

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, :

Ohio Supreme Court Case No. 2014-1462

Plaintiff-Appellee, :

v. :

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

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

Defendant-Appellant. :

Court of Appeals Case No. 13 CA 47

PLAINTIFF-APPELLEE'S MEMORANDUM IN RESPONSE TO MEMORANDUM IN
SUPPORT OF JURISDICTION OF DEFENDANT-APPELLANT ERIN BINNER,
ADMINISTRATOR OF THE ESTATE OF ROXANNE MCCLELLAN

Charles M. Elsea (0085582)
Stebelton, Aranda & Snider, L.P.A.
109 North Broad Street
P.O. Box 130
Lancaster, Ohio 43130-0130
Telephone No. (740) 654-4141
Fax No. (740) 654-2521
Email: cmelsea@sas-lawfirm.com
Attorney for Defendant-Appellant,
Erin Binner, Administrator of the
Estate of Roxanne McClellan

Grant A. Wolfe (0015309)
300 East Broad St., Ste. 450
P.O. Box 1505
Columbus, Ohio 43216-1505
Telephone No. (614) 221-2330
Fax No. (614) 221-5996
Email: gwolfe19@ameritech.net
Attorney for Plaintiff-Appellee
Christine Marie Whetstone,
Individually and as Parent and
Natural Guardian and Next Friend
of O.C. and L.C., Minors

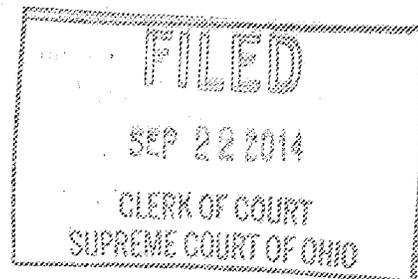


TABLE OF CONTENTS

	Page
STATEMENT OF PLAINTIFF-APPELLEE'S POSITION	3
ARGUMENT IN SUPPORT OF PLAINTIFF-APPELLEE'S POSITION ..	4
CONCLUSION	5
CERTIFICATE OF SERVICE	6

STATEMENT OF PLAINTIFF-APPELLEE'S POSITION AS TO WHETHER
A SUBSTANTIAL CONSTITUTIONAL QUESTION IS INVOLVED, OR
WHETHER THE CASE IS OF PUBLIC OR GREAT GENERAL INTEREST

This case does not involve any substantial constitutional question for the Court to resolve. Indeed, Defendant-Appellant makes no argument whatsoever that a substantial constitutional question has arisen as a result of the decision and judgment of the Court of Appeals in the case below.

Furthermore, neither party raised or argued any constitutional issue in either the trial court or the Court of Appeals. Accordingly, any argument that a substantial constitutional question is involved would be premature, as the parties did not litigate such issues in the cases below. *State ex rel. Royal v. City of Columbus*, 3 Ohio St.2d 154, 209 N.E.2d 405 (1965) citing *Williamson v. Rubich*, 171 Ohio St. 253, 168 N.E.2d 876 (1960)(Parties may not raise or argue issues for the first time in the Supreme Court.)

This case also does not present a matter of public or great general interest. The fact that the Court of Appeals' ruling in the case below follows the minority view on the issue of whether punitive damages may be awarded against a tortfeasor's estate does not, without more, elevate this issue to a matter of public or great general interest. The Court should permit the issue to be raised, argued and decided in other Ohio courts of appeal, inasmuch as the decision and judgment of the Fifth District Court of Appeals in the case below represents the first time this exact issue has been presented to and decided by an Ohio court of appeals.

The Court will benefit from other courts of appeal hearing and deciding this issue first before addressing this issue itself. There is no indication that this issue arises frequently in Ohio courts or that the public policy underlying the award of punitive damages in Ohio is in need of clarification or revision. The ruling of the Fifth District Court of Appeals in the case below is

consistent with the law of punitive damages as decided by this Court and involves only the interests of the parties in a specific factual situation. Indeed, the Fifth Circuit Court of Appeals denied Defendant-Appellant's motion to certify a conflict with the decision of the Seventh District Court of Appeals' decision in *Friedman v. Labos*, 23 Ohio Law Abs. 217 (1936) because the facts in *Friedman* are distinguishable from the facts in this case. Permitting the Ohio courts of appeal to decide this issue first will sharpen the arguments and competing theories involving the award of punitive damages against deceased tortfeasors, and provide a more comprehensive legal interpretation and treatment of the issue for the Court to consider, if and when it decides to address this issue.

ARGUMENT IN SUPPORT OF PLAINTIFF-APPELLEE'S POSITION AND IN
OPPOSITION TO DEFENDANT-APPELLANT'S PROPOSITION OF LAW NO. I.

The majority view disallowing punitive damages recoveries after a tortfeasor has died relies on the arguments that 1.) the primary purpose of imposing punitive damages is not furthered if the tortfeasor is deceased because the element of deterrence requires a perception by others that the tortfeasor is being punished, and/or 2.) the imposition of punitive damages against a tortfeasor's estate punishes innocent estate beneficiaries rather than the tortfeasor, with the result that the element of deterrence becomes diffused and speculative at best. *Whetstone v. Binner*, 2014 WL 3058546 (Ohio App. 5 Dist.)

The minority view that a claim for punitive damages survives the death of a tortfeasor and may be pursued against his estate emphasizes the general deterrence aspect of punitive damages, which serves to punish the tortfeasor and to deter the tortfeasor and others from engaging in like conduct. *Id.* The death of a tortfeasor does not completely thwart the purposes underlying the award of punitive damages since the imposition of punitive damages on a decedent's estate serves to deter others from similar conduct. *Id.* Nor does such an award of

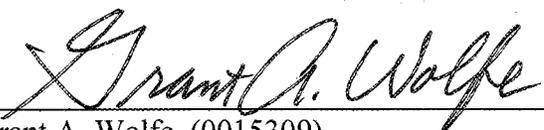
punitive damages punish the innocent beneficiaries of a estate, since the tortfeasor's beneficiaries have no right or entitlement to more than the tortfeasor would have retained had he or she lived and a judgment for punitive damages been imposed. *Id.*

Simply put, there should be no per se prohibition of the award of punitive damages against a deceased tortfeasor's estate. Additionally, safeguards exist at the trial court level to protect against the arbitrary imposition of punitive damages, such as limiting or cautionary jury instructions or remittitur. As the Fifth District Court of Appeals so aptly stated in paragraph 26 of its opinion, "[u]nder 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 the decedent and against the estate of the decedent." *Id.*; *See also Roedder v. Callis*, 2012 WL 1994936 (Mo. App. E. Dist. 2012)

CONCLUSION

For the foregoing reasons, Plaintiff-Appellee urges the Court to deny jurisdiction and dismiss this case.

Respectfully submitted,



Grant A. Wolfe (0015309)
Attorney for Plaintiff-Appellee,
Christine Marie Whetstone,
individually and as parent
and natural guardian and
next friend of Olivia Castle,
Minor and Lea Castle, Minor
300 E. Broad St., Ste. 450
P.O. Box 1505
Columbus, Ohio 43216-1505
Tel. No. (614) 221-2330
Fax No. (614) 221-5996

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing PLAINTIFF-APPELLEE'S MEMORANDUM IN RESPONSE TO MEMORANDUM IN SUPPORT OF JURISDICTION OF DEFENDANT-APPELLANT ERIN BINNER, ADMINISTRATOR OF THE ESTATE OF ROXANNE MCCLELLAN was served upon Charles M. Elsea, Attorney for Appellee, 109 N. Broad St., Suite 200, Lancaster, OH 43130 this 22nd day of September 2014 via electronic service and/or ordinary US mail.



Grant A. Wolfe (0015309)
Attorney for Plaintiff-Appellee