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IN THE SUPREME COURT OF OHIO

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CHRISTINE MARIE WHETSTONE,  
INDIVIDUALLY, AND AS PARENT  
AND NATURAL GUARDIAN AND  
NEXT FRIEND OF O. C., MINOR  
AND L. C., MINOR,

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:

Plaintiff-Appellee,

:

Case No. 2014-1462

v.

:

ERIN BINNER, ADMINSTRATOR  
OF THE ESTATE OF ROXANNE  
MCCLELLAN, DECEASED.

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:

Jurisdictional Appeal from the  
Fifth District Court of Appeals,  
Fairfield County, Ohio, Case No. 13 CA 47

Defendant-Appellant.

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MERIT BRIEF OF PLAINTIFF-APPELLEE, CHRISTINE MARIE  
WHETSTONE, INDIVIDUALLY, AND AS PARENT AND NATURAL  
GUARDIAN AND NEXT FRIEND OF O. C., MINOR AND L. C., MINOR

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## STATEMENT OF FACTS

On or about June 29, 2010, Roxanne McClellan was babysitting Christine Whetstone's two children, Olivia Castle and Lea Castle, ages 5<sup>1</sup>/<sub>2</sub> and 2<sup>1</sup>/<sub>2</sub>, respectively, at her home, and as such, was entrusted with their care and safety. While babysitting the children, McClellan intentionally assaulted and battered Olivia Castle, without provocation and with actual malice, by strangling and attempting to suffocate her while restraining her against her will.

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

Christine immediately filed a police report with the Lancaster, Ohio Police Department and quickly thereafter took Olivia to the emergency room of Fairfield Medical Center for 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. Olivia testified at the damages hearing 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:

BY MR. WOLFE:

Q. Olivia, is Christine Whetstone your mother?

A. Yes.

Q. I'm sorry, I didn't hear you honey. Say that again.

A. Yes.

Q. Okay. And was Roxanne McClellan your aunt?

A. Yes.

Q. Great Aunt.

A. *(No verbal response.)*

Q. Yes or no?

A. Yes.

Q. Okay. And what did you call her? What nickname did you call her?

A. DeeDee.

(Tr. pgs. 90-91)

\*\*\*\*\*

BY MR. PRICE:

Q. Okay. And do you know why you're here today?

A. Yes.

Q. Okay. And what are you supposed to do today? Why are you here?

A. Because Roxanne tried to strangle me.

(Tr. pg. 92)

\*\*\*\*\*

BY MR. PRICE:

Q. Okay. Do you know what would happen to you if you didn't tell the truth?

A. Uh-huh.

Q. What?

A. That Roxanne took me and when my mom came in, she put the pillow on top of my face, 'cause she didn't want my mom to hear me yelling.

Q. Okay.

(Tr. pg. 94)

\*\*\*\*\*

BY MR. WOLFE:

Q. And when did she take you to the bedroom?

A. Whenever she was talking to her boyfriend.

Q. Okay. And did she take you into the bedroom?

A. Yes.

Q. And did she put you on a bed or did you get on the bed?

A. She put me on the bed.

Q. Okay. And you said she tried to choke or strangle you?

A. Yes.

Q. Okay. And tried to put a pillow over your face?

A. Uh-huh.

Q. And what did you do when she tried to do that?

A. I was too afraid, so I didn't say anything.

(Tr. 96-97)

\*\*\*\*\*

BY MR. WOLFE:

Q. Now, after DeeDee tried to choke you and put the pillow on your face, were you afraid?

A. Yeah.

Q. Okay. Did it hurt you when you had--when she was trying to choke you and have the pillow on your face?

A. Uh-huh.

Q. How did you feel?

A. Sad and mad.

Q. Was it hard to breathe with the pillow on your face?

A. *(No verbal response.)*

Q. Did it hurt to have your *(sic)* hands on your neck?

A. Yes.

Q. How did it hurt?

A. 'Cause she was clawing me and she put her nails in my skin.

Q. You felt like you were being scratched?

A. Uh-huh.

Q. Do you remember saying anything while she was doing this? Did you scream or call out?

A. I was calling for my mom.

(Tr. 97-98)

Following the assault, battery and unlawful restraint committed by McClellan, Christine, Olivia and Lea engaged in counseling with Dawn McCoy, L.S.W. The counseling continued for

one (1) year and seven (7) months, ending in April 2012. Christine was diagnosed with Post Traumatic Stress Disorder, and Olivia and Lea were diagnosed with Post Traumatic Stress Disorder and with being a victim of physical abuse. Olivia experienced anger, trouble with sleeping, bad dreams, and fear as a result of McClellan's actions. Christine experienced nightmares, anxiety and anger as a result. 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.

Dawn McCoy testified that once McClellan passed away on April 22, 2011, Olivia and Lea's fear and anxiety subsided. Christine testified 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. McCoy also testified that Lea suffered Post Traumatic Stress Disorder as a result of McClellan's actions, even though she was aware of McClellan's actions toward her, Olivia and her mother for only a brief time.

Based upon the foregoing facts, the Trial Court awarded compensatory damages of \$500.00 to Christine Whetstone for lost wages, and \$1,000.00 to Lea Castle for past and future emotional distress. As for Olivia Castle, the Trial Court found that she had suffered physical injury and emotional distress and harm as a result of McClellan's conduct. Specifically, the Trial Court found that while the actual physical harm caused to Olivia was minimal, the emotional harm and distress caused to Olivia was extensive. The Court found that 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 considered

the impact of McClellan's conduct on Olivia and found that McClellan violated Olivia's trust, and that despite counseling, the memory of McClellan's attack on Olivia has not, and will likely not ever, go away. (Case No. 10 CV 1247, Court of Common Pleas, Fairfield County, Ohio, Entry Regarding Damages, May 7, 2013, pgs. 3-6; Appellant's Appendix # 4) The Court then awarded Olivia Castle \$50,000.00 for past physical injuries, and past and future emotional harm and distress.

Notwithstanding the intentional, malicious, wanton and willful acts committed by McClellan against Christine Whetstone and her children, the Trial Court, relying on the case of *Mongold v. Estate of Gilbert*, 114 Ohio Misc.2d 32, 758 N.E.2d 1245 (Brown Cty. Com. Pl. Ct. 2000) held that it could not award punitive damages against McClellan's estate because "punitive damages cannot properly be awarded against the estate of a tortfeasor who is deceased." The Court also denied Plaintiff's claims for attorney fees because it had also denied Plaintiff's claim for punitive damages, citing *Apel v. Katz*, 83 Ohio St.3d 11, 14, 697 N.E.2d 600 (1998)

Plaintiff-Appellee appealed the Trial Court's denial of punitive damages and attorney fees to the Court of Appeals for the Fifth Appellate District. In an Opinion and Judgment filed July 7, 2014 in Case No. 13 CA 47, the Court of Appeals for the Fifth Appellate District reversed and remanded the case, holding, in pertinent part, that there is no *per se* prohibition against the imposition of punitive damages against a deceased tortfeasor.

## ARGUMENT

- I. PROPOSITION OF LAW NO. 1: The purpose of punitive damages is not to compensate a plaintiff but to punish the guilty, deter future misconduct, and *to demonstrate society's disapproval. At the punitive-damages level, it is the societal element that is most important.* *Dardinger v. Anthem Blue Cross & Blue Shield* (2002), 98 Ohio St.3d 77, 104 (Emphasis added)

The stated purpose of deterring future misconduct is sometimes referred to as "specific deterrence", and is designed to deter the tortfeasor from re-offending or engaging in the same misconduct in the future. *See* RESTATEMENT (SECOND) OF TORTS Section 908 (1979) The stated purpose of demonstrating society's disapproval is sometimes referred to as "general deterrence", and is designed to deter others in society from committing the same or similar tortious acts. This concept of "general deterrence" dates back to the first cases to impose punitive damages in the United States. *See Coryell v. Colbaugh*, 1 N.J.L. 77, 77-78 (1791) Punitive damages are also referred to as "exemplary damages" to underscore their general deterrence function. *See, e.g.,* Benjamin C. Zipursky, *A Theory of Punitive Damages*, 84 TEX. L. REV. 105, 143 (2005) ("From the beginning, they were called 'exemplary damages,' and the capacity of the damages award to achieve fairly broad deterrence unrelated to the plaintiff struck many courts as important.") Indeed, forty-one (41) states, plus the District of Columbia, recognize a "general deterrence" function of punitive damages, either at common law or by statute. 1 JOHN J. KIRCHER & CHRISTINE M. WISEMAN, *PUNITIVE DAMAGES: LAW AND PRACTICE* (2d ed. 2014), app. tbl. 4-1.

Notwithstanding this fact, the majority of jurisdictions disallow punitive damages recoveries following the death of the tortfeasor. *See* Opinion and Judgment, filed July 7, 2014, *Whetstone v. Binner*, Case No. 13 CA 47, Court of Appeals, Fifth Appellate District, pgs. 8-10.

The stated rationale for this rule of non-survivability is that neither of the two primary aims of punitive damages-punishment or deterrence-is served when the tortfeasor dies before damages can be imposed. *See, e.g. In re Estate of Vajgrt*, 801 N.W.2d 570 (Iowa 2011) While this rationale may be logical when applied solely to the purposes of punishment and *specific* deterrence, the purpose of *general* deterrence is not necessarily defeated by the death of the tortfeasor.

If punitive damages imposed against living tortfeasors serve the purpose of *general* deterrence, then so do punitive damages imposed on the estates of deceased tortfeasors. Consider the deterrent impact on potential future tortfeasors when they are put on notice that if they commit a similar tort and die, then their estate will pay punitive damages. Such a rule will send a forceful message to those who would attempt to engage in malicious and willful acts that their assets will not be insulated by the happenstance of death. *See Haralson v. Fisher Surveying, Inc.*, 201 Ariz. 1, 4-5, 31 P.3d 114, 117-118 (2001)

Such a rule also reinforces the message that the award of punitive damages means real *personal* liability. If punitive damages can be awarded against the tortfeasor's estate, then the tortfeasor will know that his tortious actions will subject his family to financial hardship. And, he will, perhaps, for his family's sake, refrain from committing such acts. *Stephens v. Rohde*, 478 So. 2d 862, 863 (Fla. Dist. Ct. App. 1985) In other words, potential future tortfeasors may value sparing their families from punitive damages as much as they value sparing themselves.

The non-survivability rule endorsed by the majority of jurisdictions is really nothing more than a manifestation of the use of punitive damages by courts to seek retribution against a wrongdoer. *See, e.g., Jonathan Baron & Ilana Ritov, Intuitions About Penalties and Compensation in the Context of Tort Law*, 7 J. Risk and Uncertainty 17 (1993) Rejection of a

*per se* non-survivability rule will avoid giving undue preference to this retributive motivation for punitive damages, and advance the purpose of demonstrating society's disapproval of such tortious acts in cases that warrant it. At the punitive-damages level, it is this societal element that is most important. See *Dardinger v. Anthem Blue Cross & Blue Shield* (2002), 98 Ohio St.3d 77, 104.

- II. `PROPOSITION OF LAW NO. 2: Permitting the imposition of punitive damages against the estate of a deceased tortfeasor does not contravene the purposes of punitive damages, but rather, furthers the most important purpose of punitive damages, which is to demonstrate society's disapproval of the tortfeasor's malicious, wanton or reckless acts or omissions and deter the commission of such acts or omissions by others.

Several reasons support allowing the award of punitive damages against the estate of a deceased tortfeasor. First, the death of a tortfeasor does not thwart, dilute or render speculative the *general* deterrence purpose underlying the award of punitive damages. In fact, it reinforces the *general* deterrence purpose of punitive damages, which is, to society at large, the most important element. See *Dardinger v. Anthem Blue Cross & Blue Shield* (2002), 98 Ohio St.3d 77, 104. While judges who support the non-survivability rule have argued that "deterrence requires a perception by others that the tortfeasor is being punished", it seems more accurate to argue that "deterrence requires a perception by *others* that *they* will be punished if they engage in similar misconduct." *Whetstone v. Binner*, 15 N.E.3d 905, 909 (Ct. App., Fifth Dist. 2014) This latter message can be conveyed by a posthumous award of punitive damages, as long as potential future tortfeasors expect to live after committing tortious acts or omissions. Although the deceased tortfeasor will not be punished or deterred from committing further perverse and egregious acts, the imposition of punitive damages upon his estate will serve to deter others from engaging in like conduct. *G.J.D. and D.K., a minor, by G.J.D., his parent and natural guardian, et al. v. Johnson*, 552 Pa. 169, 176, 713 A.2d 1127, 1131(1998) ("The deterrent effect on the

conduct of others is no more speculative in [a case involving the egregious and perverse conduct of a deceased tortfeasor] than in cases where the tortfeasor is alive".) This deterrent effect justifies allowing the award of punitive damages to be imposed against the deceased tortfeasor's estate, especially in this case where a strong public policy against the abuse of minor children by adults exists. *See Penberthy v. Price*, 281 Ill.App.3d 16, 21-22, 666 N.E.2d 352, 356-357 (1996)

Secondly, imposing punitive damages will not punish the "innocent" heirs or beneficiaries of the tortfeasor's estate. Punitive damages leave the tortfeasor's heirs no worse off financially than they would have been had the tortfeasor survived to face judgment. *G.J.D. and D.K., a minor, by G.J.D., his parent and natural guardian, et al. v. Johnson*, 552 Pa. 169, 176-177, 713 A.2d 1127, 1131(1998) (The actual difference between the effect of the punitive damages award on the family or heirs in either case is minimal.)

After all, had a tortfeasor survived and paid the punitive damages while still alive, the value of his or her estate would have been reduced by the same amount that is assessed against his or her heirs in the case of the tortfeasor's death prior to judgment. Why should the heirs receive an undeserved windfall merely because the tortfeasor happened to die before the punitive damages could be assessed? As between the heirs of a deceased tortfeasor and the victim of a deceased tortfeasor, it is disingenuous to argue that an award of punitive damages unjustly enriches the tortfeasor's victim but not the tortfeasor's heirs. Stated alternatively, "[t]o allow a tortfeasor's estate to escape payment of punitive damages would be comparable to the injustice of allowing a defendant to transfer his wealth to his prospective heirs and beneficiaries prior to trial of a case in which punitive damages are sought against him." *Id.*

Appellee submits that there should not be a *per se* prohibition against imposing punitive damages against a deceased tortfeasor's estate. The question of whether punitive damages are

appropriate in a particular case should be resolved by the trier of fact considering the nature of the acts committed. As it specifically relates to this case, the trier of fact should be permitted to weigh the possible harm that may be suffered by the family of the deceased tortfeasor from a punitive damages award against the harm that could be prevented if the physical assault, battery, and false imprisonment of a minor child by an adult is deterred.

Finally, safeguards can be put in place to prevent the arbitrary imposition of punitive damages such as instructing a jury that it may consider the relative size of the deceased tortfeasor's estate in arriving at a proper assessment of punitive damages or the granting of a remittitur in the event of a clearly excessive punitive damages award. The concept that punitive damages may be awarded to a plaintiff despite the lack of a direct connection to the tortfeasor's acts or omissions was acknowledged by the Supreme Court over 20 years ago in *Moskovitz v. Mt. Sinai Medical Center*, 69 Ohio St.3d 638, 651, 635 N.E.2d 331, 343 (1994), where the Court held:

Therefore, it would make no sense for this court to establish a rule requiring that malicious conduct giving rise to a claim for punitive damages must independently cause compensable harm before punitive damages may be awarded. If the act of altering and destroying records to avoid liability is to be tolerated in our society, we can think of no better way to encourage it than to hold that punitive damages are not available in this case. We believe that such conduct is particularly deserving of punishment in the form of punitive damages and that a civilized society governed by rules of law can require no less.

*Id.* Although the Court stressed the role of punishment, it also stressed the presence of the dual purpose of punitive damages in Ohio, which is to express society's disapproval of outrageous conduct. Simply put, there are situations where it is appropriate and necessary to express society's disapproval of outrageous conduct. Rendering an award of punitive damages against the estate of a deceased tortfeasor is another way to further this purpose. There is no reasonable justification to permit the shielding of a deceased tortfeasor's estate from punitive damages

liability in cases where, as here, it is undisputed that the tortfeasor, McClellan, committed extreme and outrageous acts against a minor child, but happened to die while awaiting trial.

III. PROPOSITION OF LAW NO. 3: Ohio Revised Code Section 2305.21 should be liberally construed to provide that 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

The Appellant argues that at common law, personal actions abated upon the death of an individual, and Ohio's survival statute, Ohio Rev. Code Section 2305.21, cannot be interpreted to change the common law rule to allow the award of punitive damages against an estate, and while the statutory language of the survival statute expands the class of claims that survive the death of a party, it does not expand the policy or purpose of punitive damages.

The common law rule of abatement has been abrogated by statute in Ohio. *See* Ohio Rev. Code Section 2311.21. Furthermore, the causes of action alleged in Whetstone's complaint in this case and sustained by the Trial Court--assault, battery, false imprisonment, and intentional infliction of emotional distress--are all causes of action for "injuries to the person" within the meaning of Ohio Rev. Code Section 2305.21. *Bowman v. Parma Board of Education*, 44 Ohio App.3d 169, 177, 542 N.E.2d 663, 671 (1988) Additionally, when a party entitled to an award of punitive damages dies, the right to such punitive damages survives the death of the party and may be awarded to his estate. Ohio Rev. Code Section 2305.21; *Rubeck v. Hoffman*, 54 Ohio St.2d 20, 23, 374 N.E.2d 411, 413 (1978); *See also Roedder v. Callis*, 375 S.W.3d 824, 831 (2012) This rule follows from the fact that a claim for punitive damages is not a separate cause of action, but an incident of the causes of action that survive the death of the party. *Moskovitz v. Mt. Sinai Medical Center*, 69 Ohio St.3d 638, 650, 635 N.E.2d 331, 342 (1994); *Roedder v. Callis*, 375 S.W.3d 824, 831 (2012)

The question for the Court in this case is whether the Ohio survival statute, Ohio Rev. Code Section 2305.21, may be interpreted to permit the award of punitive damages against the estate of a deceased tortfeasor. In *Individual Business Services, Inc. v. Carmack*, 2009 WL 8235992 (Montgomery Cty. Com. Pl. Ct. 2009), the Common Pleas Court of Montgomery County rejected the holding of *Mongold v. Estate of Gilbert*, 114 Ohio Misc.2d 32, 758 N.E.2d 1245 (Brown Cty. Com. Pl. Ct. 2000), reasoning that

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 inherent components 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. Hoffman* (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.

The Fifth District Court of Appeals in *Whetstone* was persuaded by the reasoning of the *Individual Business Services, Inc.* case and held that:

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 *Rubeck* ruling by the Ohio Supreme Court, all causes of action, including all elements of recovery, survive as if the deceased party were still alive both on behalf of the estate of the decedent and against the estate of the tortfeasor.

*Whetstone v. Binner*, 15 N.E.3d 905, 910 (Ohio Ct. App. 2014)

While the holding of the Fifth District Court of Appeals in *Whetstone* is the first appellate court ruling in the State of Ohio on this issue, courts in other jurisdictions have interpreted their

own survival statutes to permit the award of punitive damages against the estate of a deceased tortfeasor. *See Hofer v. Lavender*, 679 S.W.2d 470 (Tex. 1984); *Tiller v. Lippert*, 909 P.2d 1158 (Mont. 1996); *Estate of Farrell ex rel. Bennett v. Gordon*, 770 A.2d 517 (Del. 2001); *Roedder v. Callis*, 2012 WL 1994936 (Mo. App. E. Dist. 2012)

- IV. PROPOSITION OF LAW NO. 4: The failure of an appellant to raise an issue or argument at the intermediate appellate court level results in a waiver of the issue or argument when first raised before the Ohio Supreme Court.

Appellant failed to cross-appeal the judgment of the trial court in this case to the Fifth District Court of Appeals. Appellant also failed to raise any argument or issue to the trial court's ruling on the basis that an award of punitive damages would be a violation of due process of law.

This failure to raise an argument or issue at the intermediate appellate court level, and to attempt to present the argument for the first time on appeal to the Ohio Supreme Court is not permitted. *Boice v. Ottawa Hills*, 137 Ohio St.3d 412, 424, 999 N.E.2d 649, 659-660 (2013) Appellant waived her due process argument by failing to cross-appeal the trial court's judgment and/or to raise the due process argument at the intermediate appellate court level.

- V. PROPOSITION OF LAW NO. 5: The failure of an appellant to move or plead to a plaintiff's complaint, being held in default by a trial court, and failing to appeal the granting of default at the intermediate appellate court level results in a waiver of affirmative defenses that might have otherwise been asserted by an appellant, and prohibits the raising of said affirmative defenses as an argument or issue before the Ohio Supreme Court.

An additional aspect of this case that weighs in favor of permitting the award of punitive damages against McClellan's estate is the fact that a default for failure to move or plead to Plaintiff's complaint was entered by the Trial Court against McClellan while she was alive. The Trial Court Entry sustaining Whetstone's motion for default judgment was filed on November 18, 2010. McClellan passed away on April 22, 2011. The Trial Court's November 18, 2010 Entry

(see Appellant's Appendix No. 7) specifically stated that a subsequent evidentiary hearing would cover the "issue of Plaintiff's damages."

Once default is entered against a defendant who fails to timely move or plead to a plaintiff's complaint, the *entitlement* to both compensatory and punitive damages has been established. *Cf. Moskovitz v. Mt. Sinai Medical Center*, 69 Ohio St.3d 638, 654, 635 N.E.2d 331, 345 (1994) (Following the refusal of a remittitur by the prevailing plaintiff on remand, and once a jury is impaneled in a new trial held solely on the issue of punitive damages, the Court shall instruct the jury that punitive damages in some amount must be awarded.) Rule 55(A) of the Ohio Rules of Civil Procedure provides in an analogous manner that the court may set an evidentiary hearing to determine *the amount of damages*. Unless otherwise specified by the court in its default entry, no further presentation of evidence on the issue of liability, entitlement, and/or proximate cause will be heard, as those issues have already been determined by reason of the court's default entry.

This follows from the settled rule that by failing to respond to a complaint, a defendant admits to the allegations of the complaint. Ohio Civ. R. 8(D) This includes any allegations of intentional, malicious, wanton or reckless conduct. *McIntosh v. Willis*, 2005 WL 941136 (Ohio 12 Dist. 2005) Default by the defendant obviates a plaintiff's burden of proof of the elements of the claim(s) alleged, including liability and proximate cause. *Reese v. Proppe*, 3 Ohio App.3d 103, 105, 443 N.E.2d 992 (1981); *Rhoden v. Akron*, 61 Ohio App.3d 725, 573 N.E.2d 1131 (1988); *Huffer v. Cicero*, 107 Ohio App.3d 65, 667 N.E.2d 103 (1995)

It can be argued, therefore, that even under Appellant's restricted interpretation of the law, an award of punitive damages may be imposed upon McClellan's estate, since the

*entitlement* to punitive damages was determined prior to her death and the only determination to be made following her death was *the amount* of the punitive damages to be awarded.

VI. PROPOSITION OF LAW NO. 6: Appellant's due process argument must fail, even if it had not been waived, because it is not ripe for consideration.

Appellant's due process argument is not ripe for consideration because the issue of punitive damages has not yet been determined by the Trial Court on remand. *Cf. Roberts v. Hutton*, 152 Ohio App. 3d 412, 2003-Ohio-1650, 787 N.E.2d 1267 (Ct. App.10th Dist. 2003) The Trial Court denied an award of punitive damages in this case solely on the basis of the court's ruling in *Mongold v. Estate of Gilbert*, 114 Ohio Misc.2d 32, 758 N.E.2d 1245 (Brown Cty. Com. Pl. Ct. 2000). Only when this case is remanded to the Trial Court with instructions to determine the amount of punitive damages to be awarded to Whetstone will Appellant's due process argument be ripe for consideration.

CONCLUSION

For the foregoing reasons, Plaintiff-Appellee, Christine Marie Whetstone prays that the Supreme Court affirm the decision and ruling of the Fifth District Court of Appeals in Case No. 13 CA 47.

Respectfully submitted,

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