

ORIGINAL

IN THE SUPREME COURT OF OHIO

Christine Marie Whetstone, Individually :
and as Parent and Natural Guardian and :
Next Friend of O.C. and L.C., Minors :

Supreme Court of Ohio

Case No.

14-1462

Plaintiff/Appellee,

v.

Erin Binner, Administrator of the
Estate of Roxanne McClellan

Defendant/Appellant

On Appeal from the
Fairfield County Court of Appeals,
Fifth Appellate District

Court of Appeals
Case No. 13 CA 47

MEMORANDUM IN SUPPORT OF JURISDICTION OF DEFENDANT/APPELLANT
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**EXPLANATION OF WHY THIS CASE IS
OF PUBLIC OR GREAT GENERAL INTEREST**

Do punitive damages punish or deter? Both, this Court has consistently held. Unfortunately, Ohio law lags far behind its sister states in praxis to this philosophical question. Here, this Court has the opportunity to breathe fresh life into the public policy underlying the award of punitive damages¹ where that the subtle differences in punitive damages public policy produce the most starkly different results: where a tortfeasor dies before a judgment is rendered. The dead absolutely cannot be punished, but the living can, to some degree, be deterred. Appellant asserts herein that Ohio law and public policy weigh against imposing punitive damages against an estate.

The majority of jurisdictions in the United States hold that punitive damages may not be imposed against the estate of a tortfeasor.² The approximately thirty jurisdictions which so hold arrive at this rule by judicial decree or legislative enactment.³ Frequently, where a state court finds that punitive damages may not imposed against an estate, the court is finding that the state survivor statute does not abrogate the common law doctrine that extinguishes punitive remedies at the death of the tortfeasor. *See, e.g. In re Vajgrt*, 801 N.W.2d 570, 573 (Iowa 2011) (holding

¹ Plaintiff/Appellee appealed the trial court's decision in the case *sub judice* on two assignments of error: (1) that the trial court erred in finding it could not award punitive damages against an estate, and (2) that the trial court similarly erred in finding it could not award attorneys' fees. The Fifth District herein reversed on both grounds. Defendant/Appellant herein raises only the punitive damages claim because the attorneys' fees issue is ancillary and dependent on an award of punitive damages. *See Columbus Fin., Inc. v. Howard*, 42 Ohio St. 2d 178, 183, 327 N.E.2d 654, 658 (1975) ("If punitive damages are proper, the aggrieved party may also recover reasonable attorney fees.").

² For an overview of the various standards, see Emily Himes Iversen, *Invading the Realm of the Dead: Exploring the (Im)propriety of Punitive Damage Awards Against Estates*, 47 U. MICH. J.L. REFORM 827, available at <http://repository.law.umich.edu/mjlr/vol47/iss3/7>; *see also Whetstone v. Binner*, 2014-Ohio-3018 (2014), ¶¶ 23, 25.

³ *See Iversen, supra* fn. 2, at Appendix, 849.

that I.C.A. § 611.20⁴ does not apply because punitive damages are not a distinct cause of action).⁵ The Restatement of Torts adopts the majority view. Restatement (Second) of Torts §§ 908 cmt. a, 926(b) (1979).

A minority of states hold that punitive damages may be imposed notwithstanding the tortfeasor's death. The most common rationale is succinctly articulated by the Pennsylvania Supreme Court:

[T]he death of the tortfeasor does not completely thwart the purposes underlying the award of punitive damages. As noted, punitive damages are awarded to punish a defendant for certain outrageous acts and to deter him or others from engaging in similar conduct.

G.J.D. by G.J.D. v. Johnson, 552 Pa. 169, 176, 713 A.2d 1127, 1131 (1998). Less than a dozen jurisdictions have adopted this view. *See Iversen, supra* fn. 2 at Appendix.

This leaves Ohio in the smallest minority of states: those without any clear mandate or direction. There appear to be no more than six decisions applying Ohio state law to this issue, including the split decision below. The United States District Court for the Southern District of Ohio has twice observed that punitive damages do not survive the death of the tortfeasor, albeit both times in dicta. *See Boyd v. Smith*, 2:12-CV-814, 2014 WL 1050080 fn. 3 (S.D. Ohio Mar. 14, 2014); *Firestone v. Galbreath*, 895 F.Supp. 917, 933 (S.D. Ohio 1995). The Seventh District Court of Appeals has held that, as a matter of law, “the trial court was clearly in error in submitting the question of exemplary or punitive damages to the jury” where the wrongdoer was

⁴ “All causes of action shall survive and may be brought notwithstanding the death of the person entitled or liable to the same.”

⁵ For its part, Ohio's survivor statute reads similarly to its Iowan counterpart: “In addition to the causes of action which survive at common law, causes of action for mesne profits, or injuries to the person or property, or for deceit or fraud, also shall survive; and such actions may be brought notwithstanding the death of the person entitled or liable thereto.” R.C. § 2305.21.

deceased.⁶ *Friedman v. Labos*, 23 Ohio Law Abs. 217, 221 1936 WL 2151 (Ohio App. 7 Dist.). The Brown County Court of Common Pleas held likewise. *Mongold v. Estate of Gilbert*, 114 Ohio Misc. 2d 32, 36, 758 N.E.2d 1245, 1248 (Com. Pl. 2000). Conversely, the Montgomery County Court of Common Pleas adopted the minority approach. *Individual Business Services, Inc. v. Carmack*, 2009 WL 8235992 (Montgomery Cty. Com. Pl. Ct.2009).

It is telling that the *Mongold* and *Individual Business Services, Inc.* decisions came within the last fifteen years. With the instant action and *Boyd*, issued in March 2014, there are now five recent decisions, with three joining the majority rule and two the minority. The decision to impose punitive damages is a momentous and monetarily significant matter. It is time for Ohio trial courts to have definitive guidance on this important issue.

STATEMENT OF THE CASE AND FACTS

Plaintiff/Appellee Christine Marie Whetstone, individually, and as parent and natural guardian and next friend of O.C., a minor, and L.C., a minor, filed a seven-count Complaint against Whetstone's aunt, Roxanne McClellan, on October 1, 2010. The Complaint set forth claims for assault, battery, false and/or unlawful imprisonment, and intentional infliction of emotional distress, on behalf of herself and her two minor daughters. On November 10, 2010, with no Answer or other responsive pleading having been filed, Plaintiff/Appellee filed a Motion for Default and Request for Damages Hearing. On November 18, 2010, Default Judgment was entered. A damages hearing was set for January 6, 2010.

⁶ As Defendant/Appellant's Notice of Appeal indicated, a Motion to Certify a Conflict is pending before the Fifth District on the basis that the Seventh District Court of Appeals issued a conflicting decision in *Friedman v. Labos*, 23 Ohio Law Abs. 217, 1936 WL 2151, 1936 Ohio Misc. LEXIS 985, Case No. 2118 (Ohio App. 7 Dist.).

McClellan filed a Motion for Leave to Plead on December 29, 2010, alleging that the Complaint was received and signed for by McClellan's friend, Henry Fisher, and that McClellan was unaware of the lawsuit until after the answer date. The Motion further alleged that McClellan was receiving chemotherapy. McClellan simultaneously filed a Motion requesting a continuance of the damages hearing, in which she further indicated that she had been diagnosed with cancer in October of 2010. The trial court continued the hearing but ultimately denied McClellan's Motion for Leave to Plead.

Whetstone filed a Suggestion of Death on May 5, 2011, indicating that Roxanne McClellan died on April 22, 2011. Erin Binner, McClellan's daughter, was appointed administrator of McClellan's estate by the Fairfield County Court of Common Pleas, Juvenile/Probate Division and was formally substituted as the party-defendant on December 30, 2011. Following a substitution of counsel for the Estate, the matter was reset for a damages hearing on damages on July 26, 2012. On May 7, 2013, following a second damages hearing and post-hearing briefs by the parties, the trial court issued an Entry Regarding Damages awarding compensatory damages to Whetstone in the amount of \$500.00, to L.C. in the amount of \$1,000.00, and to O.C. in the amount of \$50,000.00. The trial court denied Plaintiff/Appellee's request for punitive damages finding that they "cannot be awarded against the estate of a tortfeasor who is deceased." The court declined to award attorneys' fees based upon that finding.

Pursuant to Civil Rule 8(D), "Averments in a pleading to which a responsive pleading is required, other than those as to the amount of damage, are admitted when not denied in the responsive pleading." Given McClellan's default, the following allegations in the Complaint, not pertaining to damages, were deemed admitted herein:

On or about June 29, 2010, ... Defendant...maliciously, wrongfully and unlawfully choked, smothered and attempted to kill Plaintiffs minor child, [O.C.],

by holding the child down on a bed in a bedroom ... putting her hand over the child's mouth, and smothering the child with a pillow ...⁷

The trial court granted a total judgment in the amount of \$51,500.00 in compensatory damages against the Estate of McClellan, and Whetstone perfected a timely appeal to the Fifth District.

A divided Fifth District Court of Appeals reversed and remanded, finding first that the “issue of whether the recovery of punitive damages is permitted against a deceased tortfeasor's estate is an issue of first impression at the Appellate level in the state of Ohio.” *Whetstone v. Binner*, 2014-Ohio-3018 ¶ 22. The Fifth District adopted the minority view “that there is no per se prohibition against the imposition of punitive damages against a deceased tortfeasor.” *Id.* ¶ 26.

ARGUMENT IN SUPPORT OF PROPOSITIONS OF LAW

Proposition of Law: Punitive damages may not be imposed against the estate of a deceased tortfeasor.

The word “punitive” derives from Latin’s *punitus*, the past participle of *punire*, “to punish.” THE AMERICAN HERITAGE DESK DICTIONARY, de Mello Vianna, Ed., “Punitive,” *768 (1981). Accordingly, this Court has consistently held that “[p]unitive damages are designed not to compensate the plaintiff but, rather, to punish the defendant and deter future wrongdoing.” *Wiles v. Medina Auto Parts*, 96 Ohio St. 3d 240, 248, 773 N.E.2d 526, 534 (2002); *see also Moskowitz v. Mt. Sinai Med. Ctr.*, 69 Ohio St. 3d 638, 653, 635 N.E.2d 331, 344 (1994). It is for this reason, for instance, that punitive damages may not be imposed against the State or a municipal corporation. *See Drain v. Kosydar*, 54 Ohio St.2d 49, 56, 374 N.E.2d 1253 (1978). To do so would be to punish not the wrongdoer, but the innocent taxpaying public. *Id.*

⁷ This was the only quoted portion of the Complaint in the Fifth District’s Decision. The Complaint alleged that minor, L.C., was also present and subject to the assault, and the Complaint alleged that Whetstone was assaulted when she attempted to pull McClellan off of O.C.

Indeed, that punitive damages serve to punish tortfeasors and not reward plaintiffs is exemplified by the fact that here the law willingly accepts and endorses a windfall to the injured party. “Unlike compensatory damages, which are given to make whole an injured party, punitive damages are an enhancement of the actual loss, representing a ‘windfall’ to the injured party. *Casey v. Calhoun*, 40 Ohio App. 3d 83, 84, 531 N.E.2d 1348, 1349 (Ohio App. 8 Dist. 1987). As this Court has observed:

It must be continually emphasized that punitive damages are assessed over and above that amount adequate to compensate an injured party. As such, they are nothing less than a windfall to any plaintiff who receives them. When their reason for being—to punish or deter—ceases to exist, the entire rationale supporting them collapses.

Ranells v. City of Cleveland, 41 Ohio St. 2d 1, 7, 321 N.E.2d 885, 889 (1975). Though the law generally abhors a windfall, it explicitly accepts windfalls where the purpose of punishment is fulfilled. By definition, a compensatory damages award compensates an injured plaintiff and makes him whole; it is for this reason that there is no civil action simply for punitive damages and imposition of punitive damages is incidental to the main cause of action. *Bishop v. Grdina*, 20 Ohio St.3d 26, 28, 485 N.E.2d 704 (1985), *superceded by rule on other grounds*; *see also Moskowitz v. Mt. Sinai Med. Ctr.*, 69 Ohio St.3d 638, 650, 635 N.E.2d 331 (1994) (“punitive damages are awarded as a mere incident of the cause of action in which they are sought.”).

The minority of jurisdictions in the United States which allow courts to impose punitive damages against the estate of a deceased tortfeasor do so with an eye towards general deterrence—instead of specific deterrence and punishment—as the illuminating justification for such awards. *See Iverson, supra* fn. 2, at 832 (*citing Penberthy v. Price*, 666 N.E.2d 352, 355–57 (Ill. App. Ct. 1996); *Tillett v. Lippert*, 909 P.2d 1158, 1162 (Mont. 1996)). Judge Lim, dissenting in a Hawaii case allowing punitive damages against an estate, dismissed that argument thusly:

In this case, the tortfeasor drove drunk and died in the very accident giving rise to the cause of action. All of the classic purposes of punitive damages were thereby pluperfectly fulfilled. Here, the tortfeasor suffered the ultimate punishment. He was, in a manner of speaking, permanently deterred. And as for general deterrence, what was dealt to him was, *pace* the Kealoha ‘ohana, poetic justice. What additional example the imposition of punitive damages might set in this case seems paltry, especially where collateral justifying purposes...such as “facilitating payment of a plaintiff’s attorney’s fees[,]” *Lee v. Aiu*, 85 Hawai‘i 19, 35, 936 P.2d 655, 671 (1997), are advanced amidst a smell of attainder.

Kaopuiki v. Kealoha, 104 Haw. 241, 260, 87 P.3d 910, 929, Lim, J., *dissenting* (Ct. App. 2003)

(certain internal citations omitted). Obviously, not every case involves the “pluperfectly fulfilled” objectives of punitive damages; many deceased tortfeasors perish under circumstances completely unrelated to their tortious acts. Such is the case here. Nonetheless, Judge Lim’s observation remains: McClellan suffered here the ultimate punishment, and her death accomplished the apotheosis of any specific deterrence a court of this state might have meted out to her. To put it bluntly: she will never assault anyone ever again. Punitive damages in the instant action would serve *no* punitive purpose nor fulfill *any* specific deterrence.

That leaves open the question of general deterrence as a public policy behind Ohio punitive damages law. There are two glaring problems with relying on general deterrence as a justification for allowing punitive awards against an estate. First, any general deterrent effect is depreciated by the reality that a deceased tortfeasor is not truly afforded the opportunity to defend herself. *In re Vajgrt*, 801 N.W.2d 570, 577 (Iowa 2011) (“Vajgrt is no longer available to defend himself and testify why he did not act with ‘willful and wanton disregard for the rights or safety of another.’”); *see also Moskowitz, supra*, 69 Ohio St.3d at 650–651 (although the conduct of the defendant was conduct certainly worthy of public censure and disapprobation, defendant nonetheless afforded opportunity to defend himself). This Court has consistently affirmed the myriad constitutional and statutory rights at play when punitive damages are under consideration. *See, e.g. Dardinger v. Anthem Blue Cross & Blue Shield*, 98 Ohio St. 3d 77, 98,

781 N.E.2d 121, 140 (2002) (“The determination of whether a punitive damages award violates the federal Constitution is rooted in the Due Process Clause.”); *see also* R.C. § 2315.21(D)(4) (clear and convincing evidence required to establish that plaintiff is entitled to recover punitive damages in a tort action). For instance, the heightened burden of proof required to establish the right to recover punitive damages acts to protect the defendant. *See Lansdowne v. Beacon Journal Pub. Co.*, 32 Ohio St.3d 176, 180, 512 N.E.2d 979 (1987)⁸ The legislature has further protected defendants by mandating bifurcation of compensatory and punitive issues where the same is requested by the defendant. R.C. § 2315.21(B)(1). Bifurcation has been held by this Court to create, define, and regulate “a substantive, enforceable right to separate stages of trial relating to the presentation of evidence for compensatory and punitive damages...” *Havel v. Villa St. Joseph*, 131 Ohio St.3d 235, 963 N.E.2d 1270, syllabus (2012).

Similarly, a criminal fine, not reduced to civil judgment, cannot be collected from a deceased convict. *See State v. Blake*, 1977 WL 201465 (Ohio App. 8 Dist.) (“A fine, whether coupled with incarceration or imposed alone, is merely a different method of levying a punishment against the defendant. A fine, although monetary in nature, is inextricably linked to the penalty which is imposed against the person of the defendant. Once this link is broken by death, there is no person against whom the fine may be imposed.”). Moreover, punitive damages are subject to both federal Constitutional and Ohio constitutional review for excessiveness which, in part, turns on “the difference between the punitive damages award and civil or criminal penalties authorized or imposed in similar cases.” *Dardinger, supra*, 98 Ohio St.3d at 98, *citing BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 116 S.Ct. 1589 (1996).

⁸ “In the normal civil suit where [the preponderance of the evidence] standard is employed, “we view it as no more serious in general for there to be an erroneous verdict in the defendant's favor than for there to be an erroneous verdict in the plaintiff's favor.” * * * In libel cases, however, we view an erroneous verdict for the plaintiff as most serious.” (citations omitted)

Finally, in the American legal system, even the criminals convicted of the most heinous crimes are afforded the absolute right to speak on their own behalf to present information in mitigation before they are punished. *See* Crim. R. 32(A)(1); *see also State v. Green*, 90 Ohio St.3d 352, 738 N.E.2d 1208 (2000) (reversible error to not specifically address convicted criminal prior to sentencing and afford him right of allocution); *see also Green v. United States*, 365 U.S. 301, 81 S.Ct. 653 (1961) (similar rule at federal level). In the vast majority of cases where the tortfeasor is deceased, there will be little to no presentation of evidence in mitigation or against punitive damages because the defendant will be deceased. The impossibility of a deceased tortfeasor availing herself to these protections undermines any general deterrent that imposing punitive damages would accomplish.

The second problem with relying on general deterrence as a justification for imposing punitive damages against an estate is that a deterring others from engaging in noxious conduct relies on the *wrongdoer* being placed in the metaphorical stocks. This is an age-old description of general deterrence, to wit:

[the public policy behind punitive damages] seeks to promote the public safety; to punish, through the medium of a civil proceeding, a fraudulent, malicious, insulting, or wilful wrongdoer, and to hold him up as a warning example to others, to deter them from offending in like manner.

Atl. & G.W. Ry. Co. v. Dunn, 19 Ohio St. 162, 170 (1869). The deceased tortfeasor is unavailable to “hold up,” however, as an example to anybody. Instead of the tortfeasor, the innocent beneficiaries are punished. The Fifth District addressed this problem:

It stands to reason that the tortfeasor's beneficiaries have no right or entitlement to more than the tortfeasor would have had he or she lived and a judgment for punitive damages been imposed.

Whetstone, supra, ¶ 27. This approach is unsatisfactory for two reasons. First, it does *not* stand to reason that, *ipso facto*, had the tortfeasor lived an identical punitive damages award would have

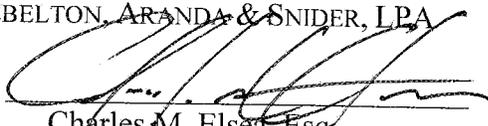
been imposed. This ignores the whole problem of the unavailability of the tortfeasor to mount any meaningful defense. More importantly, however, even if true this analysis does not address the basic fact that it is still *not* the tortfeasor being “held up” as an example. It removes entirely the reasoned judgment of the court or jury imposing the punishment and setting the example. *See Digital & Analog Design Corp. v. North Supply Co.*, 63 Ohio St. 3d 657, 590 N.E.2d 737 (1992) (*rejected on other grounds by, Zoppo v. Homestead Ins. Co.*, 71 Ohio St. 3d 552, 1994-Ohio-461, 644 N.E.2d 397 (1994) (“The amount of punitive damages is not fixed at the time the tort occurs, but rather accrues only after a reasoned determination by a jury of an amount that fairly punishes the tortfeasor for his malicious or malevolent acts and that will deter others from similar conduct.”)).

CONCLUSION

The Fairfield County Court of Common Pleas correctly held that Ohio law and public policy prohibit the imposition of punitive damages against the estate of a deceased tortfeasor. As this case presents matters of public or great general interest, this Honorable Court should accept jurisdiction and consider the matter on its merits.

Respectfully submitted,

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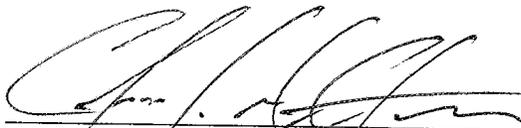
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Erin Binner, Administrator of the Estate of Roxanne McClellan

CERTIFICATE OF SERVICE

The undersigned does hereby certify that a true and accurate copy of the Memorandum in Support of Jurisdiction was served via regular U.S. mail, postage prepaid, upon Grant A. Wolfe, 300 East Broad Street, Suite 450, PO Box 1505, Columbus, OH 43216-1505 on this 21st day of August, 2014.



Charles M. Elsea (0085582)
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APPENDIX A

Opinion of the Fairfield County Court of Appeals, Fifth Appellate District, Appeal No. 13 CA 47
(July 7, 2014)

IN COMPUTER
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ORIGINAL

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FAIRFIELD COUNTY, OHIO
FIFTH APPELLATE DISTRICT
BOOK 21 Pgs. 782-798

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FAIRFIELD CO. OHIO

CHRISTINE MARIE WHETSTONE,
Individually and as Parent and Natural
Guardian and Next Friend of OLIVIA
CASTLE, Minor and LEA CASTLE,
Minor

JUDGES:
Hon. W. Scott Gwin, P. J.
Hon. John W. Wise, J.
Hon. Patricia A. Delaney, J.

Plaintiff-Appellant

-vs-

Case No. 13 CA 47

ERIN K. BINNER, Administrator of the
Estate of ROXANNE MCCLELLAN,
Deceased

Defendant-Appellee

OPINION

CHARACTER OF PROCEEDING: Civil Appeal from the Court of Common
Pleas, Case No. 10 CV 1247

JUDGMENT: Reversed & Remanded

DATE OF JUDGMENT ENTRY:

APPEARANCES:

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For Defendant-Appellee

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Gwin, P.J.

{¶1} Plaintiff-Appellant Christine Marie Whetstone, Individually and as Parent and Natural Guardian and Next Friend of Olivia Castle, Minor, and Lea Castle, Minor, appeals the decision of the Court of Common Pleas of Fairfield County, Ohio, denying their claims for punitive damages and attorney fees.

{¶2} Defendant-Appellee is Erin K. Binner, Administrator of the Estate of Roxanne McClellan, Deceased.

STATEMENT OF THE FACTS AND CASE

{¶3} On October 1, 2010, Plaintiff-Appellant Christine Marie Whetstone, individually and as parent and natural guardian and next friend of Olivia Castle, minor, and Lea Castle, minor, filed a seven-count Complaint against Whetstone's aunt, Roxanne McClellan, setting forth claims for assault, battery, false and/or unlawful imprisonment, and intentional infliction of emotional distress, on behalf of herself and her two minor daughters, Olivia Castle and Lea Castle.

{¶4} On November 10, 2010, with no Answer or other responsive pleading having been filed, Plaintiff-Appellant filed a Motion for Default and Request for Damages Hearing. On November 18, 2010, Default Judgment was entered. A damages hearing was set for January 6, 2010.

{¶5} On December 29, 2010, McClellan filed a Motion for Leave to Plead alleging that the Complaint was received and signed for by McClellan's friend, Henry Fisher, and that McClellan was unaware of the lawsuit until after the answer date. The Motion further alleged that McClellan was receiving chemotherapy. McClellan simultaneously filed a Motion requesting a continuance of the damages hearing, in

which she further indicated that she had been diagnosed with cancer in October of 2010. The trial court continued the hearing, but ultimately denied McClellan's Motion for Leave to Plead.

{¶6} On May 5, 2011, Plaintiff-Appellant filed a Suggestion of Death indicating that Roxanne McClellan died on April 22, 2011. Plaintiffs filed an Amended Motion for Substitution of Party on November 14, 2011, indicating that Erin Binner, McClellan's daughter, had been appointed administrator of McClellan's estate by the Fairfield County Court of Common Pleas, Juvenile/Probate Division. The same was granted on December 30, 2011.

{¶7} Following a substitution of counsel for the Estate, the matter was reset for a hearing on damages on July 26, 2012. A damages hearing was held on July 26, 2012. On May 7, 2013, the trial court issued an Entry Regarding Damages. The trial court's factual findings regarding compensatory damages are not in dispute, as neither party has appealed the same.

{¶8} Pursuant to Civil Rule 8(D), "Averments in a pleading to which a responsive pleading is required, other than those as to the amount of damage, are admitted when not denied in the responsive pleading." Thus, the following allegations in the Complaint, not pertaining to damages, are deemed admitted herein:

{¶9} "On or about June 29, 2010, ... Defendant also maliciously, wrongfully and unlawfully choked, smothered and attempted to kill Plaintiffs minor child, Olivia Castle, by holding the child down on a bed in a bedroom ... putting her hand over the child's mouth, and smothering the child with a pillow ..."

{¶10} The trial court awarded Christine Whetstone \$500.00 in compensatory damages for lost wages, Lea Castle \$1,000.00 in noneconomic damages for past and future emotional distress, and Olivia Castle \$50,000.00 in noneconomic damages for physical injury and past and future emotional harm and distress.

{¶11} The court declined to impose punitive damages finding that they "cannot be awarded against the estate of a tortfeasor who is deceased." The court likewise declined to award attorneys' fees based upon its finding that punitive damages cannot be awarded against the estate of a tortfeasor who is deceased.

{¶12} Appellant now appeals, assigning the following errors for review.

ASSIGNMENTS OF ERROR

{¶13} "I. THE TRIAL COURT ERRED BY DENYING APPELLANT'S CLAIM FOR PUNITIVE DAMAGES AGAINST DEFENDANT-APPELLEE AND/OR FAILING TO AWARD APPELLANT PUNITIVE DAMAGES AGAINST DEFENDANT-APPELLEE.

{¶14} "II. THE TRIAL COURT ERRED BY DENYING APPELLANT'S REQUEST AND/OR CLAIM FOR ATTORNEY FEES AGAINST DEFENDANT-APPELLEE AND/OR FAILING TO AWARD APPELLANT ATTORNEY FEES AGAINST DEFENDANT-APPELLEE."

I.

{¶15} In her First Assignment of Error, Appellant argues that the trial court erred in finding that punitive damages cannot be awarded against the estate of a deceased tortfeasor. We agree.

{¶16} In Ohio, "the purpose of punitive damages is not to compensate a plaintiff, but to punish and deter certain conduct." *Moskovitz v. Mt. Sinai Med. Ctr.*, 69 Ohio St.3d

638, 651, 635 N.E.2d 331 (1994); *Dick v. Tab Tool & Die Co., Inc.*, 5th Dist. No. 2008-CA-0013, 2008-Ohio-5145. “The policy for awarding punitive damages in Ohio * * * has been recognized * * * as that of punishing the offending party and setting him up as an example to others that they might be deterred from similar conduct.” *Preston v. Murty*, 32 Ohio St.3d 334, 512 N.E.2d 1174 (1987). The focus of the award should be the defendant, and the consideration should be what it will take to bring about the twin aims of punishment and deterrence as to that defendant. *Dardinger v. Anthem Blue Cross & Blue Shield*, 98 Ohio St.3d 77, 102, 2002-Ohio-7113781.

{¶17} In the instant case, as set forth above, the trial court denied Appellant’s claim for punitive damages, finding that “punitive damages cannot be awarded against the estate of a tortfeasor who is deceased.” The trial court cited the Common Pleas Court case of *Mongold v. Estate of Gilbert*, 114 Ohio Misc.2d 32, 758 N.E.2d 1245 (Brown Cty. Com. Pl. Ct. 2000) in support of its holding.

{¶18} In *Mongold, supra*, the trial court held:

In Ohio, punitive damages are awarded to punish the offending party and set him up as an example to others that they might be deterred from similar conduct. See *Preston*, 32 Ohio St.3d at 335, 512 N.E.2d at 1176. Agreeing with the majority, this court finds that the purpose of punishment cannot be separated from the purpose of deterrence. Through death, the tortfeasor is no longer subject to legal punishment. Without the punishment of the tortfeasor, the purpose of using the tortfeasor as an example to others to

deter their behavior is greatly diminished, if not completely frustrated. Effective deterrence cannot be achieved when punishment is impossible. For this reason, the deterrent function of punitive damages is insufficient to support an award when the tortfeasor dies before trial. *Hofer v. Lavender*. 679 S.W.2d at 478 (Spears, J., dissenting).

Id. at 114 Ohio Misc.2d 32, 35-36.

{¶19} In support of its position, Appellant cites this Court to a more recent Common Pleas Court decision out of Montgomery County, *Individual Business Services, Inc. v. Carmack*, 2009 WL 8235992 (Montgomery Cty. Com. Pl. Ct. 2009), which rejected the holding in *Mongold*, reasoning:

The Plaintiffs point to binding authority, namely the language of Ohio Rev. Code Section 2305.01 as well as decisions of the Ohio Supreme Court, to support the contention that it is entitled to punitive damages and attorney fees in this case. The Ohio Survivorship Statute specifically provides that "causes of action for ... fraud ... shall survive ... notwithstanding the death of the person entitled or liable thereto." Ohio Rev. Code 2305.21. Although the statutory language does not directly address the right to punitive damages or attorney fees, they are an inherent component of a cause of action for fraud, and the death of Mr. Carmack

has no impact on the plaintiffs' right to pursue such damages from his estate.

In addition, and on a somewhat related point, the Ohio Supreme Court has recognized that where a decedent had a right to punitive damages before his death, that right passes to his estate under Ohio Rev. Code section 2305.21. *Rubeck v. Huffman* (1978), 54 Ohio St.2d 20, 23. Since the statutory language explicitly authorized the survival of such a claim not only in favor of a decedent "entitled" to a claim, but also against a decedent "liable" for such a claim, the aforementioned reasoning dictates the survival of Plaintiffs claim against the Estate of Robert Carmack. Moreover, the Ohio Supreme Court has made it clear in other decisions that the purpose of punitive damages is not just to punish an individual defendant. Punitive damages are also designed to provide "an example to others that they might be deterred from similar conduct." *Preston v. Murty* (1987), 32 Ohio St.3d 334, 335.

{¶20} The *Individual Business Services* case cited by Appellant cites Ohio's survivor statute in support of its finding. This statute provides:

In addition to the causes of action which survive at common law, causes of action for mesne profits, or injuries to the person or property, or for deceit or fraud, also shall survive;

and such actions may be brought notwithstanding the death of the person entitled or liable thereto.

R.C. 2305.21.

{¶21} The Court in *Individual Business Services* acknowledged that such statute is silent as to punitive damages but found that such damages were a component of a cause of action for fraud and allowed the same.

{¶22} It appears that the issue of whether the recovery of punitive damages is permitted against a deceased tortfeasor's estate is an issue of first impression at the Appellate level in the state of Ohio, though this issue has been addressed by courts and legislatures in other jurisdictions.

{¶23} The majority of other jurisdictions disallow punitive damage recoveries after the tortfeasor has died. (See Idaho Code Ann. § 5-327(1) (West, Westlaw through 2011 Chs. 1-335); Vt. Stat. Ann. tit. 14, § 1454 (West, Westlaw through 2011 Sess. No. 28); *Fehrenbacher v. Quackenbush*, 759 F.Supp. 1516, 1521-22 (D.Kan.1991) (applying Kansas law); *Sanchez v. Marquez*, 457 F.Supp. 359, 364 (D.Colo.1978) (applying Colorado law) (currently codified at Colo.Rev.Stat. Ann. § 13-20-101(1) (West, Westlaw through July 1, 2011)); *Doe v. Colligan*, 753 P.2d 144, 146 (Alaska 1988); *Evans v. Gibson*, 220 Cal. 476, 31 P.2d 389, 395 (1934) (subsequently codified at Cal.Civ.Proc.Code § 377.42 (1992)); *Jonathan Woodner Co. v. Breeden*, 665 A.2d 929, 938-40 (D.C.1995); *Lohr v. Byrd*, 522 So.2d 845, 846-47 (Fla.1988); *Morris v. Duncan*, 126 Ga. 467, 54 S.E. 1045, 1046-47 (1906) (subsequently codified at Ga.Code Ann. § 9-2-41 (West, Westlaw through 2011 Reg. Sess.)); *Crabtree ex rel. Kemp v. Estate of Crabtree*, 837 N.E.2d 135, 138-40 (Ind.2005); *Stewart v. Estate of*

Cooper, 102 S.W.3d 913, 915–16 (Ky.2003); *Edwards v. Ricks*, 30 La. Ann. 926, 928 (1878); *Prescott v. Knowles*, 62 Me. 277, 279 (1874) (currently codified at Me.Rev.Stat. Ann. tit. 18–A, § 3–818 (West, Westlaw through 2011 1st Reg. Sess.)); *Wilkins v. Wainwright*, 173 Mass. 212, 53 N.E. 397, 397–98 (1899) (currently codified at Mass. Gen. Laws Ann. ch. 230, § 2 (West, Westlaw through 2011 1st Annual Sess. Ch. 67)); *Thompson v. Estate of Petroff*, 319 N.W.2d 400, 408 (Minn.1982); *Hewellette v. George*, 68 Miss. 703, 9 So. 885, 887 (1891) (subsequently codified at Miss.Code Ann. § 91–7–235 (West, Westlaw through 2011 legislative sessions)), *overruled on other grounds by Glaskox ex rel. Denton v. Glaskox*, 614 So.2d 906, 907 (Miss.1992); *Tietjens v. Gen. Motors Corp.*, 418 S.W.2d 75, 88 (Mo.1967); *Allen v. Anderson*, 93 Nev. 204, 562 P.2d 487, 489–90 (1977) (subsequently codified at Nev.Rev.Stat. Ann. § 41.100(2) (West, Westlaw through 2010 Special Sess.)); *Jaramillo v. Providence Wash. Ins. Co.*, 117 N.M. 337, 871 P.2d 1343, 1350–52 (1994); *Gordon v. Nathan*, 43 A.D.2d 917, 352 N.Y.S.2d 464, 465 (1974) (currently codified at N.Y. Est. Powers & Trusts Law § 11–3.2(a)(1) (McKinney, Westlaw through 2011 Sess.)); *Harrell v. Bowen*, 179 N.C.App. 857, 635 S.E.2d 498, 500 (2006); *Mongold v. Estate of Gilbert*, 114 Ohio Misc.2d 32, 758 N.E.2d 1245, 1247–49 (Ohio Ct.C.P.2000); *Morriss v. Barton*, 200 Okla. 4, 190 P.2d 451, 459–60 (1947); *Ashcraft v. Saunders*, 251 Or. 139, 444 P.2d 924, 926–27 (1968) (currently codified at Or.Rev.Stat. Ann. § 30.080 (West, Westlaw through 2011 emergency session)); *Aldrich v. Howard*, 8 R.I. 125, 127 (1864) (currently codified at R.I. Gen. Laws Ann. § 9–1–8 (West, Westlaw through Jan. 2010 Sess. Ch. 321)); *Olson–Roti v. Kilcoin*, 653 N.W.2d 254, 260–62 (S.D.2002); *Hayes v. Gill*, 216 Tenn. 39, 390 S.W.2d 213, 217 (1965); *In re Estate of Garza*, 725 P.2d 1328, 1330

(Utah 1986); *Dalton v. Johnson*, 204 Va. 102, 129 S.E.2d 647, 650–51 (1963) (subsequently codified at Va.Code Ann. § 8.01–25 (West, Westlaw through 2011 Reg. Sess.)); *McWilliams v. Bragg*, 3 Wis. 424, 431 (1854) (currently codified at Wis. Stat. Ann. § 895.02 (West, Westlaw through 2011 Act 31)); *Parker v. Artery*, 889 P.2d 520, 524–25 (Wyo.1995); *State Farm v. Maidment*, 107 N.M. 568 (1998). Further, the Restatement of Torts advises that the death of the tortfeasor terminates liability for punitive damages. Restatement of the Law 2d, Torts, Section 926 (1977).

{¶24} In their decisions, these courts reasoned that the primary purposes of imposing punitive damages are not furthered if the tortfeasor is deceased because the element of deterrence requires a perception by others that the tortfeasor is being punished. See *Parker* at 525 (Wyo.); *State Farm* at 449 (N.M.); *Lohr* at 846 (Fla.) Some of the majority courts also opine that the imposition of punitive damages punishes the innocent estate and beneficiaries rather than the tortfeasor and that therefore the element of deterrence becomes diffused and is speculative at best. See *Quackenbush* at 1521 (D.Kan.); *State* at 449 (N.M.); *Lohr* at 846 (Fla.).

{¶25} A minority of courts in other states have held that a claim for punitive damages survives the death of a tortfeasor and may be pursued against his estate. See *Haralson v. Fisher Surveying, Inc.*, 201 Ariz. 1, 31 P.3d 114 (2001); *G.J.D., et al. v. Johnson*, 552 Pa. 169, 713 A.2d 1127 (1998); *Penberthy v. Price*, 281 Ill.App.3d 16, 666 N.E.2d 352 (1996); *Tiller v. Lippert*, 275 Mont. 1, 909 P.2d 1158 (1996); *Hofer v. Lavender*, 679 S.W.2d 470 (Tex. 1984); *Perry v. Melton*, 171 W.Va. 397, 299 S.E.2d 8 (1982). The minority view emphasizes the general deterrence aspect of punitive damages. For example, in *Penberthy v. Price*, the court noted that punitive damages

serve to punish the tortfeasor and to deter the tortfeasor and others from engaging in like conduct. 281 Ill.App.3d 16, 666 N.E.2d 352 (1996).

{¶26} We are persuaded by the approach adopted by the minority of courts in other states and find that there is no per se prohibition against the imposition of punitive damages against a deceased tortfeasor. In Ohio, the common law rule that certain causes of action abate upon the tortfeasor's death has been abrogated by R.C. 2305.21 which provides that, "in addition to the causes of action which survive at common law, causes of action for mesne profits, or injuries to the person or property, or for deceit or fraud, also shall survive; and such actions may be brought notwithstanding the death of the person entitled or liable thereto." Further, the Ohio Supreme Court has recognized that where a decedent had a right to punitive damages before his death, that right passes to his estate under Ohio Rev. Code section 2305.21. *Rubeck v. Huffman*, 54 Ohio St.2d 20, 23, 374 N.E.2d 411 (1978). The language of R.C. 2305.21 and *Rubeck* decision does not expressly allow or disallow punitive damages against an estate. However, under the R.C. 2305.21 and the *Rubeck* ruling by the Ohio Supreme Court, all causes of action, including all elements of recovery, survive as if the deceased party were still alive both on behalf of the estate of decedent and against the estate of the tortfeasor.

{¶27} In addition, the death of the tortfeasor does not completely thwart the purposes underlying the award of punitive damages. As noted by the Ohio Supreme Court, the purpose of punitive damages is to punish and deter certain conduct and the policy of awarding punitive damages is to punish the offending party and setting him or her up as an example to *others* so they might be deterred from similar conduct.

Moskovitz v. Mt. Sinai Med. Ctr., 69 Ohio St.3d 638, 651, 635 N.E.2d 331 (1994); *Preston v. Murty*, 32 Ohio St.3d 334, 512 N.E.2d 1174 (1987). The imposition of punitive damages on a decedent's estate serves to deter others from similar conduct. Further, we are not persuaded by the argument that imposing punitive damages punishes the innocent beneficiaries of the estate. It stands to reason that the tortfeasor's beneficiaries have no right or entitlement to more than the tortfeasor would have had he or she lived and a judgment for punitive damages been imposed. Finally, as noted by the courts adopting the minority view, safeguards exist to protect against the arbitrary imposition of punitive damages such as a jury instruction that the award of punitive damages is being imposed against the estate or a remittitur by the trial judge. *G.J.D., et al. v. Johnson*, 552 Pa. 169, 176, 713 A.2d 1127 (1998).

{¶28} Accordingly we find that the question of whether punitive damages are appropriate in a particular case should be resolved by the trier of fact.

{¶29} Appellant's First Assignment of Error is sustained.

II.

{¶30} In her Second Assignment of Error, Appellant argues that the trial court erred in denying her request for attorney fees based on its ruling that punitive damages are not recoverable against decedent. We agree.

{¶31} The Ohio Supreme Court has stated that if a trier of fact determines that punitive damages are proper, "the aggrieved party may also recover reasonable attorney fees." *Columbus Finance, Inc. v. Howard, et al.*, 42 Ohio St.2d 178, 327 N.E.2d 654 (1975). Accordingly, the trial court erred in denying Appellant's request for attorney fees based solely on its ruling that punitive damages are not recoverable

against decedent. Based on this Court's disposition of Assignment of Error I, Appellant's second assignment of error is sustained.

{¶32} For the foregoing reasons, the judgment of the Court of Common Pleas of Fairfield County is reversed, and the cause is remanded to the court for further proceedings consistent with this decision.

By: Gwin, P.J.

Delaney, J. concurs.

Wise, dissents.


HON. W. SCOTT GWIN

HON. JOHN W. WISE


HON. PATRICIA A. DELANEY

WSG:clw 0613

Wise, J., dissenting

{¶33} I respectfully dissent from the majority opinion. The purposes of punitive damages in the state of Ohio are not designed to compensate victims, but to punish and deter conduct. Upon the death of the tortfeasor, the law can no longer punish him or her from similar conduct in the future. Since punishment is no longer possible, deterrence is the only remaining goal. Since deterring the actual tortfeasor is no longer a possibility or a necessity, it is likewise no longer possible to hold him or her out as an example to deter others. Punishing his or her Estate is one step removed and therefore waters down or dilutes any such deterrent effect. Assessing punitive damages against an estate serves to neither punish nor deter the tortfeasor. I believe that separating the punishment from the deterrent aspect frustrates the purpose of punitive damages and that any deterrence would be speculative at best.

{¶34} I would therefore join the majority of other jurisdictions in finding that the purposes of punitive damages are thwarted upon the death of the tortfeasor. (See Idaho Code Ann. § 5-327(1) (West, Westlaw through 2011 Chs. 1-335); Vt. Stat. Ann. tit. 14, § 1454 (West, Westlaw through 2011 Sess. No. 28); *Fehrenbacher v. Quackenbush*, 759 F.Supp. 1516, 1521-22 (D.Kan.1991) (applying Kansas law); *Sanchez v. Marquez*, 457 F.Supp. 359, 364 (D.Colo.1978) (applying Colorado law) (currently codified at Colo.Rev.Stat. Ann. § 13-20-101(1) (West, Westlaw through July 1, 2011)); *Doe v. Colligan*, 753 P.2d 144, 146 (Alaska 1988); *Evans v. Gibson*, 220 Cal. 476, 31 P.2d 389, 395 (1934) (subsequently codified at Cal.Civ.Proc.Code § 377.42 (1992)); *Jonathan Woodner Co. v. Breeden*, 665 A.2d 929, 938-40 (D.C.1995); *Lohr v. Byrd*, 522 So.2d 845, 846-47 (Fla.1988); *Morris v. Duncan*, 126 Ga. 467, 54 S.E. 1045, 1046-47 (1906) (subsequently codified at Ga.Code Ann. § 9-2-41 (West, Westlaw

through 2011 Reg. Sess.)); *Crabtree ex rel. Kemp v. Estate of Crabtree*, 837 N.E.2d 135, 138–40 (Ind.2005); *Stewart v. Estate of Cooper*, 102 S.W.3d 913, 915–16 (Ky.2003); *Edwards v. Ricks*, 30 La. Ann. 926, 928 (1878); *Prescott v. Knowles*, 62 Me. 277, 279 (1874) (currently codified at Me.Rev.Stat. Ann. tit. 18–A, § 3–818 (West, Westlaw through 2011 1st Reg. Sess.)); *Wilkins v. Wainwright*, 173 Mass. 212, 53 N.E. 397, 397–98 (1899) (currently codified at Mass. Gen. Laws Ann. ch. 230, § 2 (West, Westlaw through 2011 1st Annual Sess. Ch. 67)); *Thompson v. Estate of Petroff*, 319 N.W.2d 400, 408 (Minn.1982); *Hewellette v. George*, 68 Miss. 703, 9 So. 885, 887 (1891) (subsequently codified at Miss.Code Ann. § 91–7–235 (West, Westlaw through 2011 legislative sessions)), *overruled on other grounds by Glaskox ex rel. Denton v. Glaskox*, 614 So.2d 906, 907 (Miss.1992); *Tietjens v. Gen. Motors Corp.*, 418 S.W.2d 75, 88 (Mo.1967); *Allen v. Anderson*, 93 Nev. 204, 562 P.2d 487, 489–90 (1977) (subsequently codified at Nev.Rev.Stat. Ann. § 41.100(2) (West, Westlaw through 2010 Special Sess.)); *Jaramillo v. Providence Wash. Ins. Co.*, 117 N.M. 337, 871 P.2d 1343, 1350–52 (1994); *Gordon v. Nathan*, 43 A.D.2d 917, 352 N.Y.S.2d 464, 465 (1974) (currently codified at N.Y. Est. Powers & Trusts Law § 11–3.2(a)(1) (McKinney, Westlaw through 2011 Sess.)); *Harrell v. Bowen*, 179 N.C.App. 857, 635 S.E.2d 498, 500 (2006); *Mongold v. Estate of Gilbert*, 114 Ohio Misc.2d 32, 758 N.E.2d 1245, 1247–49 (Ohio Ct.C.P.2000); *Morriss v. Barton*, 200 Okla. 4, 190 P.2d 451, 459–60 (1947); *Ashcraft v. Saunders*, 251 Or. 139, 444 P.2d 924, 926–27 (1968) (currently codified at Or.Rev.Stat. Ann. § 30.080 (West, Westlaw through 2011 emergency session)); *Aldrich v. Howard*, 8 R.I. 125, 127 (1864) (currently codified at R.I. Gen. Laws Ann. § 9–1–8 (West, Westlaw through Jan. 2010 Sess. Ch. 321)); *Olson–Roti v. Kilcoin*, 653 N.W.2d 254, 260–62

(S.D.2002); *Hayes v. Gill*, 216 Tenn. 39, 390 S.W.2d 213, 217 (1965); *In re Estate of Garza*, 725 P.2d 1328, 1330 (Utah 1986); *Dalton v. Johnson*, 204 Va. 102, 129 S.E.2d 647, 650–51 (1963) (subsequently codified at Va.Code Ann. § 8.01–25 (West, Westlaw through 2011 Reg. Sess.)); *McWilliams v. Bragg*, 3 Wis. 424, 431 (1854) (currently codified at Wis. Stat. Ann. § 895.02 (West, Westlaw through 2011 Act 31)); *Parker v. Artery*, 889 P.2d 520, 524–25 (Wyo.1995); *State Farm v. Maidment*, 107 N.M. 568 (1998); see also Restatement (Second) of Torts §§ 908 cmt. a, 926(b) (1979).

{¶35} In these decisions, the courts reasoned that the primary purposes of imposing punitive damages are not furthered if the tortfeasor is deceased because the element of deterrence requires a perception by others that the tortfeasor is being punished. (See *Parker* at 525 (Wyo); *State Farm* at 449 (N.M.); *Lohr* at 846 (Fla). “Since the purpose of punitive damages is to punish the wrongdoer for his acts ... and to deter him from the commission of like wrongs in the future, the reason for such damages ceases to exist with his death.” *Whelan v. Rallo*, 52 Cal.App.4th 989, 60 Cal.Rptr.2d 876, 877 (1997).

{¶36} While mindful that certain situations could arise where public policy could support an award of punitive damages based on deterrence to the public as a whole, I find that those issues of public policy belong in the realm of the legislature, not the courts.


HON. JOHN W. WISE

APPENDIX B

Judgment Entry of the Fairfield County Court of Appeals, Fifth Appellate District, Appeal No.
13 CA 47 (July 7, 2014)

IN THE COURT OF APPEALS FOR FAIRFIELD COUNTY, OHIO
FIFTH APPELLATE DISTRICT

FILED
2014 JUL -7 PM 12: 35
CLERK OF COURTS
FAIRFIELD CO. OHIO

CHRISTINE MARIE WHETSTONE,
Individually and as Parent and Natural
Guardian and Next Friend of OLIVIA
CASTLE, Minor and LEA CASTLE, Minor

Plaintiff-Appellant

-vs-

ERIN K. BINNER, Administrator of the
Estate of ROXANNE MCCLELLAN,
Deceased

Defendant-Appellee

JUDGMENT ENTRY

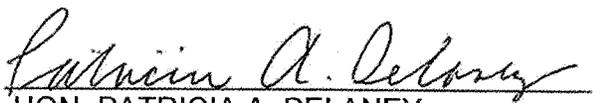
Case No. 13 CA 47

For the reasons stated in our accompanying Memorandum-Opinion, the judgment of the Court of Common Pleas of Fairfield County, Ohio, is reversed and remanded.

Costs assessed to Appellee.


HON. W. SCOTT GWIN

HON. JOHN W. WISE


HON. PATRICIA A. DELANEY

APPENDIX C

Judgment Entry of the Fairfield County Court of Common Pleas
Case No. 10 CV 1247
(May 7, 2013)

IN THE COMMON PLEAS COURT OF FAIRFIELD COUNTY, OHIO

CHRISTINE MARIE WHETSTONE, :
INDIVIDUALLY AND AS PARENT :
NATURAL GUARDIAN AND NEXT :
FRIEND OF OLIVIA CASTLE, :
MINOR AND LEA CASTLE, MINOR, :

Plaintiff, :

v. :

ERIN K. BINNER, ADMINISTRATOR :
OF THE ESTATE OF ROXANNE :
MCCLELLAN, :

Defendant. :

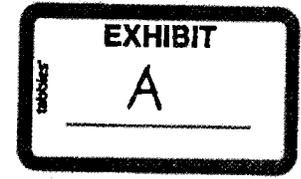
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DEBORAH S. HILLYER
CLERK OF COURTS
FAIRFIELD CO., OHIO

Case No. 10 CV 1247

Judge Berens

ENTRY Regarding Damages



This matter is before the Court for a determination of the damages to be awarded to Plaintiff Christine Whetstone, individually and on behalf of her children, Olivia and Lea Castle, minors against Erin K. Binner, Administrator of the Estate of Roxanne McClellan. Liability for damages arises from the tortious conduct of Roxanne McClellan on June 29, 2010, for which Default Judgment has been previously granted.

I. Compensatory Damages for Lost Wages and Past and Future Medical and Counseling Expenses.

The Court awards Plaintiff Christine Whetstone compensatory damages in the amount of \$500.00 for lost wages, which she incurred as a proximate result of Roxanne McClellan's (hereinafter "McClellan") conduct. In particular, directly due to McClellan's actions Lea and Olivia Castle required mental health counseling. According to Christine Whetstone's testimony, which was not rebutted, each time these minors went to counseling, Plaintiff Christine

Whetstone accompanied them and, as a result, missed work for a total of approximately two weeks, resulting in lost wages, which the Court determines to be a total of \$500.00.

Plaintiff presented evidence that she and Lea and Olivia Castle received mental health counseling as a result of the actions of McClellan. All expenses for counseling were paid by insurance. Plaintiff incurred no out-of-pocket expenses for these services. Plaintiff Christine Whetstone also testified that she was billed \$730.00 for medical services provided at the emergency department of the Fairfield Medical Center on behalf of Olivia Castle as a result of McClellan's assault of Olivia. Plaintiff did not present evidence or testimony that she paid this bill, and in any event, as far as the financial losses she incurred, Plaintiff testified that she is only seeking reimbursement for lost wages.

No evidence was presented with regard to Plaintiff's claims for future medical or counseling expenses for herself or her children. Therefore, the Court declines to award any damages relative to that aspect of the Complaint.

II. Non-Economic Compensatory Damages for Pain, Suffering, Emotional Distress, and Loss of Consortium

Plaintiff Christine Whetstone seeks compensation in this regard for herself and Olivia and Lea Castle as follows:

- A. For the assault committed by McClellan upon Olivia and Lea Castle on June 29, 2010 (Counts One and Two of the Complaint);
- B. For the false imprisonment of and detention of Olivia and Lea Castle on June 29, 2010 (Count Three of the Complaint);
- C. For the emotional distress caused by McClellan to the Plaintiff and Olivia and Lea Castle on June 29, 2010 (Count Four of the Complaint);

- D. For the assault committed by McClellan upon Plaintiff Christine Whetstone on June 29, 2010 (Counts Five and Six of the Complaint);
- E. For the loss of consortium, care, companionship, support, and services of Plaintiff Christine Whetstone's children, Olivia and Lea Castle, which Plaintiff suffered as a result of McClellan's conduct on June 29, 2010, and for such losses as Plaintiff may suffer in the future in this regard.

The Court has considered the nature of McClellan's conduct and her relationship to Olivia and Lea Castle, who were 5 ½ and 2 ½ years old, respectively, on June 29, 2010, the date of the incident. On that date, McClellan, Olivia and Lea's great aunt, was babysitting the children and, as such, was entrusted with their care and safety. However, without provocation and with actual malice, McClellan intentionally assaulted and battered Olivia by strangling and attempting to suffocate her while restraining her against her will.

Fortunately, Plaintiff Christine Whetstone arrived at McClellan's home while this was occurring and immediately, upon observing the assault upon Olivia, intervened. Upon entering the bedroom of McClellan's home where the attack was occurring, Plaintiff Christine Whetstone observed McClellan with one hand on Olivia's neck and her other hand holding a pillow over Olivia's face. Olivia was not breathing. Plaintiff Christine Whetstone struggled with McClellan in order to force her to release her grasp on Olivia's neck. Although McClellan was resisting, Plaintiff Christine Whetstone was able to free Olivia from McClellan's grasp. Plaintiff Christine Whetstone then picked up Lea, who fortunately remained asleep through this entire event, and with Olivia, escaped quickly from the house, with McClellan chasing after her and her children. Lea woke up only as Plaintiff carried her out of the house.

Plaintiff Christine Whetstone immediately filed a report with the Lancaster Police Department, and quickly thereafter took Olivia to the emergency room of the Fairfield Medical Center for an assessment of her injuries. The emergency room physician noted a mark on Olivia's left cheek, scratches on her chin and chest, and a hemorrhage to Olivia's left eye. See Plaintiff's Exhibit 11. Olivia testified at the hearing of this matter that during the attack, McClellan strangled and tried to suffocate her, that McClellan hurt her, and that it felt as if McClellan was clawing into the skin of her neck with her fingernails. Christine Whetstone observed redness and scratches on Olivia's neck.

As a proximate result of the assault, battery, and unlawful restraint, Christine Whetstone, Olivia, and Lea engaged in counseling with Mrs. Dawn McCoy, L.S.W. Details of the services provided, the nature of the counseling, and diagnoses and treatment are contained in Plaintiff's Exhibit 2. Mrs. McCoy provided counseling services to Olivia, Lea, and Christine Whetstone from September 2010 to April 2012. As the treatment summaries contained in Exhibit 2, dated January 5, 2011, indicate, Plaintiff Christine Whetstone was diagnosed with Post Traumatic Stress Disorder. Olivia and Lea Castle were diagnosed with Post Traumatic Stress Disorder and with being a victim of physical abuse. As the treatment notes indicate, Olivia experienced anger, trouble with sleeping, bad dreams, and fear as a result of McClellan's actions. Plaintiff Christine Whetstone experienced nightmares, anxiety, and anger as a result. The treatment notes also reflect that Lea experienced problems with sleeping and behavior and was scared and traumatized due to the incident involving the assault and battery of her sister. Both children expressed fear that McClellan would harm them in the future.

The treatment notes (and the record of these proceedings) reflect that McClellan died on April 22, 2011. The treatment notes indicated that Christine Whetstone, Olivia, and Lea

responded positively to counseling and continued to “work through” their anger and fear during counseling. Mrs. McCoy testified that once McClellan passed away, Olivia and Lea’s fear and anxiety subsided.

The treatment notes do not indicate whether or not, at the conclusion of counseling in April 2012, Plaintiff Christine Whetstone, Olivia, or Lea would likely continue to suffer emotional distress or harm in the future arising from the incident with McClellan. Plaintiff Christine Whetstone testified at the hearing that she remains angry about the incident; that Lea and Olivia still discuss it; that although counseling has helped them, the memory of what McClellan did to her and her children will never go away in her own mind and the minds of her children. Olivia testified that she remains fearful when she thinks of the events of June 29, 2010.

As to Plaintiff Christine Whetstone’s claims for compensation for assault, battery, intentional infliction of emotional distress and loss of consortium, the Court notes that during the course of the hearing regarding damages, Plaintiff testified that she was requesting compensation only for lost wages and compensation for her children’s injuries. Thus, the Court awards no compensation based on these claims beyond compensation for lost wages as addressed herein.

As to the claims brought by Plaintiff on behalf of Lea Castle for assault, battery, false imprisonment, and intentional infliction of emotional distress, the Court finds (a) there was no evidence produced to substantiate that Lea suffered any actual physical injury; and (b) that Lea was asleep during the incident wherein McClellan assaulted and battered Olivia and Plaintiff Christine Whetstone, and awoke only when she, Olivia, and Plaintiff Christine Whetstone were fleeing from McClellan’s home. Although Lea was only aware for a brief time of McClellan’s actions toward her, Olivia, and her mother, Mrs. McCoy opined that Lea suffered Post Traumatic Stress Disorder as a result of McClellan’s actions. The Court agrees that the actions of

McClellan of which Lea was aware were a proximate cause of the emotional distress and harm she suffered. Thus, as to Plaintiff's claim on behalf of Lea for intentional infliction of emotional distress, the Court grants judgment against Erin K. Binner, Administrator of the Estate of Roxanne McClellan, in the amount of \$1,000 for past and future emotional distress.

As to Plaintiff's claims brought on behalf of Olivia Castle for assault and battery, false imprisonment, and intentional infliction of emotional distress, the Court finds that Plaintiff has proven that Olivia Castle suffered physical injury and emotional distress and harm as a proximate result of McClellan's conduct. While the actual physical harm caused to Olivia was minimal, the Court finds the emotional harm and distress caused to Olivia was extensive. The extent and nature of the emotional harm and distress caused to this young child as a result of being strangled and nearly suffocated to death by a trusted relative and caregiver is significant. The Court has considered the impact McClellan's conduct had on Olivia, the fact that McClellan violated Olivia's trust and the evidence that despite counseling, the memory of McClellan's attack on Olivia has not, and will likely not ever, go away. As to past physical injuries and past and future emotional harm and distress caused by McClellan to Olivia Castle, the Court awards judgment against Erin K. Binner, Administrator of the Estate of Roxanne McClellan, in the amount of \$50,000.00.

III. Punitive Damages and Attorney's Fees

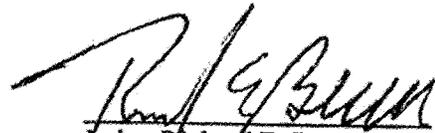
The Court recognizes that Plaintiff has requested the imposition of punitive damages against McClellan. It is undisputed, however, that McClellan is deceased. As to Plaintiff's claim for punitive damages, the Court finds that punitive damages cannot properly be awarded against the estate of a tortfeasor who is deceased. *Mongold v. Estate of Gilbert*, 114 Ohio Misc. 2d 32, 758 N.E.2d 1245 (Brown Cty. Com. Pl. Ct. 2000). Further, because punitive damages

cannot be awarded, Plaintiff's claim for attorney's fees cannot be considered as well. *See Apel v. Katz*, 83 Ohio St. 3d 11, 14, 697 N.E.2d 600 (1998); *Spurlock v. Douglas*, 4th Dist. No. 02CA19, 2003-Ohio-570, ¶ 20 (“[A]ttorney fees are recoverable in this context only if punitive damages are awarded.”).

Therefore, judgment is hereby granted against Defendant Erin K. Binner, Administrator of the Estate of Roxanne McClellan in the amount of \$51,500.00. Defendant is ordered to pay the costs of these proceedings.

This is a final appealable order and there is no just cause for delay.

IT IS SO ORDERED.


Judge Richard E. Berens

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