IN THE SUPREME COURT OF OHIO

ANDREA BARNES, Exec.	:	Supreme Court Case No. 07-0140
	:	
Plaintiffs-Appellee,	:	Court of Appeals
	:	Case No. 87247
v.	:	
	:	
UNIVERSITY HOSPITALS OF CLEVELAND, et al.	:	
	:	
Defendant-Appellants.	:	

BRIEF OF AMICUS CURIAE THE OHIO ASSOCIATION OF CIVIL TRIAL ATTORNEYS IN SUPPORT OF APPELLANTS

Anne Marie Sferra (0030855)
(Counsel of Record)
Bricker & Eckler LLP
100 South Third Street
Columbus, Ohio 43215-4291
Telephone: (614) 227-2300
Facsimile: (614) 227-2390
Email: asferra@bricker.com

Counsel for Amicus Curiae
The Ohio Association of Civil Trial Attorneys

J. Stephen Teetor (0023355)
James M. Roper (0037786)
Jessica K. Philemond (0076761)
Isaac, Brant, Ledman & Teetor, LLP
250 East Broad Street, Suite 900
Columbus, Ohio 43215-3742
Telephone: (614) 221-2121
Facsimile: (614) 365-9516
Email: jst@isaacbrant.com
jmr@isaacbrant.com
jkp@isaacbrant.com
Attorneys for Defendants-Appellants
Medlink of Ohio and The Medlink Group, Inc.

W. Craig Bashein (0034591)
Bashein & Bashein
50 Public Square, 35th Floor
Cleveland, Ohio 44113
Telephone: (216) 771-3239
Facsimile: (216) 781-5876
Attorney for Plaintiff-Appellee
Andrea Barnes, Executrix

Michael F. Becker, Esq.
Becker & Mishkind, Co. LPA
134 Middle Avenue
Elyria, Ohio 44035
Telephone: (440) 323-7070
Facsimile: (440) 323-1879
Attorney for Plaintiff-Appellee
Andrea Barnes, Executrix

FILED
AUG 15 2007
CLERK OF COURT
SUPREME COURT OF OHIO

Paul W. Flowers, Esq.
Paul W. Flowers Co., L.P.A.
Terminal Tower, 35th Floor
50 Public Square
Cleveland, Ohio 44113
Telephone: (216) 344-9393
Facsimile: (216) 344-9395
Attorney for Plaintiff-Appellee
Andrea Barnes, Executrix

TABLE OF CONTENTS

Page

TABLE OF CONTENTS i

TABLE OF AUTHORITIES ii

I. STATEMENT OF AMICUS INTEREST 1

II. STATEMENT OF THE CASE AND FACTS 2

III. ARGUMENT 2

Proposition of Law No. 1:

In reviewing an award of punitive damages, the trial court must independently analyze the three guideposts set forth by the United States Supreme Court in *BMW of North America, Inc. v. Gore* (1996), 517 U.S. 559 2

A. Introduction 3

B. Application of *BMW* and *State Farm* Compel Reversal of the Eighth District's Decision Affirming Punitive Damages 6

1. Reprehensibility Guidepost 9

a. Physical or economic harm 10

b. Indifference to or reckless disregard for the safety of others 11

c. Financially vulnerable target 12

d. Repeated actions or isolated incident 12

e. Intentional malice, trickery, or deceit 12

2. Ratio Guidepost 14

3. Comparison Guidepost 16

IV. CONCLUSION 17

CERTIFICATE OF SERVICE 18

TABLE OF AUTHORITIES

Page

CASES

Blust v. Lamar Advertising Co. (2004), 157 Ohio App. 3d 787, 2004 Ohio 2433, 813 N.E. 2d 902 15

BMW of North America, Inc. v. Gore (1996), 517 U.S. 559, 116 S. Ct. 1589, 134 L.Ed. 2d 809 ..... passim

Burns v. Prudential Securities, Inc., 167 Ohio App. 3d 809, 2006-Ohio-3550, 857 N.E. 2d 621 ..... 5, 15, 16

Clark v. Chrysler Corp (C.A. 6, 2006), 436 F.3d 594 ..... passim

Cooper Industries, Inc. v. Leatherman Tool Group, Inc. (2001), 532 U.S. 424, 121 S.Ct. 1768, 149 L.Ed. 2d 674 ..... 4, 7, 8, 9

EEOC v. Harbert-Yeargin, Inc. (C.A. 6, 2001), 266 F.3d 498 14

EEOC v. W&O, Inc. (C.A. 11, 2000), 213 F.3d 600 14

Genay v. Norris (1784), 1 S.C. 6, 1784 WL 26 (S.C.Com.Pl.Gen.Sess.) 3

Honda Motor Co. v. Oberg (1994), 512 U.S. 415, 114 S. Ct. 2331, 129 L.Ed. 2d 336 ..... 1, 4, 6

Pacific Mutual Life Ins. Co. v. Haslip (1991), 499 U.S. 1, 111 S.Ct. 1032, 113 L.Ed.2d 1 .. passim

Patterson v. P.H.P. Healthcare Corp. (C.A. 5, 1996), 90 F.3d 927 15

Preston v. Murty (1987), 32 Ohio St. 3d 334, 512 N.E. 2d 1174 13

Rubeck v. Huffman (1978), 54 Ohio St.2d 20, 374 N.E.2d 411 ..... 6, 14

Rush v. Scott Specialty Gases, Inc. (E.D.Pa. 1996), 930 F.Supp. 194 15

Smith v. General Motors Corp., 168 Ohio App. 3d 336, 2006-Ohio-4283, 859 N.E. 2d 1035 10

State Farm Mutual Automobile Ins. Co. v. Campbell (2003), 538 U.S. 408, 123 S. Ct. 1513, 155 L.Ed. 2d 585 ..... passim

TXO Production Corp. v. Alliance Resources Corp. (1993), 509 U.S. 443, 125 L.Ed. 2d 366, 113 S. Ct. 2711 ..... 4, 7

United States v. Bajakajian (1998), 524 U.S. 321, 118 S .Ct. 2028, 141 L.Ed. 2d 314 7

Villella v. Waikem Motors, Inc. (1989), 45 Ohio St. 3d 36, 543 N.E. 2d 464 ..... 5, 15

Williams v. Aetna Finance Co., 83 Ohio St. 3d 464, 700 N.E. 2d 874 9

Winner Trucking, Inc. v. Victor L. Dowers, & Assoc., 2007-Ohio-3447, 2007 Ohio App. LEXIS 3178 5

STATUTES

R.C. 2315.21 16

R.C. 2903.341 16

R.C. 2929.18(a)(3)(c) 17

OTHER AUTHORITIES

Neal R. Feigenson, *Punitive Damages: How Juries Decide*, 78 Chi. Kent L. Rev. 239, 241 (2003) 4

Schwartz, Behrens, and Mastrosimone (1999), Reining in Punitive Damages "Run Wild": Proposals for Reform by Courts and Legislatures, 65 Brook. L. Rev. 1003, 1006–10 3

I. STATEMENT OF AMICUS INTEREST

The Ohio Association of Civil Trial Attorneys (the "OACTA") is an organization comprised of civil defense attorneys and executives dedicated to the defense and management of claims. Through its involvement and commitment to the defense of lawsuits, the OACTA has demonstrated a continuing commitment to the promotion of a common sense civil justice system.

This case involves important constitutional questions regarding the manner in which punitive damages should be reviewed by Ohio's courts. In advocating for a uniform method of determining and reviewing punitive damage awards, amicus curiae seeks balance, consistency, and fairness throughout Ohio's court system. Amicus curiae believes that the best way to achieve these goals is for this Court to require Ohio's lower courts to apply the guideposts set forth by the Unites States Supreme Court in *BMW of North America, Inc. v. Gore* (1996), 517 U.S. 559, 116 S. Ct. 1589, 134 L.Ed. 2d 809 ("*BMW*") when reviewing punitive damage awards. Adopting this structured procedure will ensure that plaintiffs receive appropriate punitive damages if warranted, but will also ensure that defendants receive the due process protections afforded by the Constitution against excessive punitive damage awards.

As the United States Supreme Court has observed, "[p]unitive damages pose an acute danger of arbitrary deprivation of property, since jury instructions typically leave the jury with wide discretion in choosing amounts . . . " *Honda Motor Co. v. Oberg* (1994), 512 U.S. 415, 416, 114 S. Ct. 2331, 129 L.Ed. 2d 336. Accordingly, the United States Supreme Court repeatedly has held that due process requirements impose limitations on the size of punitive damage awards, and these limitations are exceeded when a state court imposes a "grossly excessive punishment on a tort-feasor." *See, e.g., BMW*, 517 U.S. at 562.

Excessive, unpredictable, and completely unbridled punitive damages are of utmost concern to amicus curiae. While punitive damages have a role in the civil justice system, the

civil justice system should not serve as a "litigation lottery" characterized by excessiveness and arbitrariness. The imposition of punitive damages without any meaningful review is tantamount to the deprivation of property without due process of law and should not be tolerated by this Court.

The OACTA submits this brief in support of Appellants' Proposition of Law No. 1 and asks this Court to reverse the decision of the Eighth District Court of Appeals because it flagrantly disregards United States Supreme Court jurisprudence and Ohio public policy.

II. STATEMENT OF THE CASE AND FACTS

The OACTA defers to the Statement of the Case and the Statement of Facts as set forth in the Merit Brief of Appellants.

III. ARGUMENT

Proposition of Law No. 1:

In reviewing an award of punitive damages, the trial court must independently analyze the three guideposts set forth by the United States Supreme Court in *BMW of North America, Inc. v. Gore* (1996), 517 U.S. 559.

Currently, there is no consistent practice or methodology for reviewing common law punitive damage awards in Ohio. While this Court has applied the *BMW* guideposts in reviewing such punitive damage awards, Ohio's lower courts have not felt compelled to do so. As a result, lower courts' review of punitive damage awards is inconsistent, haphazard, and often cursory – even when significant constitutional issues are involved. The Eighth Appellate District's decision in this case provides the Ohio Supreme Court with the opportunity to instruct reviewing courts on how they are to measure the appropriateness of punitive damages to ensure that such awards are not constitutionally excessive.

A. Introduction

Punitive damages are not new to American jurisprudence; they have existed since at least 1784. See *Genay v. Norris* (1784), 1 S.C. 6, 1784 WL 26 (S.C.Com.Pl.Gen.Sess.). However, in recent years they have taken on a new character and shape. Punitive damages are no longer only available where one has committed a traditional intentional tort, as they were for all of the nineteenth and a good part of the twentieth century.[1] During the last two decades, the frequency and magnitude of punitive damage awards have increased significantly. Schwartz et al., *supra* note 1, at 1006-10. Multi-million dollar punitive damage awards have become routine. These awards have captured the attention of many attorneys, litigants, legislators, and courts, including the United States Supreme Court.

One of the most significant problems is that common law procedures for awarding punitive damages often allow juries to impose punitive damages indiscriminately. See *Pacific Mutual Life Ins. Co. v. Haslip* (1991), 499 U.S. 1, 42, 111 S.Ct. 1032, 113 L.Ed.2d 1 (O'Connor, J., dissenting). As Justice O'Connor recognized, the common law system of awarding punitive damages

> encourage[s] inconsistent and unpredictable results by inviting juries to rely on private beliefs and personal predilections. Juries are permitted to target unpopular defendants, penalize unorthodox or controversial views, and redistribute wealth. Multimillion dollar losses are inflicted on a whim. While I do not question the general legitimacy of punitive damages, I see a strong need to provide juries with standards to constrain their discretion so that they may exercise their power wisely, not capriciously or maliciously. The Constitution requires as much.

Id. at 43 (O'Connor. J., dissenting).

Studies during the past decade have confirmed what many have expressed for years – jury-imposed punitive damage awards are erratic, unpredictable, and often excessive. See Neal

---

[1] See Schwartz, Behrens, and Mastrosimone (1999), Reining in Punitive Damages "Run Wild": Proposals for Reform by Courts and Legislatures, 65 Brook. L. Rev. 1003, 1006–10.

R. Feigenson, *Punitive Damages: How Juries Decide*, 78 Chi. Kent L. Rev. 239, 241 (2003) (reviewing Cass R. Sunstein, Reid Hastie, John W. Payne, David A. Schkade & W. Kip Viscusi, Can Tort Juries Punish Competently? (2002)). Importantly these findings do not suggest that jurors on the whole are not intelligent, conscientious, or properly-motivated. *Id.* Even the most conscientious jurors impose arbitrary punitive damage awards. This should come as little surprise as juries are given tremendous power and discretion and almost no constraints in exercising them.

Since at least 1991, the United States Supreme Court has recognized that the Constitution imposes a substantive limit on the size of punitive damage awards. *Honda Motor Co. v. Oberg* (1994), 512 U.S. 415, 420, 114 S. Ct. 2331, 129 L.Ed. 2d 336 (citing *TXO Production Corp. v. Alliance Resources Corp.* (1993), 509 U.S. 443, 453-54, 125 L.Ed. 2d 366, 113 S. Ct. 2711). Shortly after *Honda*, the United States Supreme Court articulated three guideposts to be used to ensure due process to defendants and to rein in unbridled jury discretion in imposing punitive damages. *BMW of North America, Inc. v. Gore* (1996), 517 U.S. 559, 116 S. Ct. 1589, 134 L.Ed. 2d 809. Thereafter, the Supreme Court made clear that an appellate court is required to conduct a *de novo* review when considering the constitutionality of a punitive damage award. *Cooper Industries, Inc. v. Leatherman Tool Group, Inc.* (2001), 532 U.S. 424, 436, 121 S.Ct. 1768, 149 L.Ed. 2d 674 ("*Cooper Industries.*"). And even more recently, the Supreme Court held that district courts are required to engage in an independent analysis of the three *BMW* guideposts to determine whether a punitive damage award is excessive. *State Farm Mutual Automobile Ins. Co. v. Campbell* (2003), 538 U.S. 408, 418-19, 123 S. Ct. 1513, 155 L.Ed. 2d 585 ("*State Farm*"). These clear standards for determining and reviewing punitive damage awards have provided necessary guidance within the federal judicial system.

Ohio is also in need of a uniform standard of review to prevent unconstitutionally excessive punitive damage awards. A statewide system incorporating the three *BMW* guideposts would greatly reduce the glaring inconsistencies in reviewing courts' opinions. At present, there is a clear discrepancy among Ohio courts (as well as a discrepancy between Ohio courts and federal courts sitting in Ohio). To illustrate, within the past year alone, some state appellate courts have followed *State Farm* and applied the *BMW* guidelines. *See Burns v. Prudential Securities, Inc.*, 167 Ohio App. 3d 809, 846, 2006-Ohio-3550, 857 N.E. 2d 621; *Winner Trucking, Inc. v. Victor L. Dowers, & Assoc.*, 2007-Ohio-3447, *11, Ohio App. LEXIS 3178. In contrast, other courts – including the Eighth Appellate District in the instant case – have failed to apply *BMW* and its progeny, thereby allowing an excessive punitive damage award to stand.

Indeed, this case presents a perfect example of the short-shrift that many lower courts give to punitive damages awarded by a jury. Despite the fact that Appellants (1) raised their due process rights in connection with the excessive punitive damage award in a specific motion, (2) raised the constitutionality of the punitive damage award as an assignment of error, and (3) extensively briefed the application of the *BMW* guideposts, neither the trial court nor the appellate court ever mentioned *BMW* or otherwise addressed the constitutionality of the punitive damage award. As such, a punitive damage award 30 times greater than the compensatory damages award was affirmed. Had the three *BMW* guideposts been applied, the punitive damage award would have been overturned.

Both this Court and the General Assembly have recognized that punitive damage awards should have some rational connection with the amount of compensatory damages awarded. *Villella v. Waikem Motors, Inc.* (1989), 45 Ohio St. 3d 36, 48, 543 N.E. 2d 464; Am. Sub. S.B. 80, Section 3(A)(4)(b)(ii). Without this correlation, punitive damages become little more than an

unnecessary and unconstitutional deprivation of property. *See Honda Motor Co.*, 512 U.S. at 417. Here there is no correlation.

In reviewing for this correlation, the compensatory damages awarded for wrongful death are not to be considered. The reason for this is that punitive damages may not be awarded for wrongful death in Ohio. *Rubeck v. Huffman* (1978), 54 Ohio St.2d 20, 22-23, 374 N.E.2d 411. The only compensatory damage award to be considered in reviewing the punitive damage award is the $100,000 for the survivorship claim. The $3 million punitive damage award in this case has no rational relationship to the $100,000 compensatory damage award with which it is to be compared. Thus, the punitive damage award flagrantly contradicts both United States Supreme Court decisions and the law of Ohio. Accordingly, the Eighth Appellate District's decision should be reversed.

B. Application of *BMW* and *State Farm* Compel Reversal of the Eighth District's Decision Affirming Punitive Damages

There has been a strong impetus at the federal level to enact a system through which punitive damage awards must be scrutinized by reviewing courts. Prior to the United States Supreme Court's decision in *BMW*, juries often granted plaintiffs staggeringly disproportionate punitive damage awards that bore no relation to the compensatory damages. *See Pacific Mutual Life Ins. Co.,* 499 U.S. at 8-10. In recognition of this troubling development, the Court in *BMW* supplied the federal courts with three guideposts to be used in their analysis of punitive damage awards. Subsequently, the decision in *State Farm* affirmed that federal courts do not have unbridled discretion in reviewing punitive damages awarded by juries. Rather, federal district courts are now required to measure punitive damage awards against the *BMW* guideposts instead of blindly accepting a trial's outcome. Not only has this approach led to a more consistent

review of punitive damage awards, but *BMW* and its progeny have also curtailed the federal courts' ability to uphold unconstitutionally excessive punitive damage awards.

The excessive punitive damage award in the instant case illustrates the need for judicial scrutiny. "Punitive damages are a powerful weapon... Imposed indiscriminately, however, they have a devastating potential for harm." *Pacific Mutual Life Ins. Co.*, 499 U.S. at 42 (O'Connor, J., dissenting). Without judicial scrutiny of a given award, juries are left with complete freedom to determine the penalty they believe should be imposed. This is exactly what occurred in the case at bar.

The United States Supreme Court has decided several cases which plainly show that the Constitution not only permits -- but also imposes -- a limit on punitive damage awards. *TXO Production Corp.*, 509 U.S. at 454. "The Due Process Clause of the Fourteenth Amendment prohibits a State from imposing a 'grossly excessive' punishment on a tortfeasor." *BMW*, 517 U.S. at 562 (quoting *TXO Production Corp.*, 509 U.S. at 454). The cases in which such [substantive] limits were enforced involved constitutional violations predicated on judicial determinations that the punishments were "grossly disproportional to the gravity of the offense." *Cooper Industries*, 532 U.S. at 434 (citing *United States v. Bajakajian* (1998), 524 U.S. 321, 324, 118 S .Ct. 2028, 141 L.Ed. 2d 314 ($357,144 punitive forfeiture for violating reporting requirement was grossly disproportional to the gravity of the offense)).

"Elementary notions of fairness enshrined in our constitutional jurisprudence dictate that a person receive fair notice not only of the conduct that will subject him to punishment, but also of the severity of the penalty that a State may impose." *BMW*, 517 U.S. at 574. Without a framework from which to evaluate punitive damages, a defendant is afforded no notice or assurance that her constitutional rights will be protected.

The applicable framework for determining whether a defendant's constitutional rights have been violated by the imposition of punitive damages starts with the three guideposts identified by the United States Supreme Court in *BMW*:

1. the degree of reprehensibility of the defendant's actions;
2. the disparity or ratio between the punitive damages award and the compensatory damages amount; and
3. the difference between the proposed remedy and applicable civil penalty.

BMW, 517 U.S. at 575.

In applying these guideposts to determine whether a punitive damage award is unconstitutionally excessive, reviewing courts need not give deference to the jury's award "[b]ecause a jury's award of punitive damages is not a finding of fact." *Cooper Industries*, 532 U.S. at 437. Moreover, a court should not replace its independent function of judicial review with deference. A jury's punitive damages award should be checked against legal standards that provide "reasonable constraints" within which "discretion is exercised" that assure "meaningful and adequate review by the trial court whenever a jury has fixed the punitive damages," and permit "appellate review [that] makes certain that the punitive damages are reasonable in their amount and rational in light of their purpose to punish what has occurred and to deter its repetition." *Pacific Mutual Life Ins. Co.*, 499 U.S. at 20 –21.[2]

If there was any prior doubt, *Cooper Industries* and *State Farm* made clear that reviewing courts have a duty to engage in the independent function of judicial review of excessive punitive

[2] Justice Breyer concluded that any presumption of validity of the punitive damage award was overcome in *BMW* because the standards applied by the jury as well as the Alabama courts were vague, open-ended, and failed to protect against arbitrary results. *BMW*, 517 U.S. at 588 (Breyer, J., concurring).

damages without presuming the validity of such awards. *Cooper Industries,* 532 U.S. at 436; *State Farm,* 538 U.S. at 418.

The trial court and Eighth District Court of Appeals failed to properly review the punitive damage award in this case. When the *BMW* guideposts are applied, as set forth below, it is apparent that the punitive damage award at issue is unconstitutionally excessive.

1. **Reprehensibility Guidepost**

"[S]ome wrongs are more blameworthy than others." *BMW,* 517 U.S. at 575. By including the degree of reprehensibility of a defendant's conduct as a "guidepost," the United States Supreme Court recognized that there are varying degrees of reprehensible conduct and that it is not fair to treat all forms of reprehensible conduct similarly. For instance, conduct calculated and designed to inflict harm on others which serves no other permissible purpose – such as sending a letter with anthrax spores in it to an office building – might be at one end of the spectrum. Placing a product in the market after it has been properly tested for risks and approved by the appropriate governmental authority, but which ultimately is determined to cause harm to others, may be deemed to be reprehensible conduct but of a different type and degree than sending anthrax. Engaging in a scheme to defraud vulnerable elderly persons of their financial resources which is difficult to detect and results in financial gain to the perpetrator of the fraud is yet another type of reprehensible conduct.

When reviewing this factor, the question is ". . . whether, from a legally objective standpoint, the defendant's conduct was so reprehensible that it tends to justify the jury's award." *Williams v. Aetna Finance Co.*, 83 Ohio St. 3d 464, 484, 700 N.E. 2d 874 (Cook, J., dissenting) (emphasis added). It is not proper to simply rely on the amount of the punitive damage award itself to demonstrate that the conduct in issue is reprehensible. *Id.* Because juries assess punitive damages as one-time decision makers in isolated cases, they generally do not have the ability

(nor role) of comparing the offending conduct with other reprehensible conduct to gauge whether substantial punitive damages are justifiable. This is a function for the courts, and the courts must not abdicate their role by deferring to the jury.

The Supreme Court has set forth a number of factors to be weighed in applying the reprehensibility guidepost:

> We have instructed courts to determine the reprehensibility of a defendant by considering whether: the harm caused was physical as opposed to economic; the tortious conduct evinced an indifference to or a reckless disregard of the health and safety of others; the target of the conduct had financial vulnerability; the conduct involved repeated actions or was an isolated incident; and the harm was the result of intentional malice, trickery, or deceit, or mere accident.

State Farm, 538 U.S. at 419; *see also Smith v. General Motors Corp.*, 168 Ohio App. 3d 336, 347, 2006-Ohio-4283, 859 N.E. 2d 1035 . Employing these criteria leads to the conclusion that the jury's damage award in this case was grossly excessive when measured against *BMW's* first guidepost.

a. Physical or economic harm

Although this case involves physical harm, it does not involve an affirmative act to cause harm to anyone. Nor does it involve a conscious or deliberate attempt to harm Natalie Barnes (or anyone else). Moreover, the physical harm was not caused by the act of hiring Endia Hill.

Appellants admitted that they were negligent in hiring Hill because she was not qualified for the position. In part, Hill was not qualified because she had been convicted of a felony for assault 10 years before she was hired. Hill's failure to remain with Barnes during dialysis was wrong, but it was not at all related to the fact that she had a previous felony conviction for assault. Another person in the same position as Hill, without a felony conviction, likewise could have stepped away from the dialysis room during Barnes' treatment despite being instructed not

to leave. Simply put, the previous felony conviction is not in any way related to the harm at issue.

The conduct at issue "must have a nexus to the specific harm suffered by the plaintiff." *State Farm*, 538 U.S. at 422. In the absence of such a nexus, the reprehensibility guidepost cannot be met. In other words, reprehensible conduct that is not the cause of the harm at issue does not satisfy the requisite reprehensibility guidepost. To illustrate, if Hill had physically assaulted Barnes, then there would be some relationship between her previous conviction and the harm suffered. But here, there is no nexus between the conduct and the harm suffered. Thus Hill's conviction (and Appellants' hiring of Hill in light of her conviction) is neither relevant nor the proximate cause of Barnes' death. Moreover, Hill's decision to depart the dialysis room and leave Barnes in the hands of competent, well-trained medical personnel certainly cannot be considered reprehensible.

b. Indifference to or reckless disregard for the safety of others

The Sixth Circuit recently discussed this factor of reprehensibility at length in a decision holding that a $3 million punitive damage award against Chrysler Corporation, arising from an automobile's design defect, was excessive. *Clark v. Chrysler Corp.* (C.A. 6 2006), 436 F.3d 594 ("*Clark*").

In *Clark*, the decedent was fatally injured in a car accident after being thrown from his car due to a defective door latch. The evidence at trial showed that Chrysler's door latch design was "outdated and had been removed from the modern state of the art of the industry for over 40 years." *Id.* at 601. The evidence also showed that Chrysler did not test for latch failures for this design. *Id.* Based on this evidence, the *Clark* Court concluded that "there is not a 'complete absence of proof' that Chrysler's use of a weak and outdated, unboxed B-pillar [door latch] constituted a reckless disregard for the safety of others." *Id.* at 602. But, the Sixth Circuit also

recognized that there was no evidence demonstrating that a proper door latch would have been able to prevent the harm. *Id.* at 602. In light of the fact that there is no evidence to show that the harm could have been prevented, the Sixth Circuit concluded that Chrysler's conduct was not "sufficiently indifferent or reckless to support the $3 million [punitive damage] award." *Id.*

The *Clark* analysis is applicable in the instant case. Here, while Appellants may have been indifferent (or even reckless) in employing Hill as an aide, there is no evidence suggesting that employing a person without a 10-year-old felony conviction would have resulted in a different outcome. Similarly, there is no evidence showing that Hill's presence in the dialysis room would have altered the ultimate outcome. This is particularly true in light of the fact that an entire team of highly-trained hospital employees was unable to remedy the situation. Hence, the only reasonable conclusion is that Hill also would have been unable to provide the necessary assistance to Barnes to save her from her ultimate demise.

c. Financially vulnerable target

The financial vulnerability of a target is particularly relevant when the harm inflicted is economic in nature. *Id.* at 604. In the instant case, economic injury is not involved, so this factor need not be considered.

d. Repeated actions or isolated incident

The evidence shows that the conduct at issue was an isolated incident. Simply put, there is no credible evidence establishing that what occurred was the result of a calculated and continued effort to cause harm. The absence of evidence of repeated misconduct weighs against a finding that Appellants' conduct was reprehensible.

e. Intentional malice, trickery, or deceit

"The concept that trickery and deceit are more reprehensible than negligence reflects the principle that punitive damages may not be 'grossly out of proportion to the severity of the

offense.'" *Clark*, 436 F.3d at 605 (citing *BMW*, 517 U.S. at 576). The *BMW* Court noted that the absence of "acts of affirmative misconduct" weighed in favor of finding that the conduct at issue was not "sufficiently reprehensible to warrant a $2 million [punitive damage] award." *BMW*, 517 U.S. at 579-80. Again, in the instant case there is no affirmative act of misconduct designed to harm anyone. Thus, the conduct is not "sufficiently reprehensible" to warrant a $3 million punitive damage award.

Punitive damage awards have been reversed even in light of the evidence establishing that affirmative acts of misconduct resulted in harm. For instance, in *State Farm* the evidence showed that the defendant had altered company records and otherwise engaged in acts that enhanced the plaintiffs' harm. Nonetheless, the Court held that such conduct did not warrant the amount of the punitive damages awarded. Unlike in *State Farm*, there is no evidence that Appellants engaged in acts of intentional malice, trickery, or deceit. Rather, the evidence shows that Appellants were negligent in hiring Hill. In addition, Hill's behavior was not characterized by "hatred, ill will or a spirit of revenge." *Preston v. Murty* (1987), 32 Ohio St. 3d 334, 335, 512 N.E. 2d 1174.

In sum, only one of the five factors utilized by the United States Supreme Court potentially weighs in favor of a finding of reprehensibility. More specifically, only the "indifference" factor appears to be satisfied (with respect to the hiring of Hill and Hill's departure from the treatment room). But, as the *Clark* Court reasoned, conduct that constitutes indifference or a reckless disregard for the safety of others cannot be considered in a vacuum. Rather, such conduct must be considered in light of all of the facts and circumstances, including the lack of any evidence showing that the harm could have been prevented had the conduct not occurred. The absence of any evidence showing that the harm could have been prevented,

particularly when coupled with the absence of a nexus between the conduct and the specific harm at issue, weigh in favor of finding that Medlink's conduct was either not reprehensible or only minimally reprehensible.

2. Ratio Guidepost

Before applying *BMW's* second guidepost -- the ratio guidepost – a review of the damages awarded in this case is appropriate. The jury awarded $3 million for the wrongful death claim, $100,000 for the survivorship claim, and $3 million in punitive damages.

It has long been the law in Ohio that punitive damages may not be awarded based on a wrongful death claim. *Rubeck v. Huffman* (1978), 54 Ohio St. 2d 20, 22, 374 N.E. 2d 411. Thus, the $3 million punitive damage award must be measured only against the $100,000 compensatory damages awarded for the survivorship claim.[3]

The second *BMW* guidepost has been viewed in terms of the ratio of compensatory damages to punitive damages. "The essence of this guidepost is to 'require a court to ask whether a relatively higher ratio of punitive to compensatory damages is permissible in order to effect the deterrent purposes behind punitive damages.'" *EEOC v. Harbert-Yeargin, Inc.* (C.A. 6, 2001), 266 F.3d 498, 515 (quoting *EEOC v. W&O, Inc.* (C.A. 11, 2000), 213 F.3d 600, 616.)

While there is no bright-line test as to what ratio is appropriate, the Supreme Court indicated years ago that a punitive damage award that was four times the amount of the compensatory damages "might be close to the line." *Pacific Mutual Life Ins. Co.*, 499 U.S. at 23. Recently, the Supreme Court again emphasized that "an award of four times the amount of

[3] In *Clark*, the Sixth Circuit reduced the compensatory damages in accordance with the finding of contributory fault. The Sixth Circuit stated that using the full amount of the compensatory damages awarded would improperly punish the defendant. *Clark*, 436 F.3d at 607, n.16. The *Clark* Court also noted that a punitive damage amount "is not to be inflated to compensate a plaintiff for damages not permitted by the relevant jurisdiction." *Id.* Here, punitive damages are not permitted for wrongful death. Thus, any analysis that compares the wrongful death damages with the punitive damages would improperly allow inflation of the punitive damages.

particularly when coupled with the absence of a nexus between the conduct and the specific harm at issue, weigh in favor of finding that Medlink's conduct was either not reprehensible or only minimally reprehensible.

2. Ratio Guidepost

Before applying *BMW's* second guidepost -- the ratio guidepost – a review of the damages awarded in this case is appropriate. The jury awarded $3 million for the wrongful death claim, $100,000 for the survivorship claim, and $3 million in punitive damages.

It has long been the law in Ohio that punitive damages may not be awarded based on a wrongful death claim. *Rubeck v. Huffman* (1978), 54 Ohio St. 2d 20, 22, 374 N.E. 2d 411. Thus, the $3 million punitive damage award must be measured only against the $100,000 compensatory damages awarded for the survivorship claim.[3]

The second *BMW* guidepost has been viewed in terms of the ratio of compensatory damages to punitive damages. "The essence of this guidepost is to 'require a court to ask whether a relatively higher ratio of punitive to compensatory damages is permissible in order to effect the deterrent purposes behind punitive damages.'" *EEOC v. Harbert-Yeargin, Inc.* (C.A. 6, 2001), 266 F.3d 498, 515 (quoting *EEOC v. W&O, Inc.* (C.A. 11, 2000), 213 F.3d 600, 616.).

While there is no bright-line test as to what ratio is appropriate, the Supreme Court indicated years ago that a punitive damage award that was four times the amount of the compensatory damages "might be close to the line." *Pacific Mutual Life Ins. Co.*, 499 U.S. at 23. Recently, the Supreme Court again emphasized that "an award of four times the amount of

[3] In *Clark*, the Sixth Circuit reduced the compensatory damages in accordance with the finding of contributory fault. The Sixth Circuit stated that using the full amount of the compensatory damages awarded would improperly punish the defendant. *Clark*, 436 F.3d at 607, n.16. The *Clark* Court also noted that a punitive damage amount "is not to be inflated to compensate a plaintiff for damages not permitted by the relevant jurisdiction." *Id.* Here, punitive damages are not permitted for wrongful death. Thus, any analysis that compares the wrongful death damages with the punitive damages would improperly allow inflation of the punitive damages.

compensatory damages might be close to the line of constitutional impropriety." *State Farm*, 538 U.S. at 425. It also stated that "few awards exceeding a single-digit ratio between punitive and compensatory damages, to a significant degree, will satisfy due process." *Id.*

In this case, the ratio is 30 to 1 - - which exceeds a single-digit ratio by a significant degree. The punitive damages bear no reasonable relationship to the compensatory damages awarded for the survivorship claim. While the punitive damage award in a given case "must be based upon the facts and circumstances of the defendant's conduct and the harm to the plaintiff," most courts that have scrutinized punitive damage awards under *BMW* have not allowed a ratio of this magnitude. *See Burns,* 167 Ohio App. 3d at 852 (ratio of 40 to 1 excessive); *Clark,* 436 F.3d at 607 (ratio of 13 to 1 excessive); *Patterson v. P.H.P. Healthcare Corp.* (C.A. 5, 1996), 90 F.3d 927, 943, (ratio of 6.5 to 1 excessive); *Rush v. Scott Specialty Gases, Inc.* (E.D.Pa. 1996), 930 F.Supp. 194, 201-02 (ratio of 10 to 1 excessive).

Even prior to *BMW*, this Court recognized that punitive damage awards should have some rational connection with the amount of compensatory damages awarded. See *Villella*, 45 Ohio St.3d at 48. Essentially, compensatory damages provide "a yardstick against which to measure a proper punitive damages award." *Blust v. Lamar Advertising Co.* (2004), 157 Ohio App. 3d 787, 795, 2004-Ohio-2433, 813 N.E. 2d 902. The very nature of punitive damages requires that parameters be defined. Because punitive damages are meant to inflict punishment, deter future misconduct and demonstrate society's disapproval, allowing broad discretion can easily lead to excessive awards that bear no relation to the original harm at issue. Courts must apply clearly delineated criteria to avoid deferring to awards based on the passions and prejudices of the jury.

In this case, the $100,000 compensatory award pales in comparison to the $3,000,000 punitive damages award. "The jurisprudence of the United States Supreme Court demonstrates that 'few awards exceeding a single-digit ratio between punitive and compensatory damages, to a significant degree, will satisfy due process.'" *Burns,* 167 Ohio App. 3d at 850 (quoting *State Farm,* 538 U.S. at 425). A ratio of 30-to-1 far surpasses an acceptable ratio, and therefore, violates due process.

To the extent an appropriate ratio for punitive damages needs to be determined in this case, amicus curiae respectfully suggests applying the ratios included in Amended Senate Bill 80 ("S.B. 80"), effective in April 2005. In S.B. 80, the Ohio General Assembly limited punitive damages to two times compensatory damages, except if the defendant is a small employer or an individual the limit is two times compensatory damages or ten percent of a defendant's net worth -- up to $350,000. Although S.B. 80 is not directly applicable to the instant case -- because it became effective after the cause of action arose -- it reflects the public policy in Ohio to limit punitive damages to a small, single digit ratio tied to the amount of compensatory damages. [4] Not only does the two-to-one ratio in S.B. 80 reflect current Ohio law, it also falls within the United States Supreme Court's guideline that punitive damage awards with a ratio of more than four times compensatory damages are rarely appropriate.

The punitive damages awarded in this case far exceed any permissible ratio.

3. <u>Comparison Guidepost</u>

The third *BMW* guidepost compares the punitive damages award to civil or criminal penalties that could be imposed for comparable misconduct. "In *State Farm*, the Court limited

[4] S.B. 80 applies to cases arising after its effective date. In such cases where S.B. 80 is applicable, the *BMW* ratio guidepost need not be considered as Ohio statutory law provides the limit on punitive damages. See R.C. 2315.21.

this comparison to civil penalties," explaining that a criminal penalty has less utility in this analysis. *Clark*, 436 F.3d at 607 (citing *State Farm*, 538 U.S. at 428).

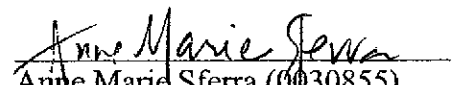
Here, the most applicable statute is the criminal statute that involves patient endangerment and risks to handicapped persons. R.C. § 2903.341. A violation of this statute can result in a felony of the third degree and is punishable by a fine of up to $10,000. R.C. § 2929.18(a)(3)(c). The punitive award is 300 times the maximum statutory penalty in Ohio. The large discrepancy between the punitive damages and this penalty support the contention that the punitive damage award is grossly excessive.

To summarize, application of the *BMW* guideposts to this case reveals that (1) Medlink's conduct does not constitute a high degree of reprehensibility (2) the ratio of punitive to compensatory damages is unjustifiably large, and (3) a wide gap exists between the punitive damage award and comparable statutory penalties that may be imposed. Accordingly, the Eighth Appellate District's decision affirming the punitive damage award must be reversed.

IV. CONCLUSION

In short, due process demands that punitive damage awards should not be upheld in the absence of rigorous judicial scrutiny. Where excessive or disproportionate punitive damages are at issue, the United States Supreme Court has held that judicial review must include an analysis of the three *BMW* guideposts applied to the facts of the case. Here, the lower courts not only failed to apply *BMW*, they did not even address Appellants' due process arguments. The lower courts' cursory review of the punitive damages in this case was wholly insufficient to protect Medlink against excessive punitive damages. Consequently, the decision of the Eighth District Court of Appeals should be reversed.

Respectfully submitted,



Anne Marie Sferra (0030855)
(Counsel of Record)
Bricker & Eckler LLP
100 South Third Street
Columbus, Ohio 43215-4291
Telephone:(614) 227-2394
Facsimile: (614) 227-2390
Email: asferra@bricker.com
Counsel for Amicus Curiae,
The Ohio Association of Civil Trial Attorneys

CERTIFICATE OF SERVICE

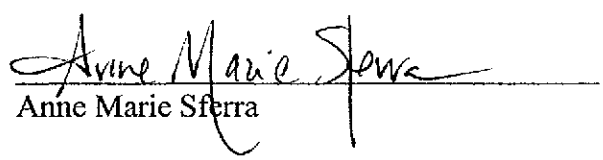
I hereby certify that a copy of the foregoing pleading was served by regular U.S. mail, postage prepaid, 15th this day of August, 2007, upon the following:

J. Stephen Teetor (0023355)
James M. Roper (0037786)
Jessica K. Philemond (0076761)
Isaac, Brant, Ledman & Teetor, LLP
250 East Broad Street, Suite 900
Columbus, Ohio 43215-3742
Attorneys for Defendants-Appellants
Medlink of Ohio and The Medlink Group, Inc.

Paul W. Flowers, Esq.
Paul W. Flowers Co., L.P.A.
Terminal Tower, 35th Floor
50 Public Square
Cleveland, Ohio 44113
Attorney for Plaintiff-Appellee
Andrea Barnes, Executrix

W. Craig Bashein (0034591)
Bashein & Bashein
50 Public Square, 35th Floor
Cleveland, Ohio 44113
Attorney for Plaintiff-Appellee
Andrea Barnes, Executrix

Michael F. Becker, Esq.
Becker & Mishkind, Co. LPA
134 Middle Avenue
Elyria, Ohio 44035
Attorney for Plaintiff-Appellee
Andrea Barnes, Executrix



Anne Marie Sferra