

IN THE SUPREME COURT OF OHIO

CASE NO. 2014-1462

CHRISTINE MARIE WHETSTONE, et al.
Plaintiff-Appellee

-v-

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

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

**AMICUS CURIAE BRIEF OF THE OHIO ASSOCIATION FOR JUSTICE
IN SUPPORT OF PLAINTIFF-APPELLEE**

Robert F. DiCello (0072020)
THE DICELLO LAW FIRM
7556 Mentor Avenue
Mentor, Ohio 44060
(440) 953-8888
Fax: (440) 953-9138
rfdicello@dicellolaw.com
*Attorney for Amicus Curiae
Ohio Association for Justice*

Jonathan R. Stoudt (0083839)
ROURKE & BLUMENTHAL, LLP
495 South High Street, Suite 450
Columbus, Ohio 43215
(614) 220-9200
Fax: (614) 220-7900
jstoudt@randblp.com
*Attorney for Amicus Curiae
Ohio Association for Justice*

Charles M. Elsea (0085582)
STEBLETON, ARANDA & SNIDER, LPA
109 North Broad Street
P.O. Box 130
Lancaster, Ohio 43130
(740) 654-4141
Facsimile: (740) 654-2521
Email: cmelsea@sas-lawfirm.com
*Attorney for Defendant-Appellant
Erin Binner, Administrator of the Estate
of Roxanne McClellan*

Grant A. Wolfe (0015309)
300 East Broad Street, Suite 450
P.O. Box 1505
Columbus, Ohio 43216
(614) 221-2330
Facsimile: (614) 221-5996
*Attorney for Plaintiff-Appellee
Christine Marie Whetstone, Individually and
as Parent and Natural Guardian and Next
Friend of O.C. and L.C., minor*

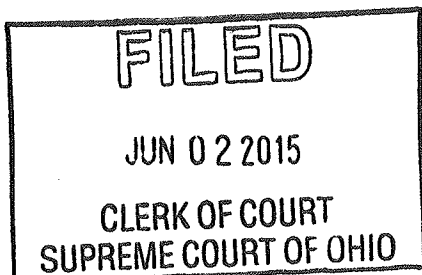


TABLE OF CONTENTS

TABLE OF CONTENTS.....	i
TABLE OF AUTHORITIES.....	ii
INTRODUCTION AND INTERESTS OF AMICUS CURIAE.....	1
STATEMENT OF THE CASE AND FACTS.....	2
APPELLANT’S PROPOSITION OF LAW.....	3
ARGUMENT	3
I. Tort law depends on punitive damages, not only as a form of distributive and retributive (corrective) justice but as a uniquely American expression of fairness.....	3
II. Ohio law has long recognized the deterrent effect of punitive damage awards, which is unaltered by the death of a culpable defendant.....	5
III. An award of punitive damages against the estate of a deceased tortfeasor is not prohibited by the Ohio Revised Code, and any limitation in this regard should be considered by the General Assembly.....	7
IV. The Proposition of Law advanced by Appellant is unnecessary because punitive damages are desirable and well insulated with procedural protections to prevent arbitrary or unjust punitive damage awards.....	9
CONCLUSION.....	10
CERTIFICATE OF SERVICE.....	12

TABLE OF AUTHORITIES

Case Authorities:

<i>Caron v. Caron</i> , 577 A.2d 1178 (Me. 1990).....	6
<i>Day v. Woodworth</i> , 54 U.S. 363, 14 L.Ed. 181 (1852).....	4
<i>Genay v. Norris</i> , 1 Bay. 6 (S.C. 1784).....	4
<i>Haralson v. Fisher Surveying, Inc.</i> , 201 Ariz. 1, 31 P.3d 114 (2001).....	6, 9
<i>Hawkins v. Allstate Ins. Co.</i> , 152 Ariz. 490, 733 P.2d 1073 (1987).....	9
<i>Individual Business Services, Inc. v. Carmack</i> , Montgomery C.P. No. 2004 CV 08159, 2009 Ohio Misc. LEXIS 553 (Nov. 18, 2009).....	8
<i>Lambert v. Shearer</i> , 84 Ohio App. 3d 266, 616 N.E.2d 965 (10 th Dist. 1992).....	7
<i>Linscott v. Rainier Nat'l Life Ins. Co.</i> , 100 Idaho 854, 606 P.2d 958 (1980).....	6
<i>Moskovitz v. Mt. Sinai Med. Ctr.</i> , 69 Ohio St.3d 638, 635 N.E.2d 331 (1994)....	6
<i>Pac. Mut. Life Ins. Co. v. Haslip</i> , 499 U.S. 1, 113 111 S. Ct. 1032 (1991).....	4
<i>Preston v. Murty</i> , 32 Ohio St.3d 334, 512 N.E.2d 1174 (1987).....	6
<i>Roberts v. Mason</i> , 10 Ohio St. 277 (1859).....	<i>passim</i>
<i>Rubeck v. Huffman</i> , 54 Ohio St.2d 20, 374 N.E.2d 411 (1978).....	7
<i>Silkwood v. Kerr-McGee</i> , 464 U.S. 238, 104 S. Ct. 615 (1984).....	4
<i>Slusher v. Palm Harbor</i> , 177 Ohio App.3d 852, 2008-Ohio-41, 896 N.E.2d 715, (4 th Dist.).....	7
<i>Whetstone v. Binner</i> , 2014-Ohio-3018, 15 N.E.3d 905, (5th Dist.).....	<i>passim</i>

Other authorities:

3 W Blackstone Commentaries 138.....	4
R.C. 2305.21	<i>passim</i>
Ohio Jury Instructions Section 315.37.....	10

Aristotle, and H. Rackham, <i>The Nicomachean Ethics</i> , Cambridge, MA: Harvard UP, Section 6 (1982).....	3
Holmes, O., <i>The Path of the Law</i> , 10 Harv. L. Rev 457 (1897).....	5
Jimenez, M., <i>Finding the Good in Holmes's Bad Man</i> , 79 Fordham L. Rev. 2069 (2011).....	5

INTRODUCTION AND INTERESTS OF AMICUS CURIAE

This Amicus Curiae represents the interests of the Ohio Association for Justice (“OAJ”), a consortium of attorneys who focus on representing individual plaintiffs in personal injury cases and other civil litigation within the State of Ohio. The members of OAJ are dedicated to protecting the rights of individuals in litigation and to the improvement and promotion of public confidence in the legal system.

In this regard, the OAJ and its members have a strong interest in defending the ability of juries to establish standards within the community, and to deter others from engaging in reprehensible conduct via the award of punitive damages. Such awards play a vital role in the civil justice system, and these interests of general deterrence do not dissipate upon the death of a culpable defendant. As such, the OAJ respectfully requests that this Court uphold the decision of the Fifth District Court of Appeals.

STATEMENT OF CASE AND FACTS

While adopting the statement of the case and the statement of facts set forth in the Merit Brief of Plaintiffs-Appellees, the OAJ offers this short introduction to focus this Court on the central issue of this Amicus Brief.

The last scene in “It’s a Wonderful Life,” conveys an important message: Jimmy Stewart learns that he can count on his neighbors’ generosity and goodness, just as they had always counted on him. They are bound together in common cause. The principle: Together, we preserve and protect genuine community.

Punitive damages are vital to a jury’s ability to preserve and protect its community. They are controversial, but they need not be feared. No evidence supports the notion that they are ruining our economy. They are not akin to criminal sanctions which are paid into the government’s (king’s) coffers for injury to the State. Nor are they an ancient peculiarity of laws that guided societies in less civilized times (as when hangings in the public square were thought to change the minds of would-be criminals). A serious discussion of punitive damages avoids these cartoonish arguments.

Rather, punitive damages are to be embraced for their ability to empower a jury to speak as and for the community where the most victimized citizens confront the most egregious wrongdoers amidst the polite procedure of the civil court room. They are not improper, whether they be imposed against a living wrongdoer or a deceased wrongdoer’s estate. They are a necessary tool of distributive and retributive justice, a mechanism for moving the wrongdoer’s money from those who deserve it least to those who need it most – and only in the interest of serving one unique American promise: that there be justice for all.

APPELLANT'S PROPOSITION OF LAW

Punitive damages may not be imposed against the estate of a deceased tortfeasor.

ARGUMENT IN OPPOSITION TO PROPOSITION OF LAW

- I. Tort law depends on punitive damages, not only as a form of distributive and retributive (corrective) justice but as a uniquely American expression of fairness.**

Let's agree at the outset that Tort law does not always involve punishing wrongdoers for morally blameworthy behavior. It often deals with contract disputes and the settling of debts or obligations incurred by accidents. But when morally blameworthy conduct is at issue, punitive damages are well-suited to the task of correcting the resulting harms, even where the wrongdoer dies leaving an estate to pay the debts.

Appellant asserts that the purpose of punitive damages is "frustrated" by the imposition of punitive damages against an estate, or that such a result "punishes innocent beneficiaries and creditors." (See Appellant's Merit Brief, pp. 18-19).

Yet, consider the fact that in a very real sense, a wrongdoer's bad choices live on in the lives and memories of his or her victims. And consider who in our community is most deserving of the wrongdoer's estate in that rare scenario. Don't the victims deserve the opportunity to be made whole from the wrongdoer's estate?

This notion of who is more deserving is at the heart of Aristotle's definition of distributive justice. Aristotle, and H. Rackham, *The Nicomachean Ethics*, Cambridge, MA: Harvard UP, Section 6 (1982). It is best summed up with the axiom, "What is just is to distribute things in proportion to merit." *Id.* While the deceased wrongdoer no longer lives with the consequences or memory of his or her actions, the victims enjoy no relief. Doesn't it therefore strike us as fair that a wrongdoer's estate, those things left

behind by the wrongdoer, be subject to distribution to the prevailing (though injured) victims? 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? And if so, doesn't the act of redistributing the wrongdoer's estate to victims give the jury, i.e., the community, the opportunity to preserve and protect itself? It does.

And so, we need to ask how well-founded is our punitive damages tradition?

According to the U.S. Supreme Court, "punitive damages have long been a part of traditional state tort law." *Silkwood v. Kerr-McGee*, 464 U.S. 238, 255, 104 S. Ct. 615 (1984). Blackstone took note of their use. See 3 W Blackstone Commentaries 138. They were reported in American case law as early as 1784. See *Pac. Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1, 15, 113 S. Ct. 1032 (1991); citing *Genay v. Norris*, 1 Bay. 6 (S.C. 1784).

The often cited case of *Day v. Woodworth* in 1852 made it clear that the doctrine of punitive damages was firmly established in American jurisprudence prior to the adoption of the Fourteenth Amendment:

We are aware that the propriety of this doctrine has been questioned by some writers; but if repeated judicial decisions for more than a century are to be received as the best exposition of what the law is, the question will not admit of argument.

Day v. Woodworth, 54 U.S. 363, 371, 14 L.Ed. 181 (1852).

For more than 150 years this Honorable Court has recognized the validity of punitive damage awards against defendants in tort actions. *Roberts v. Mason* (1859), 10 Ohio St. 277. The *Roberts* Court noted that "[i]n a case of this kind, twelve intelligent and impartial men, acting under oath, and subject, in a proper case, to control of the court, are not likely to do any great wrong; and it seems to us that the power which this

rule confers upon a jury, may, in practice, operate as a salutary restraint upon the evil passions of bad men.” *Id.*

In the sense that justice is retributive, i.e., involves the notion of retribution or paybacks, consider this: Restraint on the “bad man” is one of the central tenets of the civil justice system. “If you want to know the law and nothing else, you must look at it as a bad man, who cares only for the material consequences which such knowledge enables him to predict, not as a good one, who finds his reasons for conduct, whether inside the law or outside of it, in the vaguer sanctions of conscience.” Holmes, O., *The Path of the Law*, 10 Harv. L. Rev 457, 459 (1897).

Punitive damages, in particular, have long served as an element of Tort law “beyond the bad man’s reach.” They increase the consequences of reprehensible conduct and thus deter future wrongdoers in need of additional incentive to withstand from malicious or reckless behaviors. See Jimenez, M., *Finding the Good in Holmes’s Bad Man*, 79 Fordham L. Rev. 2069, 2098-99 (2011). History books are filled with descriptions of actions taken by “bad men” who have long since passed, and the consequences thereof. The lessons remain.

II. Ohio law has long recognized the deterrent effect of punitive damage awards, which is unaltered by the death of a culpable defendant.

A second consideration comes into play: Deterrence. As recognized by the Fifth District in this case, the general deterrent effect of punitive damage awards remains applicable regardless of whether the tortfeasor is alive at the time of the judgment. *Whetstone v. Binner*, 2014-Ohio-3018, 15 N.E.3d 905, ¶ 27 (5th Dist.). The need for an offending party to be “set up as an example to others that they might be deterred from similar conduct,” survives the death of the wrongdoer. *Id.*; citing *Moskovitz v. Mt. Sinai*

Med. Ctr., 69 Ohio St.3d 638, 651, 635 N.E.2d 331 (1994); and *Preston v. Murty*, 32 Ohio St.3d 334, 512 N.E.2d 1174 (1987). Indeed, as pointed out by the Arizona Supreme Court, there are a number of 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.” *Haralson v. Fisher Surveying, Inc.*, 201 Ariz. 1, 4, 31 P.3d 114 (2001); citing *Caron v. Caron*, 577 A.2d 1178, 1180 (Me. 1990) (“primary purpose of punitive damages is to ‘express society's disapproval of intolerable conduct and to deter such conduct where no other remedy would suffice’”); *Linscott v. Rainier Nat'l Life Ins. Co.*, 100 Idaho 854, 606 P.2d 958, 961 (Idaho 1980) (the purpose of exemplary damages “is not to compensate the plaintiff, but to express the outrage of society at certain actions of the defendant”). Here again, the society protects itself.

“Examples such as terrorist attacks or bombings, mass murders, and serial killings immediately come to mind. It is difficult to understand why the assets of those who perpetrate such atrocities and then die should be shielded from punitive damage liability.” *Haralson*, at 4. Whether imposed during the life of the wrongdoer or upon an estate after death, punitive damages nonetheless remain a material consequence to be considered by the proverbial “bad man,” so as to steer his actions toward societal norms. The Fifth District’s holding recognizes that these concerns outweigh any risk of “unfairness” to the heirs of a defendant’s estate, and as such should be upheld by the Court in this case.

III. An award of punitive damages against the estate of a deceased tortfeasor is not prohibited by the Ohio Revised Code, and any limitation in this regard should be considered by the General Assembly.

The Merit Brief of Appellant attempts to argue, at great length, that “Ohio’s survival statute does not authorize the imposition of punitive damages against the estate of a deceased tortfeasor.” (See Appellant’s Merit Brief, pp. 4-18). However, as pointed out by the Fifth District below, nothing in the language of R.C. 2305.21 suggests such a conclusion. The statute reads as follows:

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.**

(Emphasis added).

Pursuant to the statute, this Court has previously held that in situations where a plaintiff-decedent had a right to punitive damages before his death, that right remains viable and passes to his estate. *Rubeck v. Huffman*, 54 Ohio St.2d 20, 23, 374 N.E.2d 411 (1978). Although some Ohio appellate courts have noted that punitive damages are not separate claims that need be specially pled, the *Rubeck* opinion suggests that the “cause of action” for punitive damages should survive the “death of the person liable thereto” as well. See *Lambert v. Shearer*, 84 Ohio App. 3d 266, 273, 616 N.E.2d 965 (10th Dist. 1992); cited by *Slusher v. Palm Harbor*, 177 Ohio App.3d 852, 2008-Ohio-41, 896 N.E.2d 715, ¶22 (4th Dist.). “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.” *Whetstone*, ¶19; quoting *Individual Business Services, Inc.*

v. Carmack, Montgomery C.P. No. 2004 CV 08159, 2009 Ohio Misc. LEXIS 553 (Nov. 18, 2009).

Despite the assertions of Appellant that “the common law did not permit the imposition of punitive damages against an estate,” the fact remains that no Ohio appellate authority exists, either prior to or after the passage of R.C. 2305.21, which has held in such a manner. Meanwhile, the policy of general deterrence and the “salutory restraint” underlying such awards has been recognized by this Court for more than a century. *See Roberts*, 10 Ohio St. 277.

Appellant has asked this Court to base its decision on a weighing of competing public policy interests. In doing so, Appellant seeks to write new law to protect the heirs/beneficiaries of a deceased tortfeasor who has committed acts deemed malicious by a jury, at the expense of the interests of the general public in condemning such behaviors. Rather than legislating from the bench, the practice of writing new law balancing these concerns should be left to the General Assembly.

This Court has previously visited the invitation to write a new law of punitive damages as follows: “[T]he rule [of punitive damages] has been considered, so far as we know, established and elementary. If an alteration of the rule were deemed desirable, therefore, it would come more properly from the legislature than from us. But we are not prepared to recommend any such alteration.” *Roberts*, 10 Ohio St. at 280. Nothing in the language of R.C. 2305.21, nor anywhere else in the Revised Code, suggests the limitation on punitive damages advanced by Appellant in this case, and this Court should therefore refrain from making such a determination.

IV. The Proposition of Law advanced by Appellant is unnecessary because punitive damages are desirable and well insulated with procedural protections to prevent arbitrary or unjust punitive damage awards.

Is there a more desirable, humane penalty to impose than one which brings no suffering at all? Punitive damages against the estate of a deceased wrongdoer are literally a painless penalty against the wrongdoer. They benefit those who most need and deserve the estate – even above any previously named beneficiary.

Should one fear that punitive damage award are susceptible to abuse, fear not. “Adequate safeguards exist, and should be utilized, to protect against arbitrary, exorbitant, or otherwise improper verdicts. Jurors should be instructed to consider all aspects of fairness and justice in deciding whether, and in what amount, to award punitive damages. This would include the value of the estate and hardship to the heirs. The jury should also be reminded of its right to decline a punitive verdict altogether. Moreover, the parties are free to argue the reasonableness and advisability of such an award. Thus, an estate is placed in the same position as any other defendant against whom a punitive award is sought.” *Haralson*, 201 Ariz. at 6; citing *Hawkins v. Allstate Ins. Co.*, 152 Ariz. 490, 497, 733 P.2d 1073 (1987).

In Ohio, punitive damage awards are not recoverable unless a plaintiff can demonstrate that the actions of the defendant constituted “malice or aggravated or egregious fraud,” which must be supported by clear and convincing evidence. *See* R.C. 2315.21 (C)(1) and (D)(4). Further, even when this exceedingly difficult burden of proof is met, these damage awards are limited by caps set forth in R.C. 2315.21 (D)(b), which provides that awards against individuals may not exceed 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.” Furthermore, juries are reminded prior to the determination of such awards that the amount, if any, “should be fair and reasonable under all the facts and circumstances. It should neither be excessive nor influenced by passion, sympathy, or prejudice.” O.J.I. 315.37 (No. 11).

Taking these protections into account, it is clear that any risk of “unfairness” to the heirs and beneficiaries of a morally culpable tortfeasor’s estate are minimal, and thus greatly outweighed by the need for the jury system to administer punitive damage awards in the interest of general deterrence. The current jury system already provides ample protections to these individuals, and the broad-stroked proposition of law advanced by Appellant is both unnecessary and unjust.

CONCLUSION

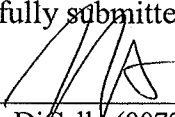
American Law must not be mute to the examples of story and myth. When an evil tyrant dies, the surviving hero or heroine typically get more than mere compensation for the injuries they sustained from all the fighting that occurred – they usually get the wrongdoer’s entire kingdom before they live happily ever after. There’s an archetypal truth buried in this sort of narrative. Together, we preserve and protect genuine community, and that’s why those who are unjustly treated are justly rewarded for enduring the misery inflicted upon them.

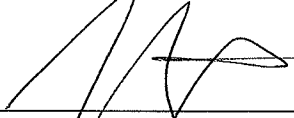
And so it ought to be in this case.

In light of the foregoing, the OAJ and its members respectfully request that that the decision of the Fifth District be upheld.

Respectfully submitted,

(0083839
PER AUTHORITY)


Robert F. DiCello (0072020)
THE DICELLO LAW FIRM
7556 Mentor Avenue
Mentor, Ohio 44060
(440) 953-8888
Fax: (440) 953-9138
rfdicello@dicellolaw.com
Attorney for Amicus Curiae
Ohio Association for Justice

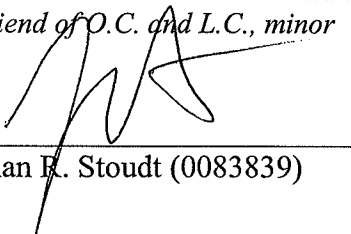

Jonathan R. Stoudt (0083839)
Rourke & Blumenthal, LLP
495 South High Street, Suite 450
Columbus, OH 43215
Telephone: (614) 220-9200
Facsimile: (614) 220-7900
jstoudt@randblp.com
Attorney for Amicus Curiae
Ohio Association for Justice

CERTIFICATE OF SERVICE

I hereby certify that the foregoing Brief was served by regular U.S. Mail on this 2nd day of June, 2015 upon the following:

Charles M. Elsea (0085582)
STEBLETON, ARANDA & SNIDER, LPA
109 North Broad Street
P.O. Box 130
Lancaster, Ohio 43130
(740) 654-4141
Facsimile: (740) 654-2521
Email: cmelsea@sas-lawfirm.com
*Attorney for Defendant-Appellant
Erin Binner, Administrator of the Estate
of Roxanne McClellan*

Grant A. Wolfe (0015309)
300 East Broad Street, Suite 450
P.O. Box 1505
Columbus, Ohio 43216
(614) 221-2330
Facsimile: (614) 221-5996
*Attorney for Plaintiff-Appellee
Christine Marie Whetstone, Individually and
as Parent and Natural Guardian and Next
Friend of O.C. and L.C., minor*



Jonathan E. Stoudt (0083839)