
IN THE SUPREME COURT OF OHIO

Christine Marie Whetstone, et.al. :
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 :
 Plaintiff/Appellee, : Case No. 2014-1462
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 vs. :
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 Erin Binner, Administrator of the :
 Estate of Roxanne McClellan :
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 Defendant/Appellant. :

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

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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

For centuries this proposition of law would have been not only uncontroversial but axiomatic, whether in Ohio courts, the courts of its sister states, or the English courts of the common law. The law has always understood death to be the end. That is why, historically, causes of actions did not survive the death of either party, actions abated at the death of either party, and damages of any kind, much less punitive damages, were unavailable. “Till death do us part,” vowed the betrothed during the traditional Anglican matrimonial ceremony using the English Book of Common Prayer, an arresting acceptance of the inevitable end of the marriage moments before it was to begin. No decree of divorce would issue; no filing or notice would be either necessary or sufficient to end it. To borrow a phrase from statutory interpretation, death is a *self-executing* legal event.

Although philosophers, theologians, and perhaps even scientists may disagree,¹ the law of mortals imposing punishment on the departed is an ontological impossibility. It is why decedents are spared indictment, no matter how heinous their crimes. The rule of law adopted by the Fifth District below, however, upended that principle and handed courts and juries the civil apparatus to reach into the grave. In so doing, the Fifth District jeopardized long-standing and unambiguous guidance from this Court.

¹ *Amicus Curiae* The Landskroner Foundation for Children also has its doubts, which will be addressed p. 4, *infra*.

B. The public policy supporting punitive damages collapses without the adoption of the proposition of law.

1. Appellee concedes that inflicting punitive damages against an estate of a deceased tortfeasor fails to advance the policies of punishment and specific deterrence.

This Court’s foundational statements of the purposes of punitive damages have been repeated *ad nauseam* throughout the merit briefs, and to adopt the proposition of law, this Court need not revisit, revise, or reinterpret any of its historical jurisprudence on the subject. This Court need only reaffirm it. The purpose of punitive damages is “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).

Appellee concedes that inflicting punitive damages against the estate of a deceased tortfeasor cannot operatively satisfy the retributive, or “punishment,” policy of punitive damages, nor can it specifically deter the deceased tortfeasor from future misconduct. [Appellee’s Merit Brief, 13] Instead, Appellee and *Amici Curiae*, Landskroner Foundation for Children (“LFC”) and Ohio Association for Justice (“OAJ”), argue that “the purpose of *general* deterrence is not necessarily defeated by the death of the tortfeasor.” [Appellee’s Merit Brief, 13; *see also id.*, 14–17; LFC Merit Brief, 2–4; OAJ Merit Brief, 5–6] This cavalier untangling of the closely related purposes of punishment and deterrence—and indeed general deterrence from specific deterrence—both undermines the policy itself and runs counter to this Court’s jurisprudence.

“A punitive damages award is more about a defendant's behavior than the plaintiff's loss.” *Wightman v. Conrail*, 86 Ohio St. 3d 431, 439, 715 N.E.2d 546 (1999). Elaborating on the *Wightman* statement, this Court in *Dardinger* held that “[t]he 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-7113, 781 N.E.2d 121. Appellee confuses this issue by citing *Dardinger’s* language that “[a]t the punitive-damages level, it is the societal element that is most important.” *Id.* at 104. [See also Appellee’s Merit Brief, 12, 14] Appellee appears to argue that this Court was endorsing an emphasis on general deterrence. The opposite is in fact true.

The quotation appeared in this Court’s discussion of a remittitur in that case, and this Court was explaining why a portion of the punitive damages should *not* be awarded to the Plaintiff, *Dardinger*. This Court observed that:

As was stated above, a punitive damages award is about the defendant's actions. 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. The plaintiff remains a party, but the de facto party is our society, and the jury is determining whether and to what extent we as a society should punish the defendant.

There is a philosophical void between the reasons we award punitive damages and how the damages are distributed. The community makes the statement, while the plaintiff reaps the monetary award.

Dardinger, Id. at 104.(internal quotations and citations omitted). The “societal element,” therefore, is *not* Society as Prospective Wrongdoers which the Court must deter, but Society as Punishers to which the Court must give voice with the wrongdoer listening.

2. Punitive damages against an estate harm innocent parties.

“Deterrence presupposes that punishment will discourage a certain act.” *State v. Cook*, 83 Ohio St. 3d 404, 420, 700 N.E.2d 570 (1998). The arguments of Appellee and *Amici Curiae* in favor of general deterrence highlight the reality that imposing punitive damages against the estate of a deceased tortfeasor punishes innocent parties. Both Appellee and *Amicus Curiae* LFC

argue, for instance, that such an imposition communicates to a potential tortfeasor that his “tortious actions will subject his family to financial hardship.” [Appellee’s Merit Brief, 13; *see also* Merit Brief of LFC, 4 (“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.”)] Putting aside for the moment the question of whether vigilant testators will be so deterred from wrongful conduct and not merely better estate planning, this argument candidly accepts that innocent parties suffer the punishment intended for the tortfeasor. It states, in essence: “Do not commit wrongs, because your children will pay the price.” Of course, Appellee does not explicitly make this argument because on its face it rejects liberal democratic notions of justice in favor of Old Testament wrath.² This Court should not endorse such a view.

For its part, the OAJ takes the opposite tack: it argues that “[p]unitive damages against the estate of a deceased wrongdoer are literally a painless penalty against the wrongdoer.” [Merit Brief of OAJ, 9] Appellant agrees. The wrongdoer’s corpse—as far as modern science can tell—feels or senses no consequence whatsoever by the approbation inflicted upon him by the jury. The deceased does not lose anything, nor can the inanimate wrongdoer sense shame. But this again highlights how general deterrence fails as a policy justification for imposing punitive damages against an estate. A painless penalty is no deterrent at all.

Additionally, in her Merit Brief the Appellant assumed without arguing that the purpose of punishing the tortfeasor himself or herself cannot be met when he or she has died.

[Appellant’s Merit Brief, fn. 23] The LFC disagreed, arguing that:

² “I the LORD thy God am a jealous God, visiting the iniquity of the fathers upon the children unto the third and fourth generation of them that hate me.” Deuteronomy 5:9.

One of the principal elements for which any punishment is feared is shame. 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.

[Merit Brief of LFC, 4] Indeed shame is a punishment, though not one inflicted upon the dead tortfeasor. What *Amicus Curiae* really means but will not say is that the shame is inflicted upon the living who care about the integrity of the name. It is, in other words, another punishment of the innocent living survivors. Indeed, the notion that the community expressing its condemnation through punitive damages brings shame as punishment expands the class of potential innocent parties who suffer. A non-beneficiary family member and a third-party fiduciary suffer equally at the hands of the community's approbation. An award of punitive damages does nothing to burden them financially, but nonetheless they are, in the sense argued by LFC, punished. Punishing the innocent is anathema to law.

Finally, Appellee argues that “[p]unitive damages leave the tortfeasors’ heirs no worse off financially than they would have been had the tortfeasor survived to face judgment.”

[Appellee’s Merit Brief, 15] This argument echoes the Fifth District, which held:

[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, v. Binner, 15 N.E.2d 905, 2014-Ohio-3018 (5th Dist.) ¶ 27. Indeed, the notion of beneficiaries’ or tort victims’ “right or entitlement” to the estate comes up frequently in the briefs. [See, e.g. Merit Brief of OAJ, 3 (“who in our community is most deserving of the wrongdoer’s estate...Don’t the victims deserve the opportunity to be made whole from the

wrongdoer's estate?"³; *id.*, 4 ("Doesn't a victim's suffering and experience of loss at the hands of the wrongdoer make them more deserving than the heirs of the wrongdoer's estate?"); Merit Brief of LFC, fn 2] The basic assumption seems to be that beneficiaries receive a "windfall" from the estate. [See, e.g. Merit Brief of Appellee, 15 ("Why should the heirs receive an undeserved windfall merely because the tortfeasor happened to die before the punitive damages could be assessed?")] This logic is misguided for several reasons.

First, certainly no one argues that *creditors* of an estate receive a windfall. Thus, where punitive damages are imposed against an insolvent estate or an estate left insolvent by the imposition, creditors are robbed of their expectancy. Second, beneficiaries do not receive a "windfall." Before a testator dies, individuals who expect to inherit have certain rights pertaining to their expectation of inheritance. See, e.g. *Firestone v. Galbreath*, 67 Ohio St. 3d 87, 616 N.E.2d 202 (1993). As attenuated as those rights may be, they nonetheless exist and therefore by definition distinguish the estate heir from the punitive damages recipient who actually does reap a windfall. *Ranells v. Cleveland*, 41 Ohio St. 2d 1, 7, 321 N.E.2d 885 (1975).⁴ It is not, therefore, a matter of weighing equities between two total strangers to a transaction who may have an interest in certain proceeds: only one, the expectant heir, has a prior right, not the fully-compensated plaintiff.

In any event, the question of how the heirs would have stood misses the mark. The death has occurred; their beneficial interest is vested. 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

³ Appellant here only notes the obvious: the issue before the Court is punitive damages, not compensatory damages. In the instant action, the victims received a judgment for over \$50,000, which they did not appeal. They are, by definition, made whole.

⁴ "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."

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). A contingent beneficiary of an inter vivos trust has a similar interest during the life of a settlor. The fully-compensated victim, on the other hand, has *no right whatsoever* to the windfall that she happens to receive in the course of the jury punishing the tortfeasor. *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.”). If punitive damages are to be a societal statement about the conduct at issue, they must be more than a transactional addition to the tortfeasor’s balance sheet. To the contrary, the *punishment* is the jury looking the tortfeasor in the eye and telling him that he will have to pay *above and beyond* what is necessary to compensate his victims, the jury—and by extension the Court—telling *him* it will sanction a windfall to this plaintiff (or other recipient) to express society’s disapproval.

This is no arbitrary distinction; it gets to the very heart of what punitive damages aim to accomplish. Death, perhaps, is arbitrary, but that is the fault neither of the law nor the courts. Thus, to say that “punitive damages leave the tortfeasors’ heirs no worse off financially than they would have been had the tortfeasor survived to face judgment” is to say that the heir is not punished because he receives no less than he would have had the tortfeasor been punished before

she died. While it is theoretically true in a transactional sense,⁵ the argument papers over the fact that the heir is being punished in the tortfeasor's stead.

3. Whatever negligible deterrent effect such damages may cause is far outweighed by the erosion in confidence in the judiciary.

General deterrence—if it is to be imbued with purpose without sacrificing the integrity of the judicial system—cannot be divorced from the reality of who is held out as an example. A murder occurs in a small village: certainly, the village marshal can drag any arbitrary citizen to the noose and publicly proclaim that he is being held out as an example of what happens to murderers. Does the specter of the swinging body generally deter the citizenry from killing? Perhaps it does; perhaps it does not. Without any reason to believe that the poor sap actually did it, though, the townsfolk are not instilled with any level of confidence in the integrity of the marshal. Instead, without that link, the dangling corpse only highlights the arbitrary, lawless exercise of power.

So too here. Does forcing Roxanne McClellan's creditors and probate beneficiaries to pay for her crime deter others from similar conduct? It is speculative, at best. What is not speculative is that the creditors and probate beneficiaries, not to mention anyone else familiar with the case, would be left knowing they were targeted to be held up as examples for someone else's crime. What does that say about our system of justice?

⁵ It is no sure thing that a jury would be so magnanimous. What is equally or more likely is a jury engaging in the type of equity-shifting analysis urged by Appellee and *Amicus Curiae* OAJ. On the one hand, the jury, despite the trial court's instruction to focus on the conduct of the tortfeasor, cannot help but sympathize with the victim, and on the other, there is no tortfeasor to worry about financially ruining. "[T]he award of punitive damages may penalize, but should not bankrupt the defendant." *Villella v. Waikem Motors*, 45 Ohio St. 3d 36, 48, 543 N.E.2d 464 (1989), HOLMES, J., dissenting in part and concurring in part. Justice Holmes' caution may be moot where an estate is involved. Indeed, juries may be *more* inclined to bankrupt an estate precisely because it perceives a beneficiary to be "lucky" to inherit wealth.

The best that Appellee and *Amici Curiae* can muster is that punitive damages imposed against an estate are a deterrent for the living. The Fifth District, summarizing the majority rule holdings against such awards, observed that:

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.

Whetstone ¶ 24 (citation omitted). Appellee argues and the Court below held that “deterrence requires a perception by *others* that *they* will be punished if they engage in similar conduct.

[Appellee’s Merit Brief, 14⁶] Again, though, the punishment was not meted out against the tortfeasor; if anything, imposing such damages against an estate *undermines* the deterrent that the actual wrongdoer will be punished. The only rational deterrent effect would be on prospective tortfeasors who do not want their estate plans disrupted by punitive damage awards. This Court’s brethren in Iowa rejected this possibility: “[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.” *In re Estate of Vajgrt*, 801 N.W.2d 570, 577–578 (2011). In any event, whether or not such a calculation occurs, adequate avenues exist whereby estate planning-conscious tortfeasors can shelter their assets from potential claimants. *See, e.g.* R.C. 5816.01, *et seq.* (Ohio Legacy Trust Act). Where this occurs, the victim is denied *any* measure of damages, much less punitive damages. The fairness of such measures is a question better left to the General Assembly.

Ultimately, the Fifth District’s decision authorizes juries to attempt to pilot between the Scylla of punishing an innocent party and the Charybdis of determining how to deter speculative tortfeasors in society by holding up a dead person as an example. The unnavigable strait need not

⁶ Appellee quotes this line from the Fifth District decision, but it cannot be found in the Decision below.

be traversed. If this Court reaffirms the traditional public policy of punishment as the primary aim of punitive damages, the question is closed and juries—and the law—are left in safe harbors.

C. Ohio’s survival statute does not expand the purposes of punitive damages.

Appellee argues that Ohio’s survival statute, R.C. 2305.21, should be liberally construed to expand punitive damages beyond the death of the tortfeasor. As the Fifth District observed, this statute “does not expressly allow or disallow punitive damages against an estate.”

Whetstone, supra ¶ 26. It is an abrogation of the common law rule that personal causes of action die with the person. [See Appellant’s Merit Brief, 4–7] Rather than being liberally construed, therefore, Ohio’s survival statute—and its cousin, the nonabatement statute, R.C. 2311.21—must be narrowly construed. As this Court has held:

Statutes are to be read and construed in the light of and with reference to the rules and principles of the common law in force at the time of their enactment, and in giving construction to a statute the legislature will not be presumed or held, to have intended a repeal of the settled rules of the common law unless the language employed by it clearly expresses or imports such intention.

Danziger v. Luse, 103 Ohio St. 3d 337, 339, 2004-Ohio-5227, 815 N.E.2d 658, quoting *Bresnik v. Beulah Park Ltd. Partnership, Inc.*, 67 Ohio St.3d 302, 304, 617 N.E.2d 1096 (1993); *see also* *Mandelbaum v. Mandelbaum*, 121 Ohio St. 3d 433, 2009-Ohio-1222, 905 N.E.2d 172 ¶ 29, quoting *State ex rel. Hunt v. Fronizer*, 77 Ohio St. 7, 16, 82 N.E. 518 (1907) (“[T]he general assembly will not be presumed to have intended to abrogate a settled rule of the common law unless the language used in a statute clearly supports such intention.”).

Based on the language and history of the statute, the General Assembly clearly did not intend to enlarge the availability of punitive damages beyond that necessary to punish and deter the tortfeasor. As Appellant argued in her Merit Brief, at pages 12–13, the General Assembly adopted R.C. 2305.21 in 1953 without any substantive changes to its predecessor statute, despite

the existence of appellate authority that punitive damages did not survive the death of the wrongdoer.

Finally, neither Appellee nor either *Amici Curiae* address the severely limiting language of R.C. 2315.21. That statute authorizes punitive damages only where “The actions or omissions of **that** defendant demonstrate malice or aggravated or egregious fraud.” R.C. 2315.21(C)(1) (emphasis added). Additionally, the statute clearly evinces the General Assembly’s intention to shield innocent third parties from vicarious liability for the malicious or aggravated acts of others. [See generally Appellant’s Merit Brief, 14–15]

D. Appellant did not make any waivers or fail to raise any of the issues herein.

Appellee, in sections of her Merit Brief styled “Proposition of Law No. 4,”⁷ “Proposition of Law No. 5,” and “Proposition of Law No. 6” argues that the Appellant made various waivers and that the Proposition of Law is not properly before this Court. The Appellee first contends, in No. 4, that failing to raise an argument at the intermediate appellate level constitutes a waiver of that argument, and she then, for the first time in the history of this litigation, argues in No. 5 that the fact that McClellan was in default triggered an “entitlement” to punitive damages on the part of the plaintiff. The fact that McClellan was in default is irrelevant; a damages hearing was set, but the order of default was interlocutory. *See, e.g. Lee v. Joseph Horne Co.*, 99 Ohio App. 3d 319, 324, 650 N.E.2d 530 (8 Dist. 1995) (“Interlocutory orders are subject to motions for reconsideration, whereas judgments and final orders are not.”). McClellan moved for leave to plead, but the Trial Court exercised its discretion in denying the motion. Until a final judgment

⁷ Appellee did not cross-appeal the Fifth District decision, nor did she otherwise petition this Court prior to the filing of her brief to adopt any propositions of law. Nonetheless, Appellant has treated the structure of Appellee’s brief as simply contrary statements to the Proposition of Law accepted for review.

was entered, however, all orders remained interlocutory and subject to the Trial Court's discretion.

There is no basis in law for the proposition that an *entitlement* to punitive damages arises *anytime* prior to a final judgment, much less prior to the submission of evidence on damages. Indeed, it is error to enter judgment for punitive damages without hearing evidence on the issue. *See, e.g. K. Ronald Bailey & Assocs. Co., L.P.A. v. Soltesz*, 6th Dist. Erie Co. No. E-05-077, 2006-Ohio-2489 (May 19, 2006); *Price v. Floro*, 3rd Dist. Henry Co. No. 7-83-16, 1985 Ohio App. LEXIS 5870 (Feb. 7, 1985); *Peachock v. Progressive American Life Ins. Co.*, 7th Dist. Mahoning Co. No. 84 C.A. 99, 1985 Ohio App. LEXIS 6098 (Feb. 12, 1985); *Chabot v. Commercial Coal Co.*, 4th Dist. Scioto Co. No. 1129, 1978 Ohio App. LEXIS 8796 (Dec. 22, 1978). If a trial court abuses its discretion by imposing punitive damages on a party in default without a hearing on the matter, what then is the basis for any entitlement to punitive damages? There is none. It is a decision that rests squarely with the trier of fact. The Trial Court here held that it could not impose punitive damages because Roxanne McClellan, the tortfeasor, was deceased. The Fifth District decision should be reversed and the Trial Court's decision should be affirmed.

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 forgoing Reply 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, Robert F. DiCello, 7566 Mentor Avenue, Mentor, Ohio 44060, Jonathan R. Stoudt, 495 South High Street, Suite 450, Columbus, Ohio 43215, Drew Legando, 1360 West 9th Street, Suite 200, Cleveland, Ohio 44113 on this 13th day of July, 2015.

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