

No. 14-1462

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IN THE SUPREME COURT OF OHIO

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Appeal from the Court of Appeals  
Fifth Appellate District  
Case No. 13 CA 47

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CHRISTINE MARIE WHETSTONE, *etc.*  
*Plaintiff-Appellee*

v.

ERIN BINNER, *etc.*  
*Defendant-Appellant*

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**MERIT BRIEF OF AMICUS CURIAE  
THE LANDSKRONER FOUNDATION FOR CHILDREN  
IN SUPPORT OF APPELLEE**

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## STATEMENT OF INTEREST

The Landskroner Foundation for Children is a non-profit charitable organization that promotes positive childhood development, supports child safety in the home, and advocates for children in need.

The Foundation's interest in this case arises from its concern for children harmed by tortious conduct. In many cases, those victims may choose not to bring their tort actions until many years later. *See* R.C. 2305.16 (tolling statutes of limitations during victim's minority); *see also* *Watkins v. Dept. of Youth Servs.*, Slip Opinion No. 2015-Ohio-1776, at ¶ 23 (claims for childhood sexual abuse, even those against the State, are subject to a 12-year limitations period). Given the longer passage of time between the tort and the action, there is a much greater likelihood that the tortfeasor will have died in the intervening years.

In many cases involving child abuse or childhood sexual abuse, the imposition of punitive damages is warranted to deter similar conduct by others in similar positions of power or opportunity to do harm to children. The death of the tortfeasor in any given case (and therefore the imposition of punitive damages against his or her estate) does not reduce the deterrent effect of punitive damages.

## ARGUMENT<sup>1</sup>

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

This Court should reject this proposition and instead hold that punitive damages may be imposed against the estate of a deceased tortfeasor. Such a holding would continue to promote Ohio's well-settled policy that punitive damages have a general deterrent effect: "The purpose of punitive damages is not to compensate a plaintiff, but to

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<sup>1</sup> The Foundation defers to the Appellee's Statement of Facts.

punish *and deter* certain conduct.” *Sivit v. Village Green of Beachwood, L.P.*, Slip Opinion No. 2015-Ohio-1193, at ¶ 7, quoting *Moskovitz v. Mt. Sinai Med. Ctr.*, 69 Ohio St.3d 638, 651, 1994-Ohio-324 (italics added). And even the Appellant (at p. 25 of her Merit Brief) acknowledges that the imposition of punitive damages serves the purpose of “general deterrence (holding up the wrongdoer as an example to the community to deter others similarly situated).” That is, punitive damages help shape the conduct of the *entire community* and not just the parties to the action. In the two short sections that follow, we address how the policy of general deterrence is well served by allowing juries to assess punitive damages against tortfeasors’ estates.<sup>2</sup>

**1. Ohio’s public policy is to use punitive damages to deter *others*.**

The General Assembly has limited punitive damages in a tort action to twice the amount of compensatory damages. See R.C. 2315.21. This Court rejected a facial challenge to the constitutionality of the statutory cap.<sup>3</sup> See *Arbino v. Johnson & Johnson*, 116 Ohio St.3d 468, 2007-Ohio-6948, at ¶ 26. And this Court recently applied the cap to “order reduction of the amount of punitive damages to twice the amount of compensatory damages that were awarded in the trial court’s judgment entry, which we deem an appropriate amount to deter the conduct at issue in this case.” *Sivit*, Slip Op. No. 2015-

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<sup>2</sup> We must also take a moment to briefly respond to the Appellant’s argument in footnote 24 (on page 20 of her Merit Brief) that creditors of a deceased tortfeasor would be “punished” if punitive damages were allowed against his estate. But creditors would be placed in the same position if the tortfeasor lived through the judgment but died shortly thereafter (*i.e.*, the estate available to creditors would still be reduced by the punitive damage judgment), so the Appellant’s proposed distinction is, in the end, arbitrary.

<sup>3</sup> This Court recently accepted jurisdiction over an “as applied” challenge to the damage caps in a case involving a victim of childhood sexual abuse. See *05/20/2015 Case Announcements*, 2015-Ohio-1896 (accepting *Simpkins v. Grace Brethren Church of Delaware, Ohio*, Case No. 2014-1953). Needless to say, the Foundation takes great interest in that issue as well.

Ohio-1193 at ¶ 8. Neither the General Assembly nor this Court in *Arbino* or *Sivit* considered the identity of the defendant *or the defendant's capacity to be deterred* when imposing and applying the one-size-fits-all damage cap of twice the compensatory damages. That is, even if punitive damages of twice the compensatory damages would be *wholly insufficient* and *entirely ineffective* at deterring a particular defendant (*e.g.*, if the compensatory damages are modest and the defendant is very wealthy), the Legislature and this Court appreciate that punitive damages may be an effective deterrent *to others* (*e.g.*, to a defendant who is not quite so wealthy).

Indeed, suppose Mr. Scrooge (who is quite rich) assaults a boy in the street. The boy's compensatory damages are rather modest, \$5,000; thus, the punitive damages under the cap will be limited to \$10,000, for a total verdict against Mr. Scrooge of just \$15,000—less than a trifle for the old miser, and not much of a deterrent to alter his own conduct. But Mr. Fagin (who is only just scraping by) learns of this verdict, which for him would be a great sum; is he not deterred from assaulting the next boy that falls in with him, for risk of the total financial ruin he would suffer if punitive damages were to be imposed against him? This may seem fanciful in fiction, but the lesson is a sound one born of Common Sense: even if a capped verdict will have a *de minimis* effect on the defendant-at-issue (like a Fortune 500 company), it may strongly deter others—for whom even a capped verdict would be ruinous (like a mom-and-pop shop)—from engaging in similar conduct.

Whether the defendant against whom punitive damages are imposed is a live human tortfeasor or his estate is *immaterial* to the other potential tortfeasors across the state: it is *conduct* that we seek to deter, regardless of whether or to what extent the one who committed the conduct can be effectively punished by the capped damages.

**2. Assessing punitive damages against a tortfeasor’s estate has a deterrent effect.**

The Appellant assumes (in footnote 23 on page 18 of her Merit Brief) that the dead cannot be punished by an earthly court. We are not so sure. One of the principal “elements for which any punishment is feared [is] shame.” Lewis, *The Humanitarian Theory of Punishment*, 13 *AMCAP Journal* 147, 150 (1987). To bring the deceased tortfeasor’s *name* into disrepute by way of a punitive damage verdict—which expresses the condemnation of the community—is undoubtedly a punishment.

More to the point, it is the fear of punishment *others* harbor that deters them from engaging in bad conduct. If others know that their estates may be reduced by punitive damage assessments—and so their children, grandchildren, and other heirs will receive less from the estate—that may be the strongest deterrent of all. In the end, it is the *availability* of punitive damages, even after death, that can deter others and moderate their conduct, not merely the *practical effect* punitive damages may (or may not) have on the life of any individual tortfeasor.

Finally, we find the Appellant’s citation to Greek tragedy (at page 18 of her Merit Brief) ironic. If Sophocles, Euripides, and Aeschylus teach us anything, it is that death does not destroy the power of example: death crystalizes the example, immortalizes it, and renders it universal. In *The Eumenides* Aeschylus asks rhetorically, “What man who fears nothing at all is ever righteous?” And in the *Gorgias*, Plato answers: “It is fitting that everyone under punishment rightly inflicted [should] serve *as an example to the rest*, that others seeing [the punishment] may in fear amend themselves.”

**CONCLUSION**

The Fifth District’s decision allowing punitive damages to be imposed against the estate of a deceased tortfeasor should be affirmed.

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

A copy of this document was served by regular mail on Charles Elsea and Grant Wolfe on June 2, 2015, pursuant to S.Ct.Prac.R. 3.11(B)(1).

Certified by,

/s Drew Legando

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