs to consumers, and stifling of innovation.

ARGUMENT IN SUPPORT OF PROPOSITIONS OF LAW

I. PROPOSITION OF LAW NO. III: A JURY CANNOT CONSIDER AN ISSUE AGAIN WHEN JURORS GIVE AN INTERROGATORY ANSWER THAT IS CLEAR AND CONSISTENT WITH THE VERDICT. R.C. 2315.21(B)(2) DOES NOT AUTHORIZE A JURY TO REVISIT IN STAGE TWO OF A BIFURCATED TRIAL ANY ISSUE RESOLVED IN STAGE ONE THAT ALSO RELATES TO LIABILITY OR COMPENSATORY DAMAGES.

The Court of Appeals created new law by allowing resolved issues to be resubmitted to a jury in violation of R.C. 2315.21.

The jury found 6 times in written interrogatories at the conclusion of the liability phase **that there was no actual malice** by the Oberlin parties. **Those findings were dispositive of the issue of actual malice**. As a result, the case **should not have proceeded to the punitive damages phase** for the relevant claims. Ignoring the jury's clear finding of no actual malice, the **trial court allowed** Bakery parties to **re-argue in the second phase of the trial the effect of the evidence of claimed malice already in the record from the first phase. No new evidence of actual malice was presented in punitive damages phase.** As a result, the **jury was allowed to decide the same issue based on the same evidence twice in direct violation of the RC 2315.21**. In affirming, the Court of Appeals went so far as to state that plaintiffs "are *entitled* to proceed to the second stage of trial and put on any evidence they had pertaining to punitive damages . . ." **simply because the defendants requested bifurcation**. *Gibson Bros. v. Oberlin College* ¶ 88 (emphasis added).

The punitive damages phase of a bifurcated trial is mandatory, however, only if punitive damages are awardable based on the findings in phase one**.** R.C.

2315.21(B)(2). **In this case, the jury's findings of no malice** should have ended the inquiry because malice is a prerequisite to finding punitive damages. Thus, when the jury decided six separate times that each Oberlin party did not act with actual malice, **the case was over with respect to the punitive damages claims**.

R.C. 2315.21(B)(1)(b) states only that, if a plaintiff is entitled to compensatory damages, then the jury should determine whether a plaintiff is "additionally" entitled to recover punitive damages. Once the jury found no malice, there was no award of compensatory damages for claims based on malice, and thus no "additional" right to punitive damages.

Instead, the **Court of Appeals endorsed duplicate trials against the same defendants on the same issues. The new law is antithetical** to the twin goals of bifurcated proceedings—**protecting parties from prejudice and from potentially inconsistent results** that are inevitable when the same evidence may be presented twice in different proceedings. *Butler Cty. Joint Vocational School Dist. Bd. of Edn. v. Andrews*, 12th Dist. Butler No. CA2006-10-245, 2007-Ohio-5896, ¶ 40 (citing staff notes to Civ. R. 42(B), which explain that **bifurcation's goal is to provide further "convenience" or "avoid prejudice" or "be conducive to expedition and economy**.") The goal is not to expose a defendant to a retrial of evidence already decided in its favor. **The new rule is akin to a civil "double jeopardy."**

A jury finding of no malice on the claim with respect to which punitive damages are awardable ends the case on that claim; to allow punitive damages demands to be considered afterwards is a violation of Oberlin parties' fundamental right to a fair jury trial.

In this case, **Bakery parties were required to present their evidence of constitutional malice during the compensatory phase of the trial**. There is no doubt that they were particularly motivated to include all such evidence, because their ability to establish liability on intentional infliction of emotional distress and defamation claims was a prerequisite to their ability to argue for punitive damages in the punitive damages phase.

Once the jury determined in the liability phase that **Oberlin parties acted without malice**, the bifurcated punitive damages claims were resolved, and no second phase was supported by the evidence**. The duplicative** argument about **the same evidence that the trial court allowed in the second phase served no purpose other than** to lead to an **impermissible inconsistent and unjust result**.

This legal principle is consistently applied by many other states:

- *Maenner v. St. Paul Fire & Marine Ins. Co.*, 127 F.R.D. 488, 491 (W.D.Mich.1989) ("**A party's Seventh Amendment guarantee of a trial by jury includes the right to have a single issue decided one time by a single jury**. As applied to the bifurcation issue, this principle allows **the issue of damages to be decided in a second trial . . . only if the issues of liability and damages are 'so distinct and separable' that they may be tried separately 'without injustice**'")

- *Unsworth v. Musk*, C.D.Cal. No. 2:18-cv-08048-SVW-JC, 2019 U.S. Dist. LEXIS 229024, at *1-2 (Nov. 27, 2019) (finding **bifurcation "unfeasible" where "[Defendant's] state of mind can be contested by similar evidence on liability as well as damages**")

- *Moyer v. Am. Zurich Ins. Co*., 2021 Del. Super. LEXIS 386, *4, 2021 WL 1830366 (**where largely the same evidence on the defendant's state of mind will have to be evaluated in both liability and punitive**

damages phases of the trial, the separate punitive damages phase of the trial is not necessary)

- *Arredondo v. Flores*, S.D.Tex. No. L-05-191, 2008 U.S. Dist. LEXIS 145340, at *3-4 (Sept. 25, 2008) (**before proceeding with the separate trial on damages, the court must** take into account the Seventh Amendment right to a jury trial where "**a single issue decided one time by a single jury"; '**were **'two juries** [] allowed to **pass on an issue involving the same factual and legal elements, the verdicts** rendered by those juries **could be inconsistent, producing intolerably anomalous results**"**)**

In **this case**, the trial court's failure to end the case with the jury's finding of no malice on claims with respect to which punitive damages were awardable, led to an **anomalous, inconsistent, and unjust result**. Although the jury found that **Oberlin parties acted without malice towards Bakery parties**, they were **nevertheless judged to owe Bakery parties over $33 million in punitive damages—damages they could only owe if they had acted with malice**. This injustice should have been prevented by the courts below by recognizing that the case was over once no malice was found on the relevant claims in the first phase of the trial. The same issues should not have proceeded to the second phase.

The Court should clarify that the **punitive damages presentation cannot proceed** on clams with respect to which no malice is found, regardless of bifurcation.

II. PROPOSITION OF LAW NO. IV: R.C. 2315.21 LIMITS PUNITIVE DAMAGES TO TWICE THE RECOVERABLE COMPENSATORY DAMAGES AWARDED TO A PLAINTIFF FROM A DEFENDANT. BECAUSE R.C. 2315.18(E)(1) LIMITS RECOVERABLE NONECONOMIC LOSS TO A CAPPED AMOUNT, AND R.C. 2315.18(F)(1) PREVENTS A JUDGMENT OVER THAT AMOUNT, CAPPED PUNITIVE DAMAGES ARE DERIVED FROM CAPPED COMPENSATORY DAMAGES.

The **Court of Appeals** adopted the **trial court**'s position that, although the trial court must apply the statutory cap to a jury determination of compensatory damages and reduce it accordingly, the trial court is not bound by that same cap when issuing the

final punitive damages award. This is not consistent with the clear instruction from the Legislature.

The courts below created a new standard for punitive damages by **failing to read the plain language of provisions of R.C. 2315** concerning damages awards *in pari materia*. They also ignored the Legislature's intent and understanding of the **specific distinct roles and powers of the jury (as the fact finder) and the court (as the arbiter of the final award)**.

In addition, the **Court of Appeals** focused on the word "**recoverable" as equivalent to the uncapped jury award**. However, a plaintiff may only actually recover the capped amount. A plaintiff cannot by law try to "recover" uncapped compensatory damages verdict. **Verdicts are not judgment awards**.

The structure of the governing statute unambiguously lays out those roles and, when its plain words are read together and according to the principle that no part of the statute is superfluous, it is **clear that "compensatory damages awarded to the plaintiff from that defendant" in R.C. 2315.21(D)(2)(a) means compensatory damages as capped by the court** (emphasis added throughout):

1. R.C. 2315.18(B)(2): " . . . **the amount of compensatory damages that represents damages for noneconomic loss that is recoverable** in a tort action under this section to recover damages for injury or loss to person or property **shall not exceed the greater of two hundred fifty thousand dollars or an amount that is equal to three times the economic loss**, as **determined by the trier of fact** . . ."
2. R.C. 2315.18(D): requiring **jury to specify in interrogatories**: (1) "total **compensatory damages recoverable by the plaintiff**"; (2) portion that represents the economic loss; and (3) portion that represents the noneconomic loss.
3. R.C. 2315.18(F)(1): "A **court** of common pleas has **no jurisdiction to enter judgment on an award** of compensatory damages for noneconomic loss **in excess of the limits set forth in this section**."

4. R.C. 2315.21(B)(2): "In a tort action that is tried to a jury . . . the **jury shall** return, a general verdict and . . . **answers to an interrogatory that specifies the total compensatory damages** recoverable by the plaintiff from each defendant."
5. R.C. 2315.21(D)(2)(a): "The **court** shall **not enter judgment for punitive or exemplary damages in excess of two times the amount of the compensatory damages awarded to the plaintiff** from that defendant, as determined pursuant to division (B)(2) or (3) of this section."

The Legislature intended for juries to make "determinations," and "specify" in interrogatory answers the amount of **compensatory damages that they determine the plaintiff should receive**. But in keeping with the legislative purpose of the entire chapter, the **court** must also apply statutory caps before issuing an "award" or "judgment;" *i.e.,* **only a court actually "awards" recoverable compensatory damages that serve as a basis for a punitive damages award**.

Courts in other jurisdictions similarly find that "compensatory damages awarded" are capped damages for purposes of determining punitive damages.

This being an issue of first impression for the Court, consideration of similar issues by courts in jurisdictions outside Ohio is instructive. The **Legislature is presumed to have full knowledge of prior judicial decisions** on specific issues it seeks to address in a statute. *Wayt v. DHSC, L.L.C.*, 155 Ohio St.3d 401, 2018-Ohio-4822, 122 N.E.3d 92, ¶ 23. Before Ohio's Legislature instituted the relevant damages caps in 2005, a number of courts in other jurisdictions have carefully considered the question of whether punitive damages must be capped based on uncapped or capped compensatory damages.

A federal court considered **Nevada's statute on punitive damages**, which, in relevant part, **capped punitive damages at "[t]hree times the amount of**

compensatory damages awarded to the plaintiff if the amount of compensatory damages is $100,000 or more." *Coughlin v. Hilton Hotels Corp*., 879 F.Supp. 1047, 1051 (D.Nev.1995), quoting Nev. Rev. Stat. § 42.005(1)(a). The defendants argued that punitive damages should be calculated from the compensatory damages after a statutory reduction was made for a separately-paid settlement. *Id*. The **court agreed that the "'compensatory damages awarded' in the punitive damages statute refers to the reduced compensatory damages award** . . ." *Id*.

In evaluating the issue, the *Coughlin* court first considered the statutory language and a decision from the Colorado Supreme Court. Both states' statutes used the terms "assessed" and "awarded". The Colorado Supreme Court had previously held that **"assessed" and "awarded" have different meanings—"assessed" meant the pre-reduction compensatory amount, and "awarded" meant the reduced amount**. *Id*., citing *Lira v. Davis*, 832 P.2d 240 (Colo. 1992).

The *Coughlin* court also referred to the general meaning of the term "award":

> As the *Lira* court noted, **when given its common meaning, "award" means "to determine after careful consideration" and "to give by judicial decree"** or "assign after careful judgment." Lira, 832 P.2d at 245 (quoting Webster's Third New International Dictionary of the English Language, Unabridged 152 (1986). See also Black's Law Dictionary 137 (6th ed. 1990) (**to award is "to grant, concede or adjudge to," or "to give or assign by . . . judicial determination** . . . .")).

Id., 879 F. Supp. at 1052.

The *Coughlin* court **also focused on legislative intent**:

> It is clear that in amending the punitive damages statute and imposing the cap, **the Nevada Legislature intended to rein in excessive punitive damages awards**. This was accomplished by mandating that punitive damages are not to

> exceed an amount that is three times what a court uses as a measure of the harm done to a plaintiff -- namely, compensatory damages. The Court's ruling today effectuates this goal.

Id. at 1052-1053.

Other courts have put forth similar reasoning:

- *Lira v. Davis*, 832 P.2d 240, 246 (Colo.1992) ("Accordingly, **we hold that the exemplary damages statute**, section 13-21-102, 6A C.R.S. (1987), **places a maximum on a plaintiff's exemplary damages award** recovery which is **measured by the amount of compensatory damages after reduction** for comparative negligence and pro rata liability.");

- *James v. Coors Brewing Co.,* 73 F.Supp.2d 1250, 1254 (D.Colo.1999) (same, relying on reasoning in *Lira*);

- *Tucker v. Marcus*, 142 Wis.2d 425, 439, 418 N.W.2d 818 (1988) ("[p]unitive damages are not available where there has been no 'award' of actual damages. In this regard . . . the **jury's finding that there had been injury suffered, and ascertainment of a sum which would fairly compensate the respondent for the injury suffered, did not constitute an "award" of actual damages**. **An "award" represents a remedy recoverable in accordance with an order for judgment**. It is not enough that actual damages may have been 'suffered' or 'sustained' in order for punitive damages to be awarded.")

- *Mississippi Valley Silica Co. v. Barnett*, 227 So.3d 1102, 1129 (Miss. App. 2016) (**adopting the *Lira* and the *Tucker* reasoning on the meaning of the term "award"** to find that noneconomic damages apportioned to persons who were not parties to the trial "should not be viewed as part of the 'award' . . . the jury's findings that their conduct caused damages do not give rise to any liability.")

- *In re Engle Progeny Cases Tobacco Litig*., 2011 Fla. Cir. LEXIS 1489, *9 ("this Court finds that it **is appropriate to apply the cap on punitive damages to the amount of the Final Judgment (as opposed to the Verdict**) for compensatory damages.")

The trial court and the Court of Appeals adopted
The flawed reasoning in Faieta without so much as
considering the legislative intent behind damages caps.

Nevertheless, the trial court and the **Court of Appeals simply adopted the assertion** of the Tenth District Court of Appeals that, because R.C. 2315.18 is not specifically called out in R.C. 2315.21 and juries cannot be instructed on existence of statutory caps, **compensatory damages must remain uncapped for punitive damages determinations**. *See Faieta v. World Harvest Church*, 10th Dist. Franklin No. 08AP-527, 2008-Ohio-6959, ¶ 90. However, **R.C. 2315.18(D) does implicate how the jury sets forth the recoverable damages**. Therefore, these two provisions of the statute—**2315.18 and 2315.21—must be read together to give meaning to the entire chapter**. Moreover, the ***Faieta*** court not only ended its analysis without recognizing the distinct roles of the jury as factfinder and the court as award-giver, as laid out in the statute, but it **also failed to even mention the interplay of that language with the Legislature's clear intent to limit runaway punitive damages awards unmoored from the practical considerations of the evidence**.

The **Ohio Legislature's intent** in capping compensatory and punitive damages was clear in accordance with its understanding that **courts, not juries, make "awards" and issue judgments awarding damages** (quoting from Section 3 of S.B. 80 (150 v--), The General Assembly's "statement of findings and intent") (emphasis added throughout):

- (3) the Legislature seeks **to make certain Ohio "has a fair, predictable judicial system of civil justice** that preserves the rights of those who have been harmed by negligent behavior, **while curbing the number of frivolous lawsuits, which increases the cost of doing business,**

threatens Ohio jobs, drives up costs to consumers, and may stifle innovation."

- (4)(a) Reform to the punitive damages law in Ohio is urgently needed to **restore balance, fairness, and predictability to the civil justice system**.

- 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 … the General Assembly finds the following:

  - (i) **Punitive** or exemplary **damages awarded** in tort actions **are similar in nature to fines and additional court costs imposed** in criminal actions, because punitive or exemplary damages, fines, and additional court costs are **designed to punish a tortfeasor** for certain wrongful actions or omissions.

  - (ii) **The 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**.

- 4(c) … "**few awards exceeding a single digit ratio between punitive damages and compensatory damages. . . will satisfy due process**." *Citing Bmw of N. Am. v. Gore,* 517 U.S. 559, 582, 116 S.Ct. 1589, 134 L.Ed.2d 809 (1996).

The Legislature clearly intended the courts, as judgment/award givers, to apply compensatory damage caps before calculating punitive damages, because that was the **only way to achieve its goal to limit runaway punitive damages awards—by tethering compensatory damages caps to punitive damages caps**. In fact, **the Legislature** could not have been clearer when it **expressly compared "punitive … damages awarded" in civil actions to "fines and additional court costs" in criminal actions—fines and costs that only a court, not a jury can impose**. *Id.* at 4(b)(i).

If the statutory compensatory damages caps are not applied to punitive damages awards, this decision will **defeat the Legislature's express purpose** of limiting punitive damages awards in way that reestablishes a "**rational connection to the wrongful actions or omissions of the tortfeasor."** If the reasoning below is allowed to stand, a jury may award $1 billion in non-economic damages and $2 billion in punitive damages. A court must cap compensatory damages at $250,000. But if no compensatory damages cap is applied to punitive damages, the $2 billion in punitive damages would dwarf the $250,000 compensatory damages judgment. With this outcome, there will be no "rational connection" between the capped compensatory damages and the runaway punitive damages ward. Allowed to stand, this approach **will eviscerate the Legislature's goal of reintroducing fairness and predictability into damages awards, and the punitive damages cap will lose all of its intended effect**.

CONCLUSION

Consequently, on Propositions of Law III and IV, the Court should reverse and clarify that: (1) where a compensatory damages determination on certain claims requires the trier of fact to decide the same mental state that is required to establish punitive damages, if the trier of fact finds no malice, no punitive damages phase shall proceed on those claims and (2) punitive damages must be calculated on the basis of properly capped compensatory damages.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that a copy of the foregoing was served on all counsel of record by electronic mail on May 16, 2022.

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