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**IN THE SUPREME COURT OF OHIO**

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Christine Marie Whetstone, et.al.	:	
	:	
Plaintiff/Appellee,	:	Case No. 2014-1462
	:	
vs.	:	
	:	
Erin Binner, Administrator of the	:	Jurisdictional Appeal from the
Estate of Roxanne McClellan	:	Fifth District Court of Appeals,
	:	Fairfield County, Case No. 13 CA 47
	:	
Defendant/Appellant.	:	

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**MERIT BRIEF OF APPELLANT ERIN BINNER, ADMINISTRATOR  
OF THE ESTATE OF ROXANNE McCLELLAN**

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## **STATEMENT OF THE CASE AND THE FACTS**

At approximately 10:00 P.M. on June 29, 2010, Roxanne McClellan attacked and attempted to kill her five year-old great-niece, O.C. Roxanne put her hand over the girl's mouth and smothered her with a pillow. O.C.'s sister, L.C., lay beside her. Fortunately, the girls' mother, Christine Whetstone, entered the bedroom during the assault and intervened. In her attempts to save her children from Roxanne, Christine was also assaulted. These facts have been undisputed since the inception of this litigation. [*See, e.g.* Supp. 1, (Complaint With Jury Demand Endorsed Hereon, October 1, 2010) (hereafter "Complaint"); Appx. 7 (Entry Granting Plaintiff's Motion for Default and Request for Damages Hearing, November 17, 2010); Appx. 6 (Entry, April 7, 2011) (overruling McClellan's Motion for Leave to Plead on the grounds that it failed to raise any meritorious defense to the allegations in the Complaint)]

Whetstone, on behalf of herself and her two minor children, filed suit against Roxanne on October 1, 2010 in the Fairfield County Court of Common Pleas. The Complaint set forth claims for assault, battery, false imprisonment, and intentional infliction of emotional distress. On November 10, 2010, with no answer or other responsive pleading having been filed, Whetstone filed a Motion for Default and Request for Damages Hearing. On November 18, 2010, the Trial Court entered a Default Judgment. The Court set a damages hearing for January 6, 2011.

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 in the Fairfield County Court Probate Court and was formally substituted as the party-defendant in the instant action in her role as Administrator of the Estate of Roxanne McClellan on December 30, 2011. Following a substitution of counsel for the Estate, the matter was reset for a hearing on damages on July 26, 2012.

Following the damages hearing and briefing by the parties, the trial court issued an Entry Regarding Damages on May 7, 2013, 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.<sup>1</sup> The trial court denied Whetstone'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. Whetstone perfected a timely appeal to the Fifth District Court of Appeals.

A divided Fifth District reversed and remanded. *Whetstone v. Binner*, 15 N.E.2d 905, 2014-Ohio-3018 (5<sup>th</sup> Dist.). The Court first stated:

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.

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<sup>1</sup> The Appellant herein did not appeal and does not here contest the amount of compensatory damages awarded.

*Whetstone, supra*, ¶ 22.<sup>2</sup> 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. From that decision, this Court accepted jurisdiction on the Appellant’s proposition of law.

### **ARGUMENT IN SUPPORT OF PROPOSITION OF LAW**

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

#### **A. Introduction: The purpose of punitive damages is not to compensate a plaintiff, but to punish and deter certain conduct. The dead can be neither punished nor deterred.**

Nothing is resisted or inevitable as death. Despite this (or perhaps because of it), when a human person dies, a medley of legal mechanisms springs to life. Widows and widowers are abruptly unmarried; children find themselves suddenly orphaned. Sometimes interests in property are created; sometimes they extinguish. Debts disappear; some debts materialize or mature. A man shoots another man, who clings to life for several weeks. The victim dies from his wounds, and at that moment, the inchoate crime is consummated. The murderer, for his part, is tried, convicted, and sentenced to death, but justice is only fulfilled when his execution is complete and his life terminates.

Until the Fifth District Court of Appeals rendered its decision below, no statutory or appellate authority existed in Ohio’s (then) 211-year history for the proposition that a court could inflict punitive damages on a dead man or woman’s estate.<sup>3</sup> To the contrary, the common law forbade imposing punitive damages on a dead person’s estate. This is the majority view. *See, e.g.*

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<sup>2</sup> *But see Friedman v. Labos*, 23 Ohio Law Abs. 217 (7 Dist. 1936) (holding that, as a matter of law, punitive damages cannot be assessed against a tortfeasor’s estate).

<sup>3</sup> Indeed, the *only* authority for the proposition arose from a single trial court case. *See Individual Business Services, Inc. v. Carmack*, Montgomery C.P. No. 2004 CV 08159, 2009 Ohio Misc. LEXIS 553, 2009 WL 8235992 (Nov. 18, 2009) ; *but see* fn. 17, *infra* (listing other Ohio cases with holdings contrary to *Carmack*).

Restatement (Second) of Torts § 926(b) (1979); *see also* Restatement (Second) of Torts § 908 cmt. a (no punitive damages against representative of deceased tortfeasor in a death action). It is deeply rooted in the history and purpose of punitive damages. This Court recently reaffirmed its longstanding statement of that purpose: "The purpose of punitive damages is not to compensate a plaintiff, but to punish and deter certain conduct." *Sivit v. Vill. Green of Beachwood, L.P.*, 2015-Ohio-1193, ¶ 7 (2015) (*quoting Moskowitz v. Mt. Sinai Med. Ctr.*, 69 Ohio St.3d 638, 651, 635 N.E.2d 331 (1994)). Left standing, the Fifth District decision does more than merely create law; it threatens the fabric of this Court's longtime punitive damages jurisprudence.

**B. Ohio's survival statute does not authorize the imposition of punitive damages against the estate of a deceased tortfeasor.**

**1. The common law did not permit the imposition of punitive damages against an estate.**

Although punitive damages are as old as recorded history,<sup>4</sup> the concept of the dead suing or being sued is a relatively recent innovation. At common law, "all actions in form *ex delicto*, for the recovery of damages, abated by the death of either party. This rule embraced injuries to person, to personal property and to real estate." *Russell v. Sunbury*, 37 Ohio St. 372, 374 (Ohio 1881); *Village of Cardington v. Adm'r of Fredericks*, 46 Ohio St. 442, 448, 21 N.E. 766 (Ohio 1889); *see also* Malcom Taylor, *Death*, in THE ENCYCLOPAEDIA OF PLEADING AND PRACTICE: UNDER THE CODES AND PRACTICE ACTS, AT COMMON LAW, IN EQUITY AND IN CRIMINAL CASES VOL. 5, 786 (Edward Thompson & Co., 1896). So severe was this rule, indeed, that the action would abate after a verdict had been rendered if a sole defendant died before final judgment.

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<sup>4</sup> *See, e.g.* Exodus 22:1 ("If a man shall steal an ox, or a sheep, and kill it, or sell it; he shall restore five oxen for an ox, and four sheep for a sheep."); *see also Transp. Ins. Co. v. Moriel*, 879 S.W.2d 10, 36–37 (Tex. 1994) (Doggett, J., concurring) (outlining brief review of the history of punitive damages as they have evolved in the common law).

Taylor, *Death, supra*, at 822. Absent statutory authority to the contrary, Ohio law treated death as an absolute abatement of an *ex delicto* action (though not an *ex contractu* action), including where final judgment had been entered against a defendant but his appeal perfected prior to his death. *Long v. Hitchcock*, 3 Ohio 274 (1827).

The basis for the harsh rule of *actio personalis moritur cum persona*<sup>5</sup> seems to have arisen from tort law's foundations in punishment. In Prosser's words:

The origin of the rule that personal tort actions die with the person of the plaintiff or defendant is rather obscure—the more so as contract actions which were equally 'personal' were held to survive the death of either. The best conjecture on the subject is that it was a result of the development of the tort remedy as an adjunct and incident to criminal punishment in the old appeal of felony and the action of trespass which succeeded it. Since the defendant could not be punished when he was dead, it was natural to regard his demise as terminating the criminal action, and tort liability with it.

W. Prosser, *Handbook of the Law of Torts* Section 126, at 898 (4<sup>th</sup> ed. 1971). Gradually, this draconian rule gave way to statutory expansion of tort law into the realm of the dead. *Id; see also* Taylor, *Death, supra*, at 822. For instance, in 1833 an English statute was passed which permitted actions for damages to real property to survive. Frederick Pollock, *A Treatise on the Law of Torts* at 52 (15<sup>th</sup> ed. 1951).

At the outset of this shift in the common law, survival of actions focused on property interests. *See, e.g.* BLACKSTONE'S COMMENTARIES 302 (Ch. 20).<sup>6</sup> "The line of demarcation," the

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<sup>5</sup> "A personal action dies with the person."

<sup>6</sup> Blackstone writes:

...Or, it may be, that the plaintiff is dead, for the death of either party is at once an abatement of the suit. And in actions merely personal, arising *ex delicto*, for wrongs actually done or committed by the defendant, as trespass, battery, and slander, the rule is that *actio personalis moritur cum persona*; and it never shall be revived either by or against the executors or other representatives. For neither the executors of the plaintiff have received, nor those of the defendant have committed, in their own personal capacity, any manner of wrong or injury. But

New Hampshire Supreme Court explained, “separating those actions which survive from those which do not, is, that in the first the wrong complained of affects primarily and principally property and property rights, and the injuries to the person are merely incidental, while in the latter the injury complained of is to the person, and the property and rights of property affected are incidental.” *Jenkins v. French*, 58 N.H. 532, 533 (N.H. 1879) (holding that a breach of contract claim could not stand against a deceased defendant physician where—though the form of the action was in contract—its substance pertained to injuries sustained due to negligent treatment). In Ohio, for instance, the legislature adopted statutes which “so modified [the common law] as to give an action *in favor* of a personal representative for injuries to *personal property*.” *Russell v. Sunbury*, 37 Ohio St. at 374 (emphasis original). These statutes, though giving executors or administrators rights to pursue claims relating to harm done to personal property, “did not extend to actions *against* executors or administrators; neither did they extend to injuries done to person or real property.” “Note,” 21 THE CENTRAL LAW JOURNAL 12, 235 (1885).

These distinctions, arcane and seemingly archaic<sup>7</sup> to modern tort law, are critical to understanding the basis of the nonabatement of pending actions and the survival of causes of actions. Ohio has never adopted a universal, comprehensive survivability scheme that would permit actions to continue unabated, in any and every case, or actions to be brought, in any and

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actions arising *ex contractu*, by breach of promise and the like, where the right descends to the representatives of the plaintiff, and those of the defendant have assets to answer the demand, though the suits shall abate by the death of the parties, yet they may be revived against or by the executors: being indeed rather actions against the property than the person, in which the executors have now the same interest that their testator had before.

<sup>7</sup> In fact, these distinctions are directly germane to survival or non-survival of certain actions today. See *infra*, Section (B)(2).

every case, without regard to whether any of its parties were alive or dead, without limitation on remedies or damages.

**2. The General Assembly did not expand the availability of punitive damages by passage of R.C. 2305.21 or any of its predecessor statutes.**

In reaching its decision, the Fifth District Court of Appeals below heavily relied on Ohio's survivor statute, R.C. 2305.21, which reads:

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. The Court reasoned that the language of the statute does not “expressly allow or disallow punitive damages against an estate.” *Whetstone*, at ¶ 26. Citing this Court’s holding in *Rubeck v. Hoffman*, 54 Ohio St. 2d 20, 374 N.E.2d 411 (1978), the Fifth District went on to conclude that “under R.C. 2305.21 and the *Rubeck* ruling...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 tortfeasor.” *Whetstone*, at ¶ 26 (emphasis added). Neither the language of the statute nor the statute’s history support the emphasized construction.

The goal of statutory construction is to ascertain and give effect to the intent of the General Assembly. *Hulsmeyer v. Hospice of Southwest Ohio, Inc.*, 2014-Ohio-5511, ¶ 21 (2014) (citing *State v. Hairston*, 101 Ohio St.3d 308, 2004-Ohio-96, 804 N.E.2d 471, ¶ 11); *Slingluff v. Weaver*, 66 Ohio St. 621, 64 N.E. 574 (1902), paragraph one of the syllabus. In determining the intent of the General Assembly, this Court looks first “to the statutory language and the purpose to be accomplished.” *Hulsmeyer, supra* (quoting *Sutton v. Tomco Machining, Inc.*, 129 Ohio

St.3d 153 2011-Ohio-2723, 950 N.E.2d 938, ¶ 12). Therefore, the only way that Ohio's survival statute abrogates the common law to the extent that "all causes of action, including all elements of recovery survive," as the Fifth District held, would be if the General Assembly specifically intended to extend the ambit of punitive awards to include those against the estates of deceased tortfeasors.

Although the Fifth District did not directly say so, the implication of its holding was that claims against an estate are left untouched by the death of a tortfeasor. This is untrue. For instance, the instant action concerned an assault, which meant it had to have been brought within one year of its accrual. R.C. 2305.111. However, had Roxanne McClellan died several days after the assault instead of several months, R.C. 2117.06(B) and (C) provide that Appellees' claim would have had to have been made within six months of McClellan's death. Filing a claim against the estate after the six-month window would have been fatal to *any* remedy, much less punitive damages, and the survival statute would not save the claim.

Statutory expansion of survivor claims is directly related to the *character* of the claims themselves. Before any "survival" statute existed, again, the common law rule was that "for injuries to the person arising ex delicto, the right to *bring* the action abated by the death of defendant." *Russell v. Sunbury*, 37 Ohio St. at 375. Expansions of the boundaries of this common law rule were always narrow. *See, e.g. Farrier v. Cairns*, 5 Ohio 45 (1831), syllabus ("When defendant dies after suit brought, and the action survives, the plaintiff can not recover costs against an executor or administrator.").

Indeed, to this day the General Assembly has *not* eroded the common law rule with respect to certain classes of claims that touch less on *property* or *person* and more on intangible nebula of harms. Revised Code Section 2311.21 reads:

Unless otherwise provided, no action or proceeding pending in any court shall abate by the death of either or both of the parties thereto, except actions for libel, slander, malicious prosecution, for a nuisance, or against a judge of a county court for misconduct in office, which shall abate by the death of either party.

R.C. 2311.21. Accordingly, “An action for slander does not survive the death of either party, and plaintiff may not commence a new action against a deceased defendant by substituting the deceased's executor as a party.” *Oakwood v. Makar*, 11 Ohio App. 3d 46, 46, 463 N.E.2d 61 (8 Dist. 1983), paragraph one of the syllabus. An action for slander is not, under the survival statute, one for “injuries to the person.” By the express, unambiguous terms of the abatement statute, on the other hand, such an action abates at the death of either party. Therefore, on its face the Fifth District’s contention that “*all* causes of action...survive” is erroneous.

As this Court observed in *Kennedy v. Byers*, 107 Ohio St. 90, 140 N.E. 630 (1923), addressing whether punitive damages were recoverable in a wrongful death action:

The right to maintain an action of the character of that involved in this case is conferred by statute, and the method of bringing the action, as well as the provision specifying those who may share therein as beneficiaries, are both matters of statute, **in the absence of which such action could not be maintained. The right conferred is accompanied by the limitation imposed, and the benefits thereof cannot be secured and enjoyed free from the restrictions and limitations which are a part of the same provision.**

*Kennedy v. Byers*, 107 Ohio St. at 95-96 (emphasis added). The wrongful death statute at issue in *Kennedy* limited recovery to “pecuniary loss,” and this Court concluded therefore that punitive damages could not be recovered. It is granted that the survival statute contains no such express limitation, but neither does it actually expressly grant the right to recover *any* damages, preserving instead “causes of action.”<sup>8</sup>

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<sup>8</sup> It should be noted here that it is long-settled Ohio law that punitive damages are not an independent cause of action. To the contrary, “[p]unitive damages are awarded as punishment for causing compensable harm and as a deterrent against similar action in the future. No civil cause of action in this state may be maintained simply for punitive damages.” *Niskanen v. Giant Eagle*,

A more analogous body of law relates to the state's sovereign immunity. Like the common law prohibition against *ex delicto* actions or causes of actions against an estate, the common law doctrine of sovereign immunity<sup>9</sup> generally provided that political subdivisions enjoyed tort immunity for the performance of governmental functions. *Frederick v. Columbus*, 58 Ohio St. 538, 51 N.E. 35 (1898), syllabus; *Broughton v. Cleveland*, 167 Ohio St. 29, 30, 146 N.E.2d 301 (1957). Notwithstanding that immunity, "when acting in a proprietary capacity, a municipal corporation may [have] generally be[en] held liable for tortious conduct in the same manner as would a private corporation or individual." *Ranells v. Cleveland*, 41 Ohio St. 2d 1, 4, 321 N.E.2d 885 (Ohio 1975).

In *Ranells*, this Court confronted a case in which plaintiffs were killed by the City of Cleveland's negligent operation of a pumping station and filtration plant. *Id.* The facts demonstrated, and the jury concluded, that the negligence rose to the level of wanton conduct which—given that the operation of the plant was a proprietary function for which sovereign immunity did not attach—would otherwise leave the City liable for punitive damages. The plaintiffs argued that "*Dayton v. Pease* (1854), 4 Ohio St. 80; *Hack v. Salem* (1963), 174 Ohio St. 383; and *Moloney v. Columbus* (1965), 2 Ohio St. 2d 213, [supported] the proposition that a municipal corporation, when acting in a proprietary capacity, assumes liability in a manner identical to a private corporation." *Ranells v. Cleveland*, 41 Ohio St. at 6.

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*Inc.*, 122 Ohio St. 3d 486, 489, 2009-Ohio-3626, 912 N.E.2d 595, quoting *Bishop v. Grdina*, 20 Ohio St.3d 26, 28, 485 N.E.2d 704 (1985), superseded by rule on other grounds. See also *Moskovitz v. Mt. Sinai Med. Ctr.*, 69 Ohio St.3d 638, 650, 635 N.E.2d 331 (1994) ("[P]unitive damages are awarded as a mere incident of the cause of action in which they are sought... Thus, compensable harm stemming from a cognizable cause of action must be shown to exist before punitive damages can be considered").

<sup>9</sup> Since abrogated by this Court decision in *Haverlack v. Portage Homes, Inc.*, 2 Ohio St.3d 26, 30, 442 N.E.2d 749 (1982) and reinstated statutorily subject to limitation by R.C. Chapters 2743 and 2744.

Nonetheless, this Court held that “in the absence of statutory authority specifically providing for an award of punitive damages, an injured plaintiff has no right to recover exemplary or punitive damages against a municipal corporation.” *Id.*<sup>10</sup> The Court’s rationale in *Ranells* is of equal weight here: imposition of punitive damages against a public entity contravenes the very purpose and policies underlying such awards. This Court held:

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. Cleveland*, 41 Ohio St. 2d at 7 (emphasis added). Likewise with the Ohio survivor statute, the *cause of action* does not, ipso facto, define the parameters of the potential *judgment* of the court so much as it defines the personal interest at stake for the plaintiff and creates a statutory conduit through which the common law tort claim can flow.<sup>11</sup> The statute does not enlarge the purpose of punitive damages.<sup>12</sup>

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<sup>10</sup> It should also be noted that this holding has survived the various iterations of sovereign immunity’s doctrinal evolution and is now enshrined in statutory law with respect to political subdivision liability. See R.C. 2744.05(A); *Spires v. Lancaster*, 28 Ohio St. 3d 76, 502 N.E.2d 614 (1986), syllabus.

<sup>11</sup> For a useful exposition of this principle, see *Sheik v. Hobson*, 64 Iowa 146, 148 (Iowa 1884):

Plaintiff had a right of action, on account of the slanderous words spoken by Rush, for such sum as would compensate her for the injury. This was her cause of action, and this is what was preserved to her by the statute at his death. But she had no personal interest in the question of his punishment. So far as he was concerned, the punitory power of the law ceased when he died. To allow exemplary damages now would be to punish his legal and personal representatives for his wrongful acts, but the civil law never inflicts vicarious punishment

<sup>12</sup> Furthermore, the General Assembly has expressed a policy in the Revised Code *against* vicarious liability for punitive or exemplary damages. See R.C. 3937.182 (insurance coverage for punitive damages prohibited); R.C. 2315.21(C)(1) (principal or master must authorize, participate in, or ratify tortious conduct to be held liable for punitive damages).

This was the conclusion of the Seventh District Court of Appeals in *Friedman v. Labos*, 23 Ohio Law Abs. 217 (7 Dist., 1936).<sup>13</sup> A case involving a breach of a promise to marry, the trial court in *Friedman* allowed the question to proceed to a jury despite the defendant's death during the pendency of the action, and further instructed the jury regarding the possibility of imposing punitive damages.<sup>14</sup> Following a verdict for the plaintiff, the defendant appealed the jury instruction for punitive damages.

The Seventh District 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 deceased. *Friedman*, 23 Ohio Law Abs. at 221. Specifically, that Court held that “[s]ince the purpose of awarding exemplary damages is to punish the wrongdoer, as a rule his death destroys the right to them and they can not be recovered against his estate or his heirs or other representatives.” *Id.*

As a claim sounding in contract, the claim for breach of a promise to marry would not abate at the death of the defendant. *See Jacob's Adm'r v. Canine*, 7 Ohio App. 268 (5 Dist., 1917), fifth paragraph of the syllabus<sup>15</sup> (*citing* General Code Sections 11397 and 11235, the predecessor statutes of R.C. 2311.21 (abatement) and R.C. 2305.21 (survival of claims), respectively). The statute in effect at that time, General Code Section 11235 read:

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

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<sup>13</sup> Appellant herein moved the Fifth District to certify a conflict to this Court in accordance with Ohio Rules of Appellate Procedure Rule 25 based on the apparent conflict of the Fifth District's decision below and the holding in *Friedman*. The Motion was denied.

<sup>14</sup> Although a breach of a promise to marry sounded in contract (*ex contractu*) and not tort (*ex delicto*), punitive damages were available in certain cases. *White v. Thomas*, 12 Ohio St. 312, 319 (1861).

<sup>15</sup> Punitive damages against an estate were not an issue in *Jacob's Adm'r* because the defendant died after a judgment had been rendered.

shall survive; and the action may be brought notwithstanding the death of the person entitled or liable thereto.

This language is substantively identical to the current R.C. 2305.21. Importantly, because the cause of action in *Friedman* was one *ex contractu*, the only application of the statute pertained to the first phrase, “In addition to the causes which survive at common law...” In other words, the cause of action in *Friedman* did not depend on *statutory* survivability.<sup>16</sup> **Nonetheless**, the Seventh District found that, at common law, the death of the wrongdoer prior to judgment would remove the possibility of punitive damages.<sup>17</sup> The statutory language merely expands the class of claims that survive the death of a party; it does not expand the policy or purpose of punitive damages under the common law, nor does it expand their availability.

Where many years of legislative acquiescence to an interpretation intervenes, this Court will give credence to that interpretation. *Akron v. Klein*, 171 Ohio St. 207, 211, 168 N.E.2d 564 (1960). Not only have seventy-nine years passed since *Friedman*’s holding, but the General Assembly explicitly addressed and reauthorized the language of General Code 11235 in the adoption of R.C. 2305.21 in 1953 without any substantive additions.<sup>18</sup> The history, language, and subsequent lack of amendment to Ohio’s survival statute definitively leads to the conclusion that

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<sup>16</sup> It was likely for this reason that the Seventh District did not specifically analyze the survivor statute.

<sup>17</sup> Incidentally, three other published opinions arrived at the same conclusion. 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*, S.D. Ohio No. 2:12-CV-814, 2014 WL 1050080 (Mar. 14, 2014), fn. 3; *Firestone v. Galbreath*, 895 F.Supp. 917, 933 (S.D. Ohio 1995). 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 (C.P. 2000).

<sup>18</sup> Notably, this was a persuasive fact in a recent decision by a sister court of this Court’s, in *In re Estate of Vajgrt*, 801 N.W.2d 570 (Iowa, 2011). That Court, holding that punitive damages cannot be assessed against the estate of a deceased tortfeasor, did not find that Iowa’s survivor statute—which is even broader than Ohio’s—expanded the availability of punitive damages beyond the grave. The Court noted that the legislature of Iowa had ample opportunity to address and expand the availability of punitive damages and declined to do so.

the Fifth District erred in holding that “all causes of action, **including all elements of recovery**, survive as if the deceased party were still alive.”

**3. Even if the Fifth District’s holding that “all causes of action, including all elements of recovery, survive as if the deceased party were still alive” is true, punitive damages as an element of recovery in a tort action must comport with R.C. 2315.21, which requires a finding of malice or aggravated or egregious fraud on the part of “that defendant.”**

The long history of tort reform in Ohio is irrelevant to this case,<sup>19</sup> but the General Assembly’s enactment of R.C. 2315.21 is very relevant. Had Roxanne McClellan not died before Appellees’ Complaint came to final judgment, it is very likely the fact finder would have imposed punitive damages pursuant to R.C. 2315.21(C), and indeed it is possible that the statutory “cap” would not have applied pursuant to R.C. 2315.21(D)(6). Section 2315.21 does not directly address the issue of punitive damages against an estate. However, it authorizes punitive damages *only* where:

The actions or omissions of **that defendant** demonstrate malice or aggravated or egregious fraud, of **that defendant** as principal or master knowingly authorized, participated in, or ratified actions or omissions of an agent or servant that so demonstrate.

R.C. 2315.21(C)(1) (emphasis added). There are two noteworthy provisions here. First, the legislature’s use of the word “that” indicates an identifiable, discrete defendant. There was no allegation below, nor could there be, that Erin Binner, Administrator of the Estate of Roxanne McClellan (the defendant)<sup>20</sup> demonstrated malice or aggravated or egregious fraud, or that she as principal or master knowingly authorized, participated in, or ratified actions or omissions of an agent or servant. *See, e.g. Stewart v. Estate of Cooper*, 102 S.W.3d 913, 916 (Ky. 2003)

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<sup>19</sup> This Court recently reviewed that history in *Arbino v. Johnson & Johnson*, 116 Ohio St. 3d 468, 469-471, 2007-Ohio-6948, 880 N.E.2d 420.

<sup>20</sup> *See infra* Section (C)(1)(a).

(interpreting KRS § 411.184, which requires proof of malice by “the defendant from whom such damages are sought,” to not include the estate (“It is undisputed that Appellants could not produce any evidence that the Estate acted in such a manner.”)).

Second, the statutory language manifests an intent to shield innocent third parties from vicarious liability. It requires the principal to have “*knowingly* authorized, participated in, or ratified actions or omissions of an agent or servant” that would otherwise justify an award of punitive damages. *Id.* (emphasis added). This principle is firmly enshrined in Ohio law. *See, e.g. Estate of Robert L. Beavers v. Knapp*, 175 Ohio App. 3d 758, 774-784, 2008-Ohio-2023, 889 N.E.2d 181 (10 Dist. 2008) (malice, active involvement, or ratification of employee’s tortious conduct required to impose punitive damages on employer). The General Assembly left open the door to respondeat superior liability for punitive damages only where “the Revised Code expressly [so] provides.” R.C. 2315.21(E).

While clearly an estate is not in an agency relationship with the deceased, the basic principle of punishing only the actual wrongdoer applies.<sup>21</sup> Merely acting within the scope of agency (such as employment) is insufficient to impose punishment on the principal. The tortious acts of the deceased, similarly, are insufficient to impose punishment on the estate.

#### **4. This Court’s holding in *Rubeck* does not contradict the proposition of law.**

This is a case of first impression before this Court. Nonetheless, as previously noted, the Fifth District below found this Court’s ruling in *Rubeck v. Hoffman*, *supra*, 54 Ohio St. 2d 20, persuasive for the proposition that punitive damages survive as a claim against the estate of a

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<sup>21</sup> *See infra* Section (C)(1)(a).

deceased tortfeasor.<sup>22</sup> Reliance below on *Rubeck* was misplaced, however, and this Court need not revisit the holding or rationale of that case to adopt the proposition of law advanced herein.

Clair Rubeck was killed in a head-on collision in Licking County in 1973, and thereafter her Estate brought two claims against the tortfeasor, Huffman, who survived the crash. One claim was for personal injuries sustained in the crash, and the other claim was brought under R.C. 2125.02 for wrongful death. A verdict for the plaintiff ensued, including an award of punitive damages. This Court addressed the question of whether the plaintiff “had a right to such damages which survived his death pursuant to” the survival statute, R.C. 2305.21. *Rubeck v. Huffman*, 54 Ohio St. 2d at 23.

Answering in the affirmative, this Court cited its holding in *Fielder v. Ohio Edison Co.*, 158 Ohio St. 375, 109 N.E.2d 855 (1952) and *Mahoning v. R. Co. v. Van Alstine*, 77 Ohio St. 395, 83 N.E. 601 (1908), as well as the survival statute. Without exposition of the specific issue of the survivability of punitive damages, this Court found that because the prior cases had held that an action for personal injury can be maintained by the administrator or executor of the victim—vis-à-vis the survival statute—punitive damages could still be imposed. *Rubeck v. Huffman*, 54 Ohio St. 2d at 23. That finding, of course, was **limited** to punitive damages for the *personal injuries sustained prior to death* (as opposed to the wrongful death claim), and in

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<sup>22</sup> The Montgomery County Court of Common Pleas, in the only other published opinion in Ohio finding similarly, also cited *Rubeck* to conclude that:

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...

*Individual Business Services, Inc. v. Carmack*, Montgomery C.P. No. 2004 CV 08159, 2009 Ohio Misc. LEXIS 553, 4.

*Rubeck* this Court reversed the award of punitive damages because the plaintiff failed to prove property loss or personal injury before he died. *Id.*

This holding is not inharmonious with the advanced proposition of law. In fact, its reasoning is consistent with such a rule. First, the defendant in *Rubeck* was alive at the time of judgment. He was available to be punished and deterred. The purpose and policy behind punitive damages in that case was fulfilled by the verdict.

With respect to the survival statute, *Rubeck* reiterated that the *claim* in a case involving a deceased party must be based on actual loss to person or property of the victim. Proof of malicious or wanton conduct by a particular defendant causing loss prior to the victim's death is paramount. Thus, just as the plaintiff in *Rubeck* might have had a right to punitive damages *but for his death* (and the resultant lack of compensable harm), Appellees herein might have had a right to punitive damages *but for the death of the tortfeasor* (and the resultant lack of a punishable party). *Rubeck* constrained the application of punitive damages, not enlarged it.

If anything, this Court has always narrowly construed the expansion of the common law affected by the survival and abatement statutes. *See, e.g. Farrier v. Cairns, supra*, 5 Ohio 45. For instance, in considering whether a divorce case abated following the death of either party, this Court observed that the abatement statute—at that time General Code 11397—did not specifically name divorce actions as those which abate. *Porter v. Lerch*, 129 Ohio St. 47, 56, 193 N.E. 766 (1934). Nonetheless, it held that:

Even in the absence of statute, it stands to reason that where one or both parties to a divorce action die before a final decree of divorce the action abates and there can be no revival. Circumstances have accomplished the primary object sought.

*Id.* The Court further found that:

the weight of authority supports the proposition that where death of one or both of the parties occurs *subsequent to a decree of absolute divorce*, whereby property

rights are fixed, the action does not abate and the decree or judgment complained of may be carried forward for review in the higher courts through the prescribed procedure in the particular jurisdiction.

*Id.* (emphasis original). The *Porter* rationale therefore rested on the notion that the divorce decree liquidated the marital estate, converting the obligations into “a money claim, a debt collectible by execution, and operated *per se* as a lien...” *Coffman v. Finney*, 65 Ohio St. 61, 67, 61 N.E. 155 (1901). Punitive damages, likewise, reduced to judgment, are collectible against an estate just as any other judgment. Such was not the case here, and the Trial Court properly found that it could not impose judgment for punitive damages against an estate.

**C. Imposing punitive damages against the estate of a deceased tortfeasor contravenes punitive damages’ concomitant purposes of punishment and deterrence.**

**1. The purposes of punishment and deterrence are frustrated, not satisfied, by imposing punitive damages against the estate of a deceased tortfeasor.**

**a. Imposing punitive damages against an estate punishes innocent beneficiaries and creditors.**

*He who learns must suffer.*

- Aeschylus, *Agamemnon*

Do the dead suffer? It is a question better left with theologians and philosophers than judges and juries.<sup>23</sup> A question the judiciary is better equipped to confront is whether the law should intentionally punish innocent, living parties. The Fifth District avoided this question

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<sup>23</sup> It is taken as assumed herein that the purpose of punishing the tortfeasor himself or herself is not met when he or she has died. As Professor Fischer observed, “[f]or a punitive damages award to punish, the award should touch the defendant so that he is aware of the sanction and its purpose.” James M. Fischer, *Understanding Remedies* 2d., 920 (LexisNexis, 2006). The purpose of this section and the one that follows it is to argue the related but separate claims that (1) imposing punitive damages against an estate *does* “punish” innocent parties, and (2) such punishment of innocents is unjust.

altogether, deciding instead that imposing punitive damages against the estate of a tortfeasor *does not punish* innocent parties:

[W]e 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.

*Whetstone*, ¶ 27. This summary dismissal of the question is unfortunate. The Fifth District's premise—that punitive damages inflicted on an estate do not punish innocent parties—does not stand even the slightest scrutiny.

The first and most obvious obstacle is the case caption. The substitution of a party-defendant is not a mere formality. *See, e.g. Baker v. Baker*, 20 Ohio App. 2d 316, 318, 253 N.E.2d 788 (1 Dist. 1969) (“If, upon the death of a sole party, the action is prosecuted without any proper substitution or revivor, the subsequent proceedings are erroneous and the rendition of judgment therein constitutes error for which such judgment may be reversed.”). Although the Civil Rules require a trial court to order the substitution of parties upon the death, that requirement only extends so far as “the claim is not thereby extinguished.” Civ.R. 25(A)(1); *see also Schectman v. Manitsas*, 12<sup>th</sup> Dist. Butler No. CA89-04-056, 1990 Ohio App. LEXIS 1060 (March 26, 1990) (an appeal ostensibly perfected on behalf of a deceased plaintiff (where no substitution of parties has been made) is properly dismissed). A slanderer's heir, under the Fifth District's reasoning, reaps a windfall at the expense of the slanderer's victim.

This is, in other words, an issue of a “real party in interest” versus a nominal party. *Compare Baker v. McKnight*, 4 Ohio St. 3d 125, 447 N.E.2d 104 (1983) (permitting relation back of amended pleadings for statute of limitations purposes where deceased defendant is initially sued). The three chief duties of an executor or administrator are: (1) collection of assets; (2) payment of debts; and (3) distribution of any balance to legatees, devisees, and others entitled

to share. 32 Oh Jur Decedents' Estates § 957. The executor or administrator owes the various constituencies of the estate, including beneficiaries and creditors, a fiduciary duty to treat claims impartially. *In re Estate of Young*, 4 Ohio App. 2d 315, 323, 212 N.E.2d 612 (10 Dist., 1964). The estate *is* the real party in interest; the beneficiaries and other creditors<sup>24</sup> have a vested interest in the assets of the estate upon the death of the testator. *See, e.g. Carpenter v. Denoon*, 29 Ohio St. 379, 395 (1876) (“Upon the probate of a domestic will, the title of the devisee becomes vested immediately, and, by relation, as of the date of the death of the testator...”); *Bielat v. Bielat*, 87 Ohio St. 3d 350, 358, 721 N.E.2d 28 (2000) (expectant rights as beneficiary vested at death of testator).

The Fifth District’s conclusion—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—is further confounded by the realities of estate planning. A future tortfeasor may open a joint and survivorship account, for instance, and fund it exclusively with his or her personal assets.<sup>25</sup> An award of punitive damages may be imposed against the tortfeasor and the judgment executed against the account. However, if the tortfeasor dies before execution of the judgment, the judgment creditor cannot reach it. *See Wright v. Bloom*, 69 Ohio St. 3d 596, 603, 635 N.E.2d 31 (1994).

This is because a “joint and survivorship account entered into by and between two parties...is a contract *inter vivos*, carrying a present, vested interest, and can in no wise be

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<sup>24</sup> Notably, it is not only the innocent beneficiaries who suffer. For insolvent estates or estates rendered insolvent by a punitive damages and/or attorney fees award, innocent creditors who would otherwise recover more of their claims under R.C. 2117.25(A)(10) will see their shares diluted proportionally to the “punishment” meted out by the jury. *See also* R.C. 2117.25(E) (shares paid ratably where insufficient funds exist to pay full class of creditors).

<sup>25</sup> This hypothetical assumes, of course, that the tortfeasor is not engaging in deliberate concealment or fraud to evade creditors.

affected by the laws of descent and distribution.” *Oleff v. Hodapp*, 129 Ohio St. 432, 436, 195 N.E. 838 (1935), first paragraph of the syllabus. Indeed, the co-owner’s interest cannot even be defeated with evidence that the depositor did not intend to create such a vested, present interest. *Wright v. Bloom*, *supra*. Likewise, absent an intention to defraud creditors by the payment of premiums, a life insurance beneficiary’s interest in the proceeds of the policy is unreachable by judgment creditors of the estate. *Weber v. Paxton*, 48 Ohio St. 266, 271, 26 N.E. 1051 (1891), first and third paragraphs of the syllabus. The conclusion that the ultimate beneficiaries of the disposition of a tortfeasor’s assets do not have a “right or entitlement” to more than the tortfeasor would have retained is clearly erroneous. Indeed, it is *only* the probate beneficiaries and creditors that would be subjected to punitive damages; the nonprobate beneficiaries would, if punitive damages were to be considered legitimately inflicted upon an estate, reap a windfall.<sup>26</sup>

Finally and more fundamentally, the illogic of the Fifth District’s holding eviscerates the purpose of punitive damages. It is the reasoned judgment of the court or jury imposing the punishment and setting the example, not the act, that gives rise to a right to punitive damages. *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, 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.”)). In imposing punitive damages, the judge or jury deprives the tortfeasor of certain funds for the unique and limited purpose of punishing and deterring certain conduct. To treat that deprivation

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<sup>26</sup> This demonstrates, too, that any general deterrent effect caused by a rule permitting punitive damages against an estate is more likely to encourage nonprobate estate planning than it is to encourage the avoidance of wrongdoing.

the same as any other obligation assumed by the tortfeasor, willingly or negligently, is to negate its punitive purpose. A tortfeasor **has an interest** in retaining any assets above and beyond what is necessary to compensate the victim. **That is the point of punitive damages: to deliberately invade and nullify that interest.** The punitive purpose of punitive damages **hinges** on this distinction. To say that **beneficiaries are not punished** because they receive no less than they would have received had the tortfeasor survived is to say that the **tortfeasor is not punished** because she does not retain assets or she is entitled to retain for the remainder of her life.<sup>27</sup>

**b. Punishing the innocent is antithetical to the retributive purpose of punitive damages. It turns punishment on its head and endorses an injustice.**

The public policy behind punitive damages in Ohio has always been “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, 2002-Ohio-3994, 773 N.E.2d 526; *see also Moskowitz v. Mt. Sinai Med. Ctr.*, 69 Ohio St. 3d 638, 653, 635 N.E.2d 331 (1994). The majority rule in the United States prohibits assessing punitive damages against estates. *See, e.g. In re Estate of Vajgrt*, 801 N.W.2d 570, 576, fn. 3 (Iowa 2011). Although it appears that fourteen states preclude such recovery by statute,<sup>28</sup> nineteen preclude recovery by judicial opinion.<sup>29</sup> The bulk of those judicial

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<sup>27</sup> Incidentally, the proposition that beneficiaries have no right or entitlement to more than the tortfeasor would have had equally calls into question the efficacy of deterrence as a policy behind punitive damages: how can a tortfeasor be deterred from tortious conduct by losing what he or she is not entitled to and nothing more?

<sup>28</sup> Cal. Civ. Proc. Code § 377.42 (West 1994) (specifically addressing claims against an estate); Colo. Rev. Stat. § 13-20-101 (1987) (survival statute); O.C.G.A. § 9-2-41 (Georgia survival statute); Idaho Code § 5-327 (1990) (survival statute); Me. Rev. Stat. Ann. tit. 18-A, § 3-818 (West 1981) (specifically addressing claims against an estate); Mass. Gen. Laws Ann. ch. 230, § 2 (West 1974) (same); Miss. Code Ann. § 91-7-235 (1973) (addressing which claims survive death); Nev. Rev. Stat. § 41.100 (1979) (survival statute); N.Y. Est. Powers & Trusts Law § 11-3.2(1) (McKinney 1981) (survival statute); Or. Rev. Stat. §§ 30.080 (1983) (addressing which claims survive death); R.I. Gen.Laws § 9-1-8 (1985) (same); Vt. Stat. Ann. tit. 14, § 1454 (1989)

opinions—many addressing survival statutes directly—rest on the punitive, or retributive, purpose of punitive damages and many give great weight to the concern that innocent parties are being punished instead. *See, e.g. Doe v. Colligan*, 753 P.2d 144, 146 (Alaska 1988) (“We reject Doe's ethical-cultural argument that the ‘sins’ of the deceased tortfeasor should be visited upon his children and family. In our view there is no social benefit to be derived from a rule which would permit the punishment of the estate and the heirs of the deceased tortfeasor.”) (*Lohr v. Byrd*, 522 So.2d 845, 846-47 (Fla.1988) (“If deterrence is justified in this instance, it would also be justified to require a decedent's family to pay a fine or be imprisoned for the decedent's criminal conduct.”); *Fehrenbacher v. Quackenbush*, 759 F.Supp. 1516, 1521-22 (D.Kan.1991) (“Awarding punitive damages would vicariously punish the heirs of the wrongdoer...”); *Stewart v. Estate of Cooper*, 102 S.W.3d 913, 915-16 (Ky.2003) (“The dissent's suggestion that KRS 411.184(1)(f) expresses a ‘clear public policy of deterring and punishing others,’ simply misconstrues that provision, which does not communicate any intention that Kentucky's courts should punish persons and entities indiscriminately regardless of whether they have committed any wrong.”); *Edwards v. Ricks*, 30 La. Ann. 926, 928 (1878) (“The measure of their liability

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(same); Va.Code § 8.01-25 (1977) (survival statute); Wis. Stat. Ann. § 895.01 (West 1983) (survival statute).

<sup>29</sup> *Doe v. Colligan*, 753 P.2d 144, 146 (Alaska 1988); *Pearson v. Semans*, 1991 Del. Super. LEXIS 163, 2 (Del. Super. Ct. May 16, 1991); *Lohr v. Byrd*, 522 So.2d 845, 846-47 (Fla.1988); *Crabtree ex rel. Kemp v. Estate of Crabtree*, 837 N.E.2d 135, 138-40 (Ind.2005); *In re Estate of Vajgrt*, 801 N.W.2d 570 (Iowa 2011); *Fehrenbacher v. Quackenbush*, 759 F.Supp. 1516, 1521-22 (D.Kan.1991) (applying Kansas law); *Stewart v. Estate of Cooper*, 102 S.W.3d 913, 915-16 (Ky.2003); *Edwards v. Ricks*, 30 La. Ann. 926, 928 (1878); *Thompson v. Estate of Petroff*, 319 N.W.2d 400, 408 (Minn.1982); *Tietjens v. Gen. Motors Corp.*, 418 S.W.2d 75, 88 (Mo.1967); *Maciag v. Estate of Kanter*, 2014 N.J. Super. Unpub. LEXIS 2134, 9 (Law Div. June 25, 2014); *Jaramillo v. Providence Wash. Ins. Co.*, 871 P.2d 1343, 1350-52 (N.M.1994); *Harrell v. Bowen*, 635 S.E.2d 498, 500 (N.C.Ct.App.2006); *Morriss v. Barton*, 190 P.2d 451, 459-60 (Okla.1947); *Olson-Roti v. Kilcoin*, 653 N.W.2d 254, 260-62 (S.D.2002); *Hayes v. Gill*, 390 S.W.2d 213, 217 (Tenn.1965); *In re Estate of Garza*, 725 P.2d 1328, 1330 (Utah 1986); *Jonathan Woodner Co. v. Breeden*, 665 A.2d 929, 938-40 (D.C.1995); *Parker v. Artery*, 889 P.2d 520, 524-25 (Wyo.1995).

consists in repairing the actual damage done to the person or property of the sufferer. Anything more is in the nature of punishment, and neither reason nor law would sanction its infliction upon any other than the wrongdoer.”); *Olson-Roti v. Kilcoin*, 653 N.W.2d 254, 260-62 (S.D.2002) (“It is not the policy of South Dakota law to punish the next generation for the wrongs of the last. And a dead wrongdoer is far beyond our temporal power to penalize.”).

It is for this reason, among others, that punitive damages are not available against municipalities, counties, or other governmental entities under 42 U.S.C. 1983 unless expressly authorized by statute. *City of Newport v. Fact Concerts, Inc.*, 453 U.S. 247, 259-71, 101 S. Ct. 2748, 69 L. Ed. 2d 616 (1981). “Regarding retribution,” the United States Supreme Court has opined, “it remains true that an award of punitive damages against a municipality ‘punishes’ only the taxpayers, who took no part in the commission of the tort. These damages are assessed over and above the amount necessary to compensate the injured party.” *Newport v. Fact Concerts*, 453 U.S. at 267.

Ohio law does not punish the dead. *See State v. Blake*, 53 Ohio App. 2d 101, 103, 371 N.E.2d 843 (8 Dist., 1977) (“A [criminal] 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.”).<sup>30</sup> When it punishes the living, it affords the wrongdoer the right to an allocution in mitigation prior to punishment. *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

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<sup>30</sup> In fact, the Eight District Court of Appeals in *Blake* held that if the defendant died prior to levying against the property of the defendant, the fine, even though reduced to judgment, could not be collected from the estate.

criminal prior to sentencing and afford him right of allocution); *see also Green v. United States*, 365 U.S. 301, 81 S.Ct. 653, 5 L. Ed. 2d 670 (1961) (similar rule at federal level). The dead cannot anymore speak for themselves than they can be punished. The retributive purpose of punitive damages is not merely unsatisfied by imposing such damages against an estate, it is contravened and perverted.

**c. Punishing the innocent serves no deterrent effect.**

Concomitantly to the retributive purpose, punitive damages serve a deterrent purpose. Deterrence can be broken down into two forms: specific deterrence (deterring future misconduct by the wrongdoer) and general deterrence (holding up the wrongdoer as an example to the community to deter others similarly situated). *See J. Dressler, Understanding Criminal Law* at 15 (4<sup>th</sup> ed. 2006). Similar to the retributive (punitive) purpose of punitive damages, specific deterrence is obviously wholly irrelevant where the tortfeasor is deceased. As Judge Lim observed: by the wrongdoer's death, "[a]ll 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." *Kaopuiki v. Kealoha*, 104 Haw. 241, 260, 87 P.3d 910, 929 (Ct. App. 2003) (Lim, J., dissenting).

Following this Court's lead, Ohio courts have held that the deterrent effect of a punitive damages award should focus on "deterrence **as to that defendant**," or specific deterrence. *Dardinger v. Anthem Blue Cross & Blue Shield*, 98 Ohio St. 3d 77, 102, 2002-Ohio-7113, 781 N.E.2d 121; *see also Burns v. Adams*, 4<sup>th</sup> Dist. Scioto No. 12CA3508, 2014-Ohio-1917, ¶ 100 (*quoting Dardinger*); *Northpoint Props. v. Charter One Bank*, 8<sup>th</sup> Dist. Cuyahoga No. 100210, 2014-Ohio-1430, ¶ 97 (same); *T.P. v. Weiss*, 5<sup>th</sup> Dist. Delaware No.12 CAE 03 0014, 2013-Ohio-

1402, ¶ 46 (same)<sup>31</sup>; *Innovative Techs. Corp. v. Advanced Mgmt. Tech.*, 2<sup>nd</sup> Dist. Montgomery No. 23819, 2011-Ohio-5544, ¶ 118 (same); *Cox v. Cox*, 12 Dist. Warren No. 2008-06-077, 2009-Ohio-1446, ¶ 46 (same); *Sicklesmith v. Hoist*, 169 Ohio App. 3d 470, 496, 2006-Ohio-6137, 863 N.E.2d 677 (7 Dist.) (same); *Burns v. Prudential Sec., Inc.*, 167 Ohio App. 3d 809, 853, 2006-Ohio-3550, 857 N.E.2d 621 (3 Dist.) (same). Indeed, this Court went on to observe in *Dardinger* that “those awards [which make] the most significant societal statements”—and therefore may possibly be considered statements of general deterrence—are “the most likely candidates for alternative distribution” to parties other than the plaintiff. *Dardinger v. Anthem Blue Cross & Blue Shield*, 98 Ohio St. 3d at 105.

In the eight states that presently recognize the availability of punitive damages against the estate of a deceased tortfeasor, a common theme among the judicial opinions is the general deterrent effect such awards may serve. *See, e.g. Shirley v. Shirley*, 261 Ala. 100, 73 So. 2d 77 (1954) (the general deterrent effect of punitive damages was sufficient justification under the state's wrongful death statute to allow such damages against a decedent's estate); *Haralson v. Fisher Surveying, Inc.*, 201 Ariz. 1 (Ariz. 2001) (although “it is impossible to punish or deter the decedent in this case... there are situations in which it would be appropriate, and perhaps even necessary, ‘to express society's disapproval of outrageous conduct’ by rendering such an award against the estate of a deceased tortfeasor.”); *Kaopuiki v. Kealoha*, 104 Haw. 241, 259 (Haw. Ct. App. 2003) (citing the general deterrent effect); *Penberthy v. Price*, 281 Ill. App. 3d 16, 666 N.E.2d 352, (1996) (in Illinois, punitive damages serve to punish the tortfeasor and to deter the tortfeasor and others from engaging in like conduct); *Hofer v. Lavender*, 679 S.W.2d 470, 475 (Tex. 1984) (citing the deterrent effect on others); *Perry v. Melton*, 171 W. Va. 397, 299 S.E.2d

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<sup>31</sup> Ironically, the Fifth District quoted *Dardinger* on this point below as well. *Whetstone, supra*, ¶ 16.

8 (1982) (same).<sup>32</sup> Some of these states, too, recognize alternate policies behind punitive damages. *See, e.g. Kaopuiki, supra*, at 258 (also citing punishment specifically of the tortfeasors' assets and "facilitate[ing] payment" of attorney fees as policy rationales).

Any policy justification for the general deterrent effect of punitive damages must forthrightly acknowledge the fact that the party punished is the estate and not the actual tortfeasor. It must then isolate the retributive component of punitive damages and make a policy determination that the general deterrent effect could outweigh the injustice of intentionally punishing innocent parties. Below, the Fifth District opined that "[t]he imposition of punitive damages on a decedent's estate serves to deter others from similar conduct." *Whetstone, supra*, ¶ 27. The quick use of the word "others" in that sentence deserves further inquiry. Other tortfeasors? To use the instant action as an example, how will other potential assailants be deterred by imposition of punitive damages on the beneficiaries and creditors of the Estate of Roxanne McClellan?

An intellectually honest answer is that there is only one feasible, conjectural class of potential deterree: a "tortfeasor who understands the distribution of the assets in his estate could be disrupted by a judgment for punitive damages." *In re Estate of Vajgrt*, 801 N.W.2d 570, 580 (Iowa 2011) (Hecht, J., dissenting).<sup>33</sup> Beyond the extremely narrow class of potential wrongdoers

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<sup>32</sup> Two other states, Montana and Pennsylvania, largely leave the question to the trier of fact. *Tillett v. Lippert*, 275 Mont. 1, 909 P.2d 1158 (1996); *G.J.D. v. Johnson*, 552 Pa. 169 (Pa. 1998).

<sup>33</sup> The majority in *In re Estate of Vajgrt* rejected this rationale:

[W]e doubt that the typical tortfeasor makes a calculation about the possibility of a punitive damage award against his or her estate, should he or she die before judgment. Thus, the marginal deterrence gain from a rule allowing punitive damages to be awarded against decedent's estate seems to us relatively small.

*In re Estate of Vajgrt*, 801 N.W.2d at 577-578.

who may be deterred by the prospect of their estate plans being disrupted,<sup>34</sup> no general deterrent effect ensues, and in fact even this as a prospective policy justification fails on both philosophical and legal grounds because it requires the intentional infliction of suffering on the innocent.<sup>35</sup>

From a legal/policy perspective, with respect to general deterrence, this Court held:

[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) (emphasis added). The deceased tortfeasor is unavailable to “hold up,” however, as an example to anybody. It is the *wrongdoer* being placed in the metaphorical stocks to deter the public. Deterrence cannot be separated from punishment. By abandoning retribution as a policy justification altogether and placing the

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<sup>34</sup> And, as discussed, savvy estate planners frequently and effectively evade probate distribution anyway.

<sup>35</sup> Obviously moral philosophy is beyond the scope of this case, but it bears mentioning that while long-standing and convincing utilitarian bases for punishment, standing on their own without regard to retributivism, exist, their defenders generally deny that intentionally punishing innocent parties can serve a utilitarian purpose. *See, e.g.* Binder and Smith, *Utilitarianism and Punishment of the Innocent*, 32 Rutgers L.J. 115 (2000) (critiquing modern utilitarians for responding to the charge that severing utility-based justifications for punishment from retributive-based justifications leads to the conclusion that it is morally acceptable to punish the innocent in one of five ways:

by accepting that punishment of the innocent is an implication of utilitarianism, denying the possibility of this consequence by imposing a "definitional stop," minimizing the likelihood of such a consequence, charging that retributivism entails the same consequence, and reinterpreting utilitarianism as a "restricted utilitarian" or "rule utilitarian" ethics.

*Id.* at 127. Binder and Smith argue that these responses are insufficient and miss a structural assumption inherent in classical utilitarianism: that penological utilitarianism is concerned with collective rules and action, and that it presupposes both an institutional architecture that guards individual rights and a collective agnosticism towards individual ethics. *Id.* at 218-224.

innocent estate beneficiaries and creditors in the stocks as an admonition to the public, the court is more likely to erode public confidence in the efficacy and fairness of the judiciary than it is to deter potential tortfeasors who are also careful estate planners. Therefore, Ohio's policy of imposing punitive damages to deter others from similar conduct is *not* satisfied by imposing punitive damages against an estate.

## **2. Imposing punitive damages against the estate of a tortfeasor violates due process.**

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 at, 98 (“The determination of whether a punitive damages award violates the federal Constitution is rooted in the Due Process Clause.”); U.S. Const. amend. XIV; *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).<sup>36</sup> 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 (2012), syllabus.

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<sup>36</sup> “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)

The United States Supreme Court articulated three guideposts, in *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 116 S. Ct. 1589 (1996), that courts must consider under the Due Process Clause of the Fourteenth Amendment in order for punitive damage awards to comport with elementary notions of justice. *See* U.S. Const. amend. XIV. The Court held that persons are constitutionally required to receive fair notice not only of the conduct that will subject him or her to punishment, “but also the severity of the penalty that a State may impose.” *Gore*, 517 U.S. at 574. In *Barnes v. Univ. Hosps. Of Cleveland*, 119 Ohio St.3d 173, 2008-Ohio-3344, 893 N.E.2d 142, this Court affirmed that the *Gore* analysis is a mandatory component of state punitive damages law. *Barnes*, 119 Ohio St. 3d at ¶ 38, *citing State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 123 S. Ct. 1513, 155 L. Ed. 2d 585 (2003).

The first guidepost is “the degree of reprehensibility of the defendant's conduct.” *Gore*, 517 U.S. at 562. The Supreme Court called this the “the first (and perhaps most important) indicium of a punitive damages award's excessiveness.” *Id.* It is obvious from the record below that neither the substituted defendant, Erin Binner, Administrator of the Estate of Roxanne McClellan, nor the beneficiaries or creditors of that estate had *any* conduct relating to the action of *any* degree of reprehensibility. This will be the case, by and large, any time an estate is sued for the wrongdoing of a deceased tortfeasor.

The third and final guidepost<sup>37</sup> under *Gore* is “the difference between [the punitive damages award] and the civil or criminal sanctions that could be imposed for comparable misconduct.” *Id.* 517 U.S. at 562. Again, *no* new criminal sanctions may attach to the Estate of

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<sup>37</sup> The second guidepost—the disparity between the actual or potential harm suffered by the plaintiff and the punitive damages award—relates to excessiveness without regard to the tortfeasor’s misconduct or other criminal or civil liability, and therefore due process concerns are not implicated under this guidepost *per se* by the assessment of punitive damages against an estate.

Roxanne McClellan. A jury may not convict the Estate of anything, and even if it did, a judge could not impose sentence against the Estate. In a word, *any* punitive damage award rendered against the innocent beneficiaries or creditors of an estate runs wholly against two of the three *Gore* guideposts. *Gore* and the Due Process Clause of the Fourteenth Amendment to the United States Constitution prohibit imposing punitive damages against the estate of a deceased tortfeasor.

### **CONCLUSION**

For the foregoing reasons, Appellant respectfully requests that this Court adopt the Proposition of Law, reverse the decision of the Fifth District Court of Appeals, and affirm the decision of the Fairfield County Court of Common Pleas.

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

The undersigned does hereby certify that a true and accurate copy of the Merit Brief of Appellant Erin Binner, Administrator of the Estate of Roxanne McClellan, was served via regular Electronic Mail and U.S. mail, postage prepaid, upon Grant A. Wolfe, 300 East Broad Street, Suite 450, PO Box 1505, Columbus, OH 43216-1505 on this 13th day of April, 2015.

/s/ Charles M. Elsea \_\_\_\_\_  
Charles M. Elsea (0085582)  
Attorney for Defendant/Appellant

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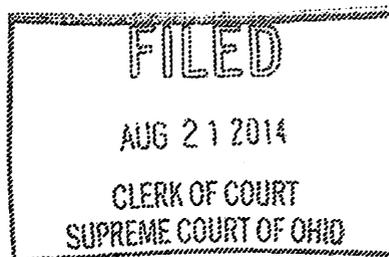
IN THE SUPREME COURT OF OHIO

<b>Christine Marie Whetstone, Individually</b>	:	Supreme Court of Ohio
<b>and as Parent and Natural Guardian and</b>	:	
<b>Next Friend of O.C. and L.C., Minors</b>	:	Case No. <u>14-1462</u>
	:	
Plaintiff/Appellee,	:	
	:	On Appeal from the
v.	:	Fairfield County Court of Appeals,
	:	Fifth Appellate District
	:	
<b>Erin Binner, Administrator of the</b>	:	
<b>Estate of Roxanne McClellan</b>	:	Court of Appeals
	:	Case No. 13 CA 47
	:	
Defendant/Appellant	:	

NOTICE OF APPEAL OF DEFENDANT/APPELLANT ERIN BINNER,  
ADMINISTRATOR OF THE ESTATE OF ROXANNE McCLELLAN

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

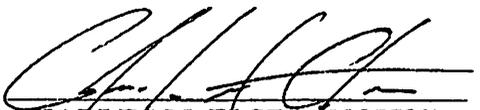


Defendant/Appellant, Erin Binner, Administrator of the Estate of Roxanne McClellan, hereby gives notice of Appeal to the Supreme Court of Ohio from the Judgment of the Fairfield County Court of Appeals, Fifth Appellate District entered in Court of Appeals Case No.13 CA 47 on July 7, 2014.

This case raises questions of public and great general interest.

Pursuant to S.Ct.Prac.R. 7.01(B)(2), Defendant/Appellant hereby gives notice that a motion to certify a conflict under App.R. 25 has been filed with the Court of Appeals and is currently pending.

Respectfully submitted,



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**CERTIFICATE OF SERVICE**

The undersigned does hereby certify that a true and accurate copy of the Notice of Appeal 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)  
Attorney for Defendant/Appellant

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

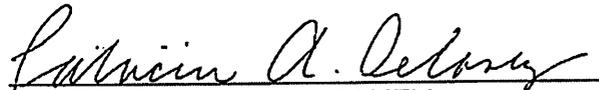
Case No. 13 CA 47

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

IN COMPUTER  
Charles  
Elsea

**ORIGINAL**

COURT OF APPEALS  
FAIRFIELD COUNTY, OHIO  
FIFTH APPELLATE DISTRICT  
**BOOK 21 Pgs. 782-798**

**SCANNED**  
**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

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:

For Plaintiff-Appellant

For Defendant-Appellee

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**APPENDIX 3**

*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

*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

B

**ORIGINAL**

IN COMPUTER

IN THE COMMON PLEAS COURT OF FAIRFIELD COUNTY, OHIO

FILED  
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CLERK OF COURTS  
FAIRFIELD CO. OHIO

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

Plaintiff,

Case No. 10 CV 1247

v.

Judge Berens

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

ENTRY Regarding Damages

Defendant.

CV 200 Pg 693 - 699

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**

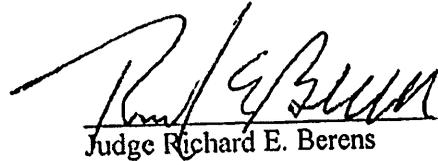
The Court recognizes that Plaintiff has requested the imposition of punitive damages against McClellan. It is undisputed, however, that McClellan is deceased. As to Plaintiff's claim for punitive damages, the Court finds that punitive damages cannot properly be awarded against the estate of a tortfeasor 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

Copies to:

Jason Price, Esq., Courthouse mailbox

Grant Wolfe, Esq., 261 S. Front St., P.O. Box 1505, Columbus, OH 43215

IN COMPUTER

IN THE COURT OF COMMON PLEAS OF FAIRFIELD COUNTY, OHIO

CHRISTINE MARIE WHETSTONE, :  
individually, and as parent, natural :  
guardian and next friend of Olivia Castle, :  
minor and Lea Castle, minor, :

2011 DEC 30 PM 3:17

COLLEEN J. KELLEY  
CLERK OF COURTS  
FAIRFIELD COUNTY, OHIO

Plaintiff, :

v. :

Case No. '10 CV 1247

ROXANNE MCCLELLAN, :

Judge Berens

CV 176 Pg 528

Defendant. :

ORDER GRANTING PLAINTIFF'S AMENDED MOTION  
FOR SUBSTITUTION OF PARTY

This matter came on for a hearing upon Plaintiff's Amended Motion for Substitution of Party, previously filed herein. It appearing to the Court that no response has been filed to Plaintiff's Amended Motion for Substitution of Party, the Court finds said Motion to be well-taken and hereby grants the same. It is therefore ORDERED that Erin Kay Binner, Administrator of the Estate of Roxanne McClellan, Deceased, be, and she hereby is, substituted herein as a party defendant for Roxanne McClellan.

It is so ORDERED.

  
\_\_\_\_\_  
Judge

APPROVED:

  
\_\_\_\_\_  
Grant A. Wolfe (SCR # 0015309)  
Attorney for Plaintiff

IN COMPUTER

IN THE COMMON PLEAS COURT OF FAIRFIELD COUNTY, OHIO

CHRISTINE WHETSTONE, ET AL., :  
 Plaintiffs, : Case No. 10 CV 1247  
 v. : Judge Berens  
 ROXANNE MCCLELLAN, : ENTRY  
 Defendants. : *CW 103 pg 748-749*

FILED  
 2011 APR -7 AM 9:06  
 DEBORAH SMALLEY  
 CLERK OF COURTS  
 FAIRFIELD CO. OHIO

This matter is before the Court upon the Motion for Leave to Plead and motion to postpone the damages hearing, both filed by Defendant Roxanne McClellan on December 29, 2011. For the following reasons, Defendants' motion for leave is **OVERRULED**.

The Complaint in this action was filed October 1, 2010, alleging damages resulting from several intentional torts. Defendant failed to answer or otherwise appear, and the Court granted default judgment as to liability and scheduled a damages hearing. Before the date scheduled for the damages hearing, Defendant filed the motions currently under consideration.

Civ.R. 55(B) provides that a default judgment may be set aside "in accordance with Rule 60(B)." Accordingly, the Court will construe Defendant's motion for leave as a motion under Civ.R. 55(B). Relief under Civ.R. 60(B) is available if the movant demonstrates that "(1) the party has a meritorious defense or claim to present if relief is granted; (2) the party is entitled to relief under one of the grounds stated in Civ.R. 60(B)(1) through (5); and (3) the motion is made within a reasonable time, and, where the grounds of relief are Civ.R. 60(B)(1), (2) or (3), not more than one year after the judgment, order or proceeding was entered or taken."<sup>1</sup> Additionally, "[t]he movant must submit factual material with his motion which demonstrates grounds which,

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<sup>1</sup> *GTE Automatic Elec., Inc. v. ARC Industries, Inc.* (1976), 47 Ohio St. 2d 146, 150-51, 351 N.E.2d 113.

if true, would constitute a defense to the action.”<sup>2</sup> Though evidentiary support is unnecessary, the movant must do more than make bare assertions that he is entitled to relief.<sup>3</sup> Instead, the movant must allege specific facts that support a defense on the merits.<sup>4</sup>

Defendant’s motion stated that Defendant has a serious illness and did not receive a copy of the Complaint until after the answer date had passed. Defendant asserted no defense on the merits. The Court is sympathetic to the situation and aware that default judgments are not favored in law or public policy. But the Court is bound to follow the law as set forth in the *GTE* decision. Because Defendant’s motion asserts no meritorious defense, the Court must **OVERRULE** Defendant’s motion for leave.

The damages hearing in this matter was originally scheduled for January 6, 2011. That date having long passed, the Court finds that Defendant’s motion to delay the damages hearing is moot. The Court will set a new date for the damages hearing by separate entry.

IT IS SO ORDERED.

  
Judge Richard E. Berens

Copies to:

John Harker, Courthouse mailbox

Grant Wolfe, 261 S. Front St., P.O. Box 1505, Columbus, OH 43215

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<sup>2</sup> *Bergmeyer v. DeLong*, 5th Dist. No. 2005CA00079, 2005-Ohio-5400, at ¶ 29.

<sup>3</sup> *Kay v. Marc Glassman, Inc.* (1996), 76 Ohio St.3d 18, 20, 665 N.E.2d 1102.

<sup>4</sup> *E.g., Kadish, Hinkel & Weibel Co., LPA v. Rendina* (1998), 128 Ohio App.3d 349, 352, 714 N.E.2d 984.

IN THE COURT OF COMMON PLEAS OF FAIRFIELD COUNTY, OHIO

FILED  
2010 NOV 18 PM 2:48  
CLERK OF COURT  
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. :

Case No. '10 CV 1247

ROXANNE MCCLELLAN, :

Judge Berens

Defendant. :

**ENTRY GRANTING PLAINTIFF'S MOTION FOR DEFAULT  
AND REQUEST FOR DAMAGES HEARING**

This matter is before the Court upon Plaintiff's Motion for Default and Request for Damages Hearing, previously filed herein. It appearing that the Defendant Roxanne McClellan was served with Summons and Complaint via certified mail on October 5, 2010, and has failed to serve and file an Answer or other responsive pleading to Plaintiff's Complaint, the Court hereby finds that Defendant is in default for failure to move or plead to Plaintiff's Complaint and that the Plaintiff is entitled to an evidentiary hearing to present evidence of damages incurred.

It is, therefore, ORDERED, ADJUDGED, and DECREED, pursuant to Rule 55(A) of the Ohio Rules of Civil Procedure, that the Defendant is hereby declared to be in default for failure to move or plead to Plaintiff's Complaint, and an evidentiary hearing on the issue of Plaintiff's damages shall be heard before the Court on the 6<sup>th</sup> day of

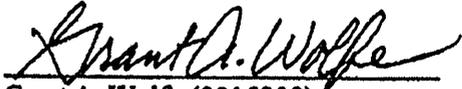
January, 2011, at 1:00 P.m. in Courtroom 206.

It is so ORDERED.

  
Richard E. Berens, Judge

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APPROVED:



Grant A. Wolfe (0015309)

Attorney for Plaintiff

COPY TO:

Roxanne McClellan, 1419 N. High ST., Lancaster, OH 43130

## **2305.21 Survival of actions.**

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.

Effective Date: 10-01-1953

## **2311.21 Abatement by death of party.**

Unless otherwise provided, no action or proceeding pending in any court shall abate by the death of either or both of the parties thereto, except actions for libel, slander, malicious prosecution, for a nuisance, or against a judge of a county court for misconduct in office, which shall abate by the death of either party.

Effective Date: 01-01-1958

## **2315.21 Punitive or exemplary damages.**

(A) As used in this section:

(1) "Tort action" means a civil action for damages for injury or loss to person or property. "Tort action" includes a product liability claim for damages for injury or loss to person or property that is subject to sections 2307.71 to 2307.80 of the Revised Code, but does not include a civil action for damages for a breach of contract or another agreement between persons.

(2) "Trier of fact" means the jury or, in a nonjury action, the court.

(3) "Home" has the same meaning as in section 3721.10 of the Revised Code.

(4) "Employer" includes, but is not limited to, a parent, subsidiary, affiliate, division, or department of the employer. If the employer is an individual, the individual shall be considered an employer under this section only if the subject of the tort action is related to the individual's capacity as an employer.

(5) "Small employer" means an employer who employs not more than one hundred persons on a full-time permanent basis, or, if the employer is classified as being in the manufacturing sector by the North American industrial classification system, "small employer" means an employer who employs not more than five hundred persons on a full-time permanent basis.

(B)

(1) In a tort action that is tried to a jury and in which a plaintiff makes a claim for compensatory damages and a claim for punitive or exemplary damages, upon the motion of any party, the trial of the tort action shall be bifurcated as follows:

(a) The initial stage of the trial shall relate only to the presentation of evidence, and a determination by the jury, with respect to whether the plaintiff is entitled to recover compensatory damages for the injury or loss to person or property from the defendant. During this stage, no party to the tort action shall present, and the court shall not permit a party to present, evidence that relates solely to the issue of whether the plaintiff is entitled to recover punitive or exemplary damages for the injury or loss to person or property from the defendant.

(b) If the jury determines in the initial stage of the trial that the plaintiff is entitled to recover compensatory damages for the injury or loss to person or property from the defendant, evidence may be presented in the second stage of the trial, and a determination by that jury shall be made, with respect to whether the plaintiff additionally is entitled to recover punitive or exemplary damages for the injury or loss to person or property from the defendant.

(2) In a tort action that is tried to a jury and in which a plaintiff makes a claim for both compensatory damages and punitive or exemplary damages, the court shall instruct the jury to return, and the jury shall return, a general verdict and, if that verdict is in favor of the plaintiff, answers to an interrogatory that specifies the total compensatory damages recoverable by the plaintiff from each defendant.

(3) In a tort action that is tried to a court and in which a plaintiff makes a claim for both compensatory damages and punitive or exemplary damages, the court shall make its determination with respect to whether the plaintiff is entitled to recover compensatory damages for the injury or loss to person or property from the defendant and, if that determination is in favor of the plaintiff, shall make findings of fact that specify the total compensatory damages recoverable by the plaintiff from the defendant.

(C) Subject to division (E) of this section, punitive or exemplary damages are not recoverable from a defendant in question in a tort action unless both of the following apply:

(1) The actions or omissions of that defendant demonstrate malice or aggravated or egregious fraud, or that defendant as principal or master knowingly authorized, participated in, or ratified actions or omissions of an agent or servant that so demonstrate.

(2) The trier of fact has returned a verdict or has made a determination pursuant to division (B)(2) or (3) of this section of the total compensatory damages recoverable by the plaintiff from that defendant.

(D)

(1) In a tort action, the trier of fact shall determine the liability of any defendant for punitive or exemplary damages and the amount of those damages.

(2) Except as provided in division (D)(6) of this section, all of the following apply regarding any award of punitive or exemplary damages in a tort action:

(a) The court shall not enter judgment for punitive or exemplary damages in excess of two times the amount of the compensatory damages awarded to the plaintiff from that defendant, as determined pursuant to division (B)(2) or (3) of this section.

(b) If the defendant is a small employer or individual, the court shall not enter judgment for punitive or exemplary damages in excess of the lesser of two times the amount of the compensatory damages awarded to the plaintiff from the defendant or ten percent of the employer's or individual's net worth when the tort was committed up to a maximum of three hundred fifty thousand dollars, as determined pursuant to division (B)(2) or (3) of this section.

(c) Any attorneys fees awarded as a result of a claim for punitive or exemplary damages shall not be considered for purposes of determining the cap on punitive damages.

(3) No award of prejudgment interest under division (C)(1) of section 1343.03 of the Revised Code shall include any prejudgment interest on punitive or exemplary damages found by the trier of fact.

(4) In a tort action, the burden of proof shall be upon a plaintiff in question, by clear and convincing evidence, to establish that the plaintiff is entitled to recover punitive or exemplary damages.

(5)

(a) In any tort action, except as provided in division (D)(5)(b) or (6) of this section, punitive or exemplary damages shall not be awarded against a defendant if that defendant files with the court a certified judgment, judgment entries, or other evidence showing that punitive or exemplary damages have already been awarded and have been collected, in any state or federal court, against that defendant based on the same act or course of conduct that is alleged to have caused the injury or loss to person or property for which the plaintiff seeks compensatory damages and that the aggregate of those previous punitive or exemplary damage awards exceeds the maximum amount of punitive or exemplary damages that may be awarded under division (D)(2) of this section against that defendant in the tort action.

(b) Notwithstanding division (D)(5)(a) of this section and except as provided in division (D)(6) of this section, punitive or exemplary damages may be awarded against a defendant in either of the following types of tort actions:

(i) In subsequent tort actions involving the same act or course of conduct for which punitive or exemplary damages have already been awarded, if the court determines by clear and convincing evidence that the plaintiff will offer new and substantial evidence of previously undiscovered, additional behavior of a type described in division (C) of this section on the part of that defendant, other than the injury or loss for which the plaintiff seeks compensatory damages. In that case, the court shall make specific findings of fact in the record to support its conclusion. The court shall reduce the amount of any punitive or exemplary damages otherwise awardable pursuant to this section by the sum of the punitive or exemplary damages awards previously rendered against that defendant in any state or federal court. The court shall not inform the jury about the court's determination and action under division (D)(5)(b)(i) of this section.

(ii) In subsequent tort actions involving the same act or course of conduct for which punitive or exemplary damages have already been awarded, if the court determines by clear and convincing evidence that the total amount of prior punitive or exemplary damages awards was totally insufficient to punish that defendant's behavior of a type described in division (C) of this section and to deter that defendant and others from similar behavior in the future. In that case, the court shall make specific findings of fact in the record to support its conclusion. The court shall reduce the amount of any punitive or exemplary damages otherwise awardable pursuant to this section by the sum of the punitive or exemplary damages awards previously rendered against that defendant in any state or federal court. The court shall not inform the jury about the court's determination and action under division (D)(5)(b)(ii) of this section.

(6) Division (D)(2) of this section does not apply to a tort action where the alleged injury, death, or loss to person or property resulted from the defendant acting with one or more of the culpable mental states of purposely and knowingly as described in section 2901.22 of the Revised Code and when the defendant has been convicted of or pleaded guilty to a criminal offense that is a felony, that had as an element of the offense one or more of the culpable mental states of purposely and knowingly as described in that section, and that is the basis of the tort action.

(E) This section does not apply to tort actions against the state in the court of claims, including, but not limited to, tort actions against a state university or college that are subject to division (B)(1) of section 3345.40 of the Revised Code, to tort actions against political subdivisions of this state that are commenced under or are subject to Chapter 2744. of the Revised Code, or to the extent that another section of the Revised Code expressly provides any of the following:

(1) Punitive or exemplary damages are recoverable from a defendant in question in a tort action on a basis other than that the actions or omissions of that defendant demonstrate malice or aggravated or egregious fraud or on a basis other than that the defendant in question as principal or master knowingly authorized, participated in, or ratified actions or omissions of an agent or servant that so demonstrate.

(2) Punitive or exemplary damages are recoverable from a defendant in question in a tort action irrespective of whether the plaintiff in question has adduced proof of actual damages.

(3) The burden of proof upon a plaintiff in question to recover punitive or exemplary damages from a defendant in question in a tort action is one other than clear and convincing evidence.

(4) Punitive or exemplary damages are not recoverable from a defendant in question in a tort action.

(F) If the trier of fact is a jury, the court shall not instruct the jury with respect to the limits on punitive or exemplary damages pursuant to division (D) of this section, and neither counsel for any party or a witness shall inform the jury or potential jurors of those limits.

(G) When determining the amount of an award of punitive or exemplary damages against either a home or

a residential facility licensed under section 5123.19 of the Revised Code, the trier of fact shall consider all of the following:

- (1) The ability of the home or residential facility to pay the award of punitive or exemplary damages based on the home's or residential facility's assets, income, and net worth;
- (2) Whether the amount of punitive or exemplary damages is sufficient to deter future tortious conduct;
- (3) The financial ability of the home or residential facility, both currently and in the future, to provide accommodations, personal care services, and skilled nursing care.

Effective Date: 11-07-2002; 04-07-2005