[Cite as *Luri v. Republic Servs., Inc.*, 2009-Ohio-5691.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 92152

RONALD LURI

PLAINTIFF-APPELLEE

vs.

REPUBLIC SERVICES, INC., ET AL.

DEFENDANTS-APPELLANTS

JUDGMENT:
DISMISSED

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

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

RELEASED: October 23, 2009

JOURNALIZED:

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

MARY EILEEN KILBANE, P.J.,:

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

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

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

Procedural History

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

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

{¶ 6} On July 3, 2008, a jury found in favor of Luri.

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

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

{¶ 9} On September 17, 2008, the trial court faxed an entry to all

counsel denying appellants' motion for new trial or in the alternative for remittitur.

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

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

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

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

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

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

So rather than have you come back in a couple of years, should you be appealing this case, and provide edification on a case that's not as fresh in my mind, would I mind looking at this? I don't have any issue with that.

[Counsel for appellants]:

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

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

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

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

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

{¶ 17} On October 1, 2008, instead of presenting the trial court with a

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

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

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

{¶ 19} On November 5, 2008, appellee filed a motion to dismiss, or in the alternative for limited remand. Appellee argues that the trial court's

September 22, 2008 posttrial order expressly states the trial court's intent to finalize ruling on appellant's motion for new trial or in the alternative for remittitur. We agree.

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

Analysis

{¶ 21} When an order contemplates further action, and the judge does not certify any part of the order as final under Civ.R. 54(B), it is not final under R.C. 2505.02. See *Nwabara v. Willacy*, Cuyahoga App. Nos. 79416

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

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

{¶ 23} In their brief in opposition to appellee's motion to dismiss, appellants argue they were concerned about the losing their 30 days within which to file an appeal under App.R. 4(A), because under App.R. 4(B)(2),[1] the trial court's September 25, 2008 order on the posttrial motions for attorneys' fees, prejudgment interest, and the motion to tax costs decided "all remaining post-trial motions." Inexplicably, appellants argue that no party requested findings of fact and conclusions of law under Civ.R. 52, and as a consequence,

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

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

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

> "**The Court:**
>
> **"I was actually going to say that the prevailing party would have the ability to present the Court with a more detailed entry and that's what you're doing here today?**
>
> **[Counsel for appellee]:**
>
> **I believe that's right your Honor, yes. Yes, your honor. It's our –**
>
> **The Court:**
>
> **You're citing Rule 19 for some reason I thought it was another Rule of Civil Procedure in our court. Is that**

maybe -

[Counsel for appellee]:

Local rule 19.

The Court:

Oh. Local rule. (Tr. 1850).

"* * *

The Court:

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

**"* * *

[Counsel for appellee]:

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

The Court:

How much time would you like, Counsels?

[Counsel for appellants]:

Your Honor, two weeks, please.

The Court:

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

{¶ 25} Based upon the statements of appellants' counsel at tr.

1855-1857, their arguments about the propriety of App.R. 4(B)(2) are misplaced, and clearly belied by the record.

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

Appeal dismissed.

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

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

MARY EILEEN KILBANE, PRESIDING JUDGE

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