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# Adding Insult to Death: Why Punitive Damages Should Not Be Imposed Against a Deceased Tortfeasor's Estate in Ohio

Alec A. Beech

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**ADDING INSULT TO DEATH: WHY PUNITIVE DAMAGES  
SHOULD NOT BE IMPOSED AGAINST A DECEASED  
TORTFEASOR’S ESTATE IN OHIO**

*Alec A. Beech\**

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## I. INTRODUCTION

Should the law punish the dead? If so, should the courts or the legislature decide the issue? These questions arise in the context of punitive damages. Punitive, or exemplary, damages are generally awarded to punish and deter certain wrongful conduct. In some situations, however, an exemplary award may not advance these longstanding purposes of punitive damages. Specifically, a tortfeasor who dies before damages are levied can no longer be punished or deterred. Thus, a punitive award, in such situations, would frustrate the purposes of punitive damages. For these reasons, a majority of jurisdictions agree that punitive damages cannot be awarded against a deceased tortfeasor's estate. However, courts in a growing minority of states, including Ohio, have held to the contrary.

On July 7, 2014, in *Whetstone v. Binner*, the Ohio Fifth District Court of Appeals, consisting of a divided three-judge panel, held that a plaintiff injured in a tort action could recover punitive damages against a deceased tortfeasor's estate.<sup>1</sup> In its decision, the court acknowledged a jurisdictional split on the issue.<sup>2</sup> Nevertheless, the court adopted the position and reasoning followed by a minority of jurisdictions.<sup>3</sup>

The facts that gave rise to the issue at bar are as follows: the great aunt of two small children, aged five and two, was responsible for watching over and caring for the children.<sup>4</sup> The great aunt assaulted the five-year-old girl by "strangling and attempting to suffocate her while restraining her against her will."<sup>5</sup> The children's mother arrived home during the chaos to find the great aunt with a pillow over her daughter's face and a hand around her daughter's neck.<sup>6</sup> The mother freed her daughter from the great aunt's grasp and fled the house with the great

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1. 2014-Ohio-3018, 15 N.E.3d 905, ¶ 26 (5th Dist.) (one justice dissenting).

2. *Whetstone*, 2014-Ohio-3018 at ¶ 22.

3. *Whetstone*, 2014-Ohio-3018 at ¶ 26.

4. Merit Brief of Plaintiff-Appellee at 6, *Whetstone v. Binner*, No. 2014-1462.

5. *Id.*

6. *Id.*

aunt “chasing after her and her children.”<sup>7</sup>

The plaintiff-mother filed suit against the great aunt alleging assault, battery, false and/or unlawful imprisonment, and intentional infliction of emotional distress.<sup>8</sup> Importantly, a judgment was entered against the defendant-great aunt while she was alive.<sup>9</sup> Thereafter, the plaintiff filed a suggestion of death indicating that the defendant-great aunt died and that the great aunt’s daughter was appointed administrator of the estate.<sup>10</sup> At the hearing on damages, after the great aunt’s death, the trial court awarded \$500 in compensatory damages for lost wages to the plaintiff-mother, \$1,000 in non-economic damages for past and future emotional distress to the unharmed two-year-old child, and \$50,000 in non-economic damages to the five-year-old for physical injury and past and future emotional harm and distress.<sup>11</sup> However, the trial court declined to award punitive damages to the plaintiff, reasoning that “punitive damages cannot be awarded against the estate of a tortfeasor who is deceased.”<sup>12</sup>

The Fifth District Court of Appeals disagreed with the trial court and, thus, aligned Ohio with a small minority of jurisdictions that allows punitive damages to be imposed against a deceased tortfeasor’s estate.<sup>13</sup> The Supreme Court of Ohio granted certiorari and, thereafter, heard oral arguments on the case.<sup>14</sup> On March 15, 2016, the Court, in a 4-3 decision, upheld the appellate decision, concluding that “a punitive-damages award is available *in the limited circumstances presented here*.”<sup>15</sup>

Writing for the majority, Chief Justice O’Connor acknowledged a jurisdictional split on the threshold issue of whether punitive damages may be imposed against an estate.<sup>16</sup> However, the court did not expressly align Ohio with either the majority or minority, and, instead, decided the case on the facts presented. The Court’s analysis focused on the fact that the defendant was alive when the trial court entered judgment against her for assault, false imprisonment, emotional distress,

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7. *Id.*

8. *Whetstone*, 2014-Ohio-3018 at ¶ 3.

9. *Whetstone*, 2014-Ohio-3018 at ¶ 4.

10. *Whetstone*, 2014-Ohio-3018 at ¶ 6.

11. *Whetstone*, 2014-Ohio-3018 at ¶ 10.

12. *Whetstone*, 2014-Ohio-3018 at ¶ 6 (citing *Mongold v. Estate of Gilbert*, 114 Ohio Misc. 2d 32, 35-36, 758 N.E.2d 1245, 1247-49 (Ohio Ct. Com. Pl. 2000)).

13. *Whetstone*, 2014-Ohio-3018 at ¶ 26. *See also* Appendices C and D *infra* for a list of minority jurisdictions.

14. *Whetstone v. Binner*, 141 Ohio St.3d 1473, 25 N.E.3d 1080 (Table), 2015-Ohio-554.

15. *Whetstone v. Binner*, Slip Opinion No. 2016-Ohio-1006, ¶ 1 (emphasis added).

16. *Whetstone*, 2016-Ohio-1006 at ¶ 17-18.

and loss of consortium.<sup>17</sup> For that reason, the Court ultimately held that “in cases in which liability has been determined while the tortfeasor is alive, punitive damages are available to the plaintiff.”<sup>18</sup> Nevertheless, the actual effect of such a holding in this case is that punitive damages may be imposed against the defendant’s estate because, at the time of the Court’s decision, she was deceased and any punitive award would be paid by her estate.

Two justices authored dissenting opinions.<sup>19</sup> Each dissenter expressed that the appellate decision should be reversed because the imposition of punitive damages against an estate does not further the espoused purposes of punitive damages in Ohio.<sup>20</sup> The effect of the Ohio Supreme Court’s majority opinion has left uncertainty in the law as to whether punitive damages may be imposed against a deceased tortfeasor in Ohio. Although the Court held that punitive damages could be awarded against an estate in the limited circumstances of *Whetstone*,<sup>21</sup> it did not express a bright line rule on the threshold issue. The appellate decision, in contrast, did acknowledge that its decision placed Ohio in the minority.<sup>22</sup> For the following reasons, this Comment argues that both the appellate and Supreme Court decisions are contrary to the longstanding purposes of punitive damages.

While other jurisdictions have offered different reasons for awarding punitive damages, the Supreme Court of Ohio has repeatedly expressed that punishment and deterrence are the only two purposes that should be considered when imposing punitive awards.<sup>23</sup> The appellate holding in *Whetstone v. Binner* is contrary to the Supreme Court’s prior interpretation of punitive damages in that the *Whetstone* holding does not truly advance these espoused purposes. General deterrence alone is not a sufficient reason to support the recovery of punitive damages following the death of the tortfeasor. Not only is the appellate court’s reasoning contrary to Ohio common law, its holding is not supported by statute, and negative policy concerns arise from the holding.<sup>24</sup> The Supreme Court of Ohio’s prior decisions align with the majority view that punitive damages cannot be awarded in such situations. Furthermore, the legislature may be better suited to address the issue at

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17. *Whetstone*, 2016-Ohio-1006 at ¶ 21-24.

18. *Whetstone*, 2016-Ohio-1006 at ¶ 24.

19. *See generally Whetstone*, 2016-Ohio-1006 at ¶ 28-45.

20. *See Whetstone*, 2016-Ohio-1006 at ¶ 28-45.

21. *Whetstone*, 2016-Ohio-1006 at ¶ 1.

22. *Whetstone v. Binner*, 2014-Ohio-3018, 15 N.E.3d 905, ¶ 26 (5th Dist.).

23. *See infra* Part III.A.

24. *See infra* Parts III.A, III.B, and IV.

bar and, if so, should adopt a statute contrary to the *Whetstone* holding. Thus, whether it does so judicially or statutorily, Ohio should adopt the majority view that a claim for punitive damages cannot survive the death of the tortfeasor.

Part II of this Comment provides the background information necessary for a meaningful discussion of the issue, including an overview of compensatory and punitive damages, as well as state survival statutes, and the relevant law specific to Ohio in comparison to other jurisdictions. Part III analyzes whether Ohio should impose punitive damages against the estates of tortfeasors. Part IV discusses the broader policy implications of the majority and minority views and whether the courts or the legislature is better suited to address the issue. Finally, Part V embraces the ultimate conclusion that Ohio should adopt the majority position and disallow punitive damages after the death of a tortfeasor. It also suggests that either the Ohio General Assembly or the Supreme Court of Ohio should overrule the appellate holding in *Whetstone*.

## II. BACKGROUND

Part A of this section discusses the types of damages awarded in tort actions; compensatory damages are discussed in Part A.1 and punitive damages are discussed in Part A.2. Part B discusses how punitive damages are awarded in Ohio and the applicable Ohio statutes while Part C introduces survival statutes, both in Ohio and other states. Part D outlines the seminal court cases in Ohio that discuss whether a deceased tortfeasor's estate is liable for punitive damages. Finally, Part E outlines the discussion of the issue in other jurisdictions and the majority and minority views across those jurisdictions.

### A. *General Damages in Tort Actions*

Generally, a plaintiff files suit against an alleged wrongdoer in order to receive some type of remedy. Remedies can include injunctions and declaratory judgments issued by a court, but most tort plaintiffs seek damages against the defendant. "Damages have been defined to be the compensation which the law will award for an injury done . . . ."<sup>25</sup> In other words, the term "damages" describes an award for a legally recognized harm.<sup>26</sup> Intentional torts, such as assault or battery, are

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25. *Scott v. Donald*, 165 U.S. 58, 86 (1897).

26. DAN B. DOBBS, *THE LAW OF TORTS* 1047 (2000).

inherently harmful to the plaintiff, and, thus, the plaintiff is always entitled to some form of relief.<sup>27</sup> Furthermore, damages are one of the four elements of a negligence claim.<sup>28</sup> The remainder of this section will discuss two types of damages awarded in tort actions: compensatory damages and punitive damages.

### 1. Compensatory Damages

The most common type of damages recoverable by a plaintiff in a tort action is compensatory damages.<sup>29</sup> Compensatory damages are designed to repay the plaintiff for losses that resulted from the tort.<sup>30</sup> The goal of compensatory damages is that the plaintiff should be restored to her original position before the injury as if the harm had never taken place.<sup>31</sup> Thus, such damages may not exceed the amount that makes the plaintiff whole.<sup>32</sup> Compensatory damages may include awards for lost earnings, medical expenses, emotional distress, and mental and physical pain and suffering, among many other things.<sup>33</sup> There are also several other types of damages available to tort victims, including nominal, liquidated, and punitive damages.

### 2. Punitive Damages

Punitive damages go beyond the purposes of compensatory damages. The term “punitive” is defined as “[i]nvolving or inflicting punishment.”<sup>34</sup> The United States Supreme Court has stated that the primary purposes of such damages are to “punish[] . . . the guilty, to deter from any such proceeding for the future, and [to prove] the detestation of the jury to the action itself.”<sup>35</sup> Thus, in certain situations, a plaintiff may be entitled to additional damages where certain types of conduct are involved.<sup>36</sup> Punitive damages are “allowable in excess of the actual loss where a tort is aggravated by evil motive, actual malice,

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27. *Id.*

28. *Id.*

29. *Id.*

30. *Id.*

31. 22 AM. JUR. 2D *Damages* § 28 Westlaw (database updated Nov. 2015).

32. 22 AM. JUR. 2D *Damages* § 31 Westlaw (database updated Nov. 2015).

33. *See* DOBBS, *supra* note 26, at 1047-62. Compensatory damages may also be awarded for invasions of constitutional rights and harms to property. *See id.* at 1053-56.

34. BLACK'S LAW DICTIONARY 1354 (9th ed. 2009).

35. *Scott v. Donald*, 165 U.S. 58, 87 (1897) (internal quotation marks omitted).

36. DOBBS, *supra* note 26, at 1062.

deliberate violence, or oppression.”<sup>37</sup>

Courts generally cite two primary reasons for the awarding of punitive damages: to punish and to deter.<sup>38</sup> As expressed in the Restatement (Second) of Torts, punitive damages are meant to punish the tortfeasor for the wrongful act and to discourage the tortfeasor, specifically, and the public, generally, from committing similar conduct.<sup>39</sup> However, some jurisdictions award punitive damages for other reasons, including where compensatory damages were insufficient to make the plaintiff whole.<sup>40</sup> Still, other courts use punitive awards to compensate “a plaintiff for the humiliation, sense of outrage, and indignity resulting from injuries maliciously, wilfully and wantonly inflicted by the defendant.”<sup>41</sup> While most courts focus on the punishment and deterrence of the tortfeasor in awarding punitive damages, a minority of jurisdictions emphasizes “the harm done the plaintiff” as well as other purposes.<sup>42</sup>

Courts treat compensatory and punitive awards quite differently.<sup>43</sup> Fundamentally, compensatory damages cannot enhance the plaintiff’s situation, while punitive damages effectively compensate far beyond making the injured party whole. Compensatory damages may be reduced by a plaintiff’s comparative negligence or some other mitigating factor, yet punitive damages are generally not decreased under similar circumstances.<sup>44</sup> Also, courts and legislatures often impose a higher burden of proof for the recovery of punitive damages.<sup>45</sup>

Nearly all jurisdictions permit judges and juries to assess punitive damages against the tortfeasor.<sup>46</sup> Punitive damages are only available to the plaintiff where the tortfeasor acted with bad intent or malice.<sup>47</sup> There must be “some element of outrage” due to the tortfeasor’s malicious

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37. *Scott*, 165 U.S. at 86.

38. DOBBS, *supra* note 26, at 1063; *See also* Freudeman v. Landing of Canton, 702 F.3d 318, 330 (6th Cir. 2012) (applying Ohio law). Punishment and deterrence are often referred to as the “twin aims” of punitive damages.

39. RESTATEMENT (SECOND) OF TORTS § 908 (1979).

40. *Phillips v. Gen. Motors Corp.*, 2000 MT 55, ¶ 45, 298 Mont. 438, 995 P.2d 1002.

41. *Kewin v. Mass. Mut. Life Ins. Co.*, 295 N.W.2d 50, 55 (Mich. 1980) (internal quotation marks omitted).

42. *Id.*

43. Timothy R. Robicheaux & Brian H. Bornstein, *Punished, Dead or Alive: Empirical Perspectives on Awarding Punitive Damages Against Deceased Defendants*, 16 PSYCHOL. PUB. POL’Y & L. 393, 395 (2010).

44. *Id.*

45. *Id.*

46. *Scott v. Donald*, 165 U.S. 58, 86 (1897).

47. *Id.*

intent or reckless indifference to others.<sup>48</sup> For example, an Ohio jury awarded a decedent's estate \$15 million in punitive damages where the defendant's train struck and killed the decedent, and the defendant could have easily prevented the accident.<sup>49</sup>

### B. Punitive Damages in Ohio

Ohio has codified the procedure for recovering punitive damages.<sup>50</sup> Revised Code 2315.21 allows for a plaintiff's recovery of punitive damages only where the acts or omissions of the tortfeasor "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."<sup>51</sup> In addition, the trier of fact must first determine whether the plaintiff may recover compensatory damages before awarding punitive damages.<sup>52</sup> "The compensatory-damages requirement prevents plaintiffs from bringing cases solely for an award of punitive damages . . ."<sup>53</sup> Punitive damages "are not independent remedies."<sup>54</sup> Furthermore, a plaintiff may not recover punitive damages of more than twice the amount of the plaintiff's compensatory award.<sup>55</sup>

Pursuant to R.C. 2315.21 (the punitive damages statute), the factfinder must determine that the tortfeasor committed the act with "actual malice" before the plaintiff is eligible to receive punitive damages.<sup>56</sup> "Actual malice" for the purposes of awarding punitive damages is "(1) that state of mind under which a person's conduct is characterized by hatred, ill will or a spirit of revenge, or (2) a conscious disregard for the rights and safety of other persons that has a great probability of causing substantial harm."<sup>57</sup>

Revised Code 2315.21 provides the framework for the awarding of punitive damages. However, punitive awards developed from the common law, and Ohio courts have molded the doctrine through judicial

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48. RESTATEMENT (SECOND) OF TORTS § 908 cmt. b (1979).

49. *Wightman v. Consol. Rail Corp.*, 715 N.E.2d 546, 550 (Ohio 1999).

50. OHIO REV. CODE ANN. § 2315.21 (West, Westlaw through Files 1-29 of 131st Gen. Ass. 2015-2016).

51. § 2315.21(C)(1) (Westlaw).

52. § 2315.21(C)(2) (Westlaw).

53. *Niskanen v. Giant Eagle, Inc.*, 122 Ohio St. 3d 486, 2009-Ohio-3626, 912 N.E.2d 595, ¶ 13.

54. *Niskanen* at ¶ 13.

55. § 2315.21(D)(2)(a) (Westlaw).

56. *Preston v. Murty*, 512 N.E.2d 1174, 1176 (Ohio 1987).

57. *Id.*

decisions.<sup>58</sup> Specifically, the Supreme Court of Ohio has held that “[t]he purpose of punitive damages is not to compensate a plaintiff, but to punish and deter certain conduct.”<sup>59</sup> The punishment of the tortfeasor should not go beyond the twin aims of punitive damages, and the primary focus of punitive awards should be the defendant-tortfeasor rather than the plaintiff.<sup>60</sup>

### C. State Survival Statutes

State survival statutes play an important role in bringing an action and recovering damages following the death of a litigant. Survival statutes provide deceased litigants with the same rights had the death not occurred.<sup>61</sup> Thus, a living or deceased plaintiff may institute a cause of action and seek damages against a deceased defendant’s estate under such statutes.<sup>62</sup> At common law, actions that could survive the death of the tortfeasor generally only included injuries to property.<sup>63</sup> However, many states, including Ohio, have modified the common-law survival standards through statute by expanding or restricting the causes of action that survive.<sup>64</sup>

Revised Code 2305.21 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.”<sup>65</sup> In construing R.C. 2305.21, Ohio courts have permitted claims for intentional or reckless infliction of emotional distress, pain and suffering, legal malpractice, and a claim under the Consumer Sales Practices Act following the death of the party entitled to or liable for damages.<sup>66</sup> Claims for worker’s compensation,

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58. *Dardinger v. Anthem Blue Cross & Blue Shield*, 98 Ohio St. 3d 77, 2002-Ohio-7113, 781 N.E.2d 121, ¶ 188 (citing *Roberts v. Mason*, 10 Ohio St. 277 (Ohio 1859)).

59. *Moskovitz v. Mt. Sinai Med. Ctr.*, 635 N.E.2d 331, 343 (Ohio 1994). *See also Dardinger* at ¶ 178; *Wiles v. Medina Auto Parts*, 96 Ohio St. 3d 240, 2002-Ohio-3994, 773 N.E.2d 526, ¶ 21.

60. *Dardinger* at ¶ 178.

61. *Robicheaux & Bornstein*, *supra* note 33, at 397.

62. *Id.*

63. 1 AM. JUR. 2D *Abatement, Survival, and Revival* § 51 Westlaw (database updated Nov. 2015).

64. 1 AM. JUR. 2D *Abatement, Survival, and Revival* § 52 Westlaw (database updated Nov. 2015).

65. OHIO REV. CODE ANN. § 2305.21 (West, Westlaw through Files 1-29 of 131st Gen. Ass. 2015-2016).

66. *See Williams v. Barrick*, 10th Dist. Franklin No. 08AP-133, 2008-Ohio-4592, ¶ 10 (emotional distress); *Dickerson v. Thompson*, 624 N.E.2d 784, 787 (Ohio Ct. App. 1993) (pain and suffering); *Loveman v. Hamilton*, 420 N.E.2d 1007, 1008 (Ohio 1981) (legal malpractice); *Estate of*

slander, libel, violation of civil rights, and malicious prosecution do not survive the death of a liable or entitled party under R.C. 2305.21.<sup>67</sup> However, the Supreme Court of Ohio, in *Rubeck v. Huffman*, permitted a deceased party's next of kin to recover punitive damages against a living defendant pursuant to the Survival Statute.<sup>68</sup> Based upon the high court's ruling in *Rubeck* and the Survival Statute, the Fifth District Court of Appeals held that a claim for punitive damages could survive the death of the tortfeasor and could be awarded against the decedent's estate under R.C. 2305.21.<sup>69</sup>

One state, Georgia, expressly prohibits the recovery of punitive damages following the death of the tortfeasor in its survival statute.<sup>70</sup> The Georgia code provides that actions for a tort, homicide, or injury do not abate with the death of either the plaintiff or the defendant.<sup>71</sup> However, the statute contains a clause that specifically bars the recovery of punitive damages against the personal representative of a wrongdoer.<sup>72</sup> In contrast, two states expressly allow the recovery of punitive damages in their survival statutes.<sup>73</sup> The relevant Texas statute provides: "When the death is caused by the wilful act or omission or gross negligence of the defendant, exemplary as well as actual damages may be recovered."<sup>74</sup> Oklahoma's wrongful death statute states that "[i]n proper cases . . . punitive or exemplary damages may also be recovered against the person proximately causing the wrongful death or the person's representative if such person is deceased."<sup>75</sup>

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Cattano v. High Touch Homes, Inc., 6th Dist. Erie No. E-01-022, 2002-Ohio-2631, ¶ 44 (Consumer Sales Practices Act).

67. See *Hook v. Springfield*, 750 N.E.2d 1162, 1167 (Ohio Ct. App. 2001) (worker's compensation); *Oakwood v. Makar*, 463 N.E.2d 61, 64 (Ohio Ct. App. 1983) (slander); *Stein-Sapir v. Birdsell*, 673 F.2d 165, 167 (6th Cir. 1982) (per curiam) (applying Ohio law) (libel); *Alsup v. Int'l Union of Bricklayers*, 679 F. Supp. 716, 721 (N.D. Ohio 1987) (applying Ohio law) (violation of civil rights); *State ex rel. Crow v. Weygandt*, 162 N.E.2d 845, 848 (Ohio 1959) (malicious prosecution).

68. 374 N.E.2d 411, 413-14 (Ohio 1978) (per curiam).

69. *Whetstone v. Binner*, 2014-Ohio-3018, 15 N.E.3d 905, ¶ 26 (5th Dist.).

70. GA. CODE ANN. § 9-2-41 (West, Westlaw through 2015 Legis. Sess.).

71. § 9-2-41 (Westlaw).

72. § 9-2-41 (Westlaw).

73. OKLA. STAT. ANN. tit. 12, § 1053 (West, Westlaw through Ch. 399 (End) of the First Sess. of the 55th Legislature (2015)); TEX. CIV. PRAC. & REM. CODE ANN. §§ 71.008, 71.009 (West, Westlaw through end of 2015 Reg. Sess. of the 84th Legislature).

74. TEX. CIV. PRAC. & REM. CODE ANN. § 71.009 (Westlaw).

75. OKLA. STAT. ANN. tit. 12, § 1053(C) (Westlaw).

*D. Claims for Punitive Damages Following the Death of the Tortfeasor in Ohio Courts*

The appellate decision in *Whetstone* stated that the issue was one of first impression among Ohio appellate courts. However, at least one court has opined on whether punitive damages may be imposed against an estate.<sup>76</sup> Furthermore, the *Whetstone* court addressed two Ohio common pleas court decisions that came to conflicting conclusions on the issue.<sup>77</sup> In *Mongold v. Estate of Gilbert*, the common pleas court held that punitive damages could *not* be awarded against a tortfeasor's innocent heirs following the death of the tortfeasor.<sup>78</sup> The court was concerned that a decision to the contrary would impede the goals of a punitive award.<sup>79</sup> Specifically, the court reasoned that "the purpose of punishment cannot be separated from the purpose of deterrence."<sup>80</sup> Furthermore, "[t]hrough death, the tortfeasor is no longer subject to legal punishment," and "the purpose of using the tortfeasor as an example to others to deter their behavior is greatly diminished, if not completely frustrated."<sup>81</sup>

In contrast, another Ohio common pleas court came to the opposite conclusion in *Individual Business Services, Inc. v. Carmack*.<sup>82</sup> In a short opinion, the trial court held that it was not persuaded by the *Mongold* court's view "that a decedent's estate is immune from an award of punitive damages since the decedent is no longer available to be punished."<sup>83</sup> The court cited *Rubeck v. Huffman* and R.C. 2305.21, as well as the theory of general deterrence, in support of its decision.<sup>84</sup> In addition, the court reasoned that because punitive damages are inherent in a cause of action for fraud, and because R.C. 2305.21 allows causes of action for fraud to survive, R.C. 2305.21 allows punitive damages to be awarded against a deceased tortfeasor's estate.<sup>85</sup> The courts' decisions in

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76. *Friedman v. Lobos*, 23 Ohio Law Abs. 217, 221 1936 WL 2151, \*6 (7th Dist.) (holding 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). The *Friedman* case was factually different from *Whetstone*, however, in that the defendant in *Friedman* died before a judgment was entered against him rather than after. *Id.* at 218.

77. *Whetstone v. Binner*, 2014-Ohio-3018, 15 N.E.3d 905, ¶¶ 17-21 (5th Dist.).

78. 114 Ohio Misc. 2d 32, 36, 758 N.E.2d 1245, 1249 (Ohio Ct. Com. Pl. 2000).

79. *Id.*

80. *Id.*

81. *Id.*

82. *Montgomery C.P. No. 2004 CV 08159*, 2009 WL 8235992, at \*3 (Dec. 17, 2009).

83. *Id.*

84. *Id.* at \*3-4.

85. *Id.* at \*3. The *Whetstone* court later followed the same reasoning in its decision. *Whetstone v. Binner*, 2014-Ohio-3018, 15 N.E.3d 905, ¶ 26 (5th Dist.).

*Mongold* and *Individual Business Services* essentially outlined the majority and minority views on the issue.

*E. Claims for Punitive Damages Following the Death of the Tortfeasor in Other Jurisdictions*

A majority of jurisdictions has held that a claim for punitive damages cannot survive the death of the tortfeasor.<sup>86</sup> Fourteen states have enacted statutes that disallow punitive damages to be awarded against a decedent's estate.<sup>87</sup> In addition, thirteen other states, and the District of Columbia, have judicially adopted the majority view.<sup>88</sup> A minority of jurisdictions, on the other hand, has held to the contrary—that punitive damages can survive the death of a tortfeasor.<sup>89</sup> Two states, by legislative action, have allowed punitive damages to be awarded against a decedent's estate,<sup>90</sup> while nine states have adopted the minority view through appellate court decisions.<sup>91</sup>

1. Majority Jurisdictions

Most jurisdictions agree that a claim for punitive damages does not survive the death of the tortfeasor.<sup>92</sup> Courts deciding the issue in jurisdictions that award punitive damages pursuant to the traditional twin aims reason that punishment and deterrence are not satisfied where the tortfeasor is deceased.<sup>93</sup> In addition, these courts argue that punishing the estate inflicts harm on the innocent heirs rather than the true wrongdoer.<sup>94</sup> Furthermore, the plaintiffs, in such cases, have already

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86. For purposes of this Comment, a “majority jurisdiction” includes any state that has disallowed the recovery of punitive damages after the death of the tortfeasor, whether by appellate court decision or statute. For a discussion of both the majority and minority views on this subject and empirical data, see *G.J.D. v. Johnson*, 713 A.2d 1127, 1129-30 & nn.4 & 6 (Pa. 1998); Emily Himes Iversen, Note, *Invading The Realm Of The Dead: Exploring The (Im)propriety Of Punitive Damage Awards Against Estates*, 47 U. MICH. J.L. REFORM 827, 831-35 (2014); Robicheaux & Bornstein, *supra* note 33, at 410.

87. See *infra* Appendix B.

88. See *infra* Appendix A.

89. For purposes of this Comment, a “minority jurisdiction” includes any state that has allowed the recovery of punitive damages after the death of the tortfeasor by either appellate court decision or statute.

90. See *infra* Appendix D.

91. See *infra* Appendix C.

92. *Whetstone v. Binner*, 2014-Ohio-3018, 15 N.E.3d 905, ¶ 23 (5th Dist.).

93. See *Parker v. Artery*, 889 P.2d 520, 525 (Wyo. 1995); *Jaramillo v. Providence Wash. Ins. Co.*, 871 P.2d 1343, 1351-52 (N.M. 1994); *Lohr v. Byrd*, 522 So. 2d 845, 846-47 (Fla. 1988); *Thompson v. Estate of Petroff*, 319 N.W.2d 400, 408 (Minn. 1982).

94. *Whetstone*, 2014-Ohio-3018 at ¶ 24.

been compensated for their injuries by money damages.<sup>95</sup> Stated simply, “the reason for awarding punitive damages ceases to exist with the death of the tortfeasor.”<sup>96</sup>

When rejecting the imposition of punitive damages against an estate, most courts hold that a ruling to the contrary thwarts the two main reasons for punitive awards.<sup>97</sup> Specifically, the retributive element of punitive damages is extinguished by the death of the wrongdoer.<sup>98</sup> “Upon the death of the tortfeasor, the law can no longer punish him . . . .”<sup>99</sup> Because punishment is a desired effect of punitive damages, the victim should no longer be entitled to a punitive award when punishment of the wrongdoer cannot be achieved.<sup>100</sup>

The inability of courts to punish the deceased leaves only the theory of deterrence to justify punitive awards against estates. However, majority jurisdictions also agree that specific deterrence can no longer be furthered after the tortfeasor’s death for the same reasons that a punitive award can no longer punish a deceased tortfeasor.<sup>101</sup> The Florida Supreme Court reasoned that “[i]f 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.”<sup>102</sup> Courts adopting the majority reasoning also opine that imposing punitive damages against an estate punishes the tortfeasor’s innocent heirs for the wrongdoing of the tortfeasor.<sup>103</sup> Moreover, “[w]ith the wrongdoer dead, there is no one to punish, and to punish the innocent ignores [the] basic philosophy of justice.”<sup>104</sup>

In *Lohr v. Byrd*, the Florida Supreme Court considered whether punitive damages could be awarded against a deceased tortfeasor’s estate.<sup>105</sup> In *Lohr*, the plaintiff, Byrd, sued Lohr’s estate for compensatory and punitive damages for injuries caused by an automobile accident between the plaintiff and the tortfeasor, Lohr.<sup>106</sup>

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95. *Lohr*, 522 So. 2d at 846-47.

96. *Parker*, 889 P.2d at 525.

97. *Id.*

98. *Id.*; *Jaramillo*, 871 P.2d at 1351-52; *Lohr*, 522 So. 2d at 846-47; *Thompson*, 319 N.W.2d at 408.

99. *Whetstone*, 2014-Ohio-3018 at ¶ 33 (Wise, J., dissenting).

100. *Jaramillo*, 871 P.2d at 1351.

101. *See Lohr*, 522 So. 2d at 847.

102. *Id.*

103. *Fehrenbacher v. Quackenbush*, 759 F. Supp. 1516, 1521-22 (D. Kan. 1991) (applying Kansas law); *Lohr*, 522 So. 2d at 847.

104. *Lohr*, 522 So. 2d at 847.

105. *Id.* at 845.

106. *Id.* at 846.

Lohr was intoxicated at the time of the accident and died as a result of his sustained injuries.<sup>107</sup> The trial jury awarded the plaintiff \$31,000 in compensatory damages and \$25,000 in punitive damages.<sup>108</sup> On appeal, the defendant contended that “punitive damages are not proper against the estate of a deceased tortfeasor, who is beyond material punishment.”<sup>109</sup> The District Court of Appeals of Florida reduced the issue to “whether the factor of deterrence of other potential tortfeasors, standing alone, is a sufficient basis to sustain an award of punitive damages against an estate” and ultimately answered the question affirmatively.<sup>110</sup> The Florida Supreme Court, however, reversed, holding that punitive damages could not be awarded against the deceased’s estate.<sup>111</sup> The court acknowledged that punitive damages are imposed only to punish the tortfeasor and deter others from similar conduct and that the tortfeasor’s death left no one to punish.<sup>112</sup> The court further held that “logic, common sense, and justice dictate that this [c]ourt follow the majority of jurisdictions in this country.”<sup>113</sup>

In the *Whetstone* dissent, Judge Wise succinctly outlined the majority view:

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.<sup>114</sup>

## 2. Minority Jurisdictions

A minority of jurisdictions has held that a claim for punitive damages can survive the death of the tortfeasor and can be awarded against a decedent’s estate.<sup>115</sup> Oklahoma and Texas allow for such

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107. *Id.*

108. *Id.* The trial court thereafter granted the defendant’s remittitur as to the amount of punitive damages and reduced that amount to \$9,000. *Id.*

109. *Byrd v. Lohr*, 488 So. 2d 138, 138 (Fla. Dist. Ct. App. 1986).

110. *Id.* at 138-40.

111. *Lohr*, 522 So. 2d at 847.

112. *Id.*

113. *Id.*

114. *Whetstone v. Binner*, 2014-Ohio-3018, 15 N.E.3d 905, ¶ 33 (5th Dist.) (Wise, J., dissenting).

115. *See Whetstone*, 2014-Ohio-3018 at ¶ 25; *G.J.D. v. Johnson*, 713 A.2d 1127, 1131 (Pa.

recovery by statute.<sup>116</sup> Most courts in the minority jurisdictions emphasize general deterrence in allowing the recovery of punitive damages against a decedent's estate, while some give additional reasons.<sup>117</sup>

Pennsylvania endorses the traditional view that punitive damages are meant to punish and deter certain behavior.<sup>118</sup> However, in *G.J.D. v. Johnson*, the Supreme Court of Pennsylvania held that imposing punitive damages on a deceased tortfeasor's estate would serve a legitimate policy concern in deterring others from similar conduct.<sup>119</sup> In *G.J.D.*, an oft-cited case on this issue, the minor-plaintiff, G.J.D., was in an intimate relationship with Thebes, during which Thebes took sexually explicit photographs of G.J.D.<sup>120</sup> Upon G.J.D. ending the relationship, Thebes distributed the photographs throughout the community.<sup>121</sup> Thereafter, G.J.D. brought suit against Thebes for defamation and intentional infliction of emotional distress, among other causes of action.<sup>122</sup> However, Thebes committed suicide before the trial, and Thebes's sister, the executrix of his estate, was substituted as the defendant.<sup>123</sup> The trial court awarded both compensatory and punitive damages to G.J.D., and the issue of whether punitive damages should have been awarded was appealed to the Supreme Court of Pennsylvania.<sup>124</sup>

In its opinion, Pennsylvania's high court extensively discussed the jurisdictional split on the issue and ultimately sided with the minority.<sup>125</sup> The court's decision rested on the theory of general deterrence.<sup>126</sup> Specifically, the court stated that "[t]he deterrent effect on the conduct of

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1998); *Haralson v. Fisher Surveying, Inc.*, 31 P.3d 114, 119 (Ariz. 2001) (en banc); *Perry v. Melton*, 299 S.E.2d 8, 13 (W. Va. 1982).

116. OKLA. STAT. ANN. tit. 12, § 1053 (West, Westlaw through Ch. 399 (End) of the First Sess. of the 55th Legislature (2015)); TEX. CIV. PRAC. & REM. CODE ANN. §§ 71.008, 71.009 (West, Westlaw through end of 2015 Reg. Sess. of the 84th Legislature) (for wrongful death claims only).

117. See *Whetstone*, 2014-Ohio-3018 at ¶ 25; *G.J.D.*, 713 A.2d at 1131; *Haralson*, 31 P.3d at 116-17; *Perry*, 299 S.E.2d at 12-13.

118. "[P]unitive damages are awarded to punish a defendant for certain outrageous acts and to deter him or others from engaging in similar conduct." *G.J.D.*, 713 A.2d at 1131 (citing *Kirkbride v. Lisbon Contractors, Inc.*, 555 A.2d 800 (Pa. 1989)) (emphasis in original).

119. *Id.*

120. *Id.* at 1128.

121. *Id.*

122. *Id.*

123. *G.J.D. v. Johnson*, 713 A.2d 1127, 1128 (Pa. 1998).

124. *Id.* at 1128-29.

125. *Id.* at 1129-31.

126. *Id.* at 1131.

others is no more speculative in the instant case than in cases where the tortfeasor is alive.”<sup>127</sup> Furthermore, the court believed that the heirs of Thebes’s estate would not be punished and, instead, would receive their rightful inheritance.<sup>128</sup> Finally, the court was satisfied that other safeguards, including jury instructions, were sufficient to safeguard against a jury’s arbitrary imposition of punitive damages.<sup>129</sup>

Similarly, minority courts have also held that awarding punitive damages against a decedent’s estate may be appropriate to “express society’s disapproval of outrageous conduct.”<sup>130</sup> In certain situations where the tortfeasor is guilty of radical wrongdoing, such as bombings and mass murders, the estate of the tortfeasor should not be shielded from liability.<sup>131</sup> Other minority jurisdictions adopt similar general deterrence arguments in support of the recovery of punitive damages following the death of the tortfeasor.<sup>132</sup> Some minority courts further their position by arguing that the tortfeasor’s innocent heirs are not punished when punitive damages are assessed against the tortfeasor’s estate. In *G.J.D.*, the court stated that “[t]he heirs of the decedent tortfeasor are in essentially the same financial position as if the tortfeasor were living at the time damages were awarded.”<sup>133</sup> Thus, the estate’s inheritance is “generally contingent upon the obligations incurred by the deceased during his or her lifetime.”<sup>134</sup> The heirs of the estate, then, still receive the assets rightfully owed to them.

Other minority jurisdictions do not award punitive damages exclusively for the purposes of punishment and deterrence. In *Hofer v. Lavender*, the Supreme Court of Texas reaffirmed state common law in holding that punitive damages could be awarded “to reimburse for losses too remote to be considered as elements of strict compensation” and “for inconvenience and attorney’s fees” in addition to punishment and deterrence.<sup>135</sup> Similarly, in Michigan, the express purpose of exemplary damages is to make the plaintiff whole.<sup>136</sup> Specifically, a punitive award

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127. *Id.*

128. *G.J.D. v. Johnson*, 713 A.2d 1127, 1131 (Pa. 1998).

129. *Id.*

130. *Haralson v. Fisher Surveying, Inc.*, 31 P.3d 114, 117 (Ariz. 2001) (en banc) (internal quotation marks omitted).

131. *Id.*

132. *See Penberthy v. Price*, 666 N.E.2d 352, 357 (Ill. App. Ct. 1996) (holding general deterrence and the “strong public policy against mixing alcohol and automobiles” justified the recovery of punitive damages following the death of the tortfeasor).

133. *G.J.D.*, 713 A.2d at 1131.

134. *Haralson*, 31 P.3d at 118.

135. 679 S.W.2d 470, 474 (Tex. 1984).

136. *Unibar Maint. Servs., Inc. v. Saigh*, 769 N.W.2d 911, 923 (Mich. Ct. App. 2009) (per

may supplement an insufficient compensatory award.<sup>137</sup> Thus, where the defendant maliciously injures the plaintiff, the injured party may recover punitive damages for humiliation and indignity.<sup>138</sup> Although the Michigan Supreme Court has not sided with the majority or minority, the state's purposes for awarding punitive damages align more closely with the minority reasoning for awarding such damages against estates.<sup>139</sup>

In addition, minority courts argue that arbitrary punitive damage awards are safeguarded by the fact that the fact-finder may consider that the tortfeasor is deceased in deciding whether to award punitive damages.<sup>140</sup> Furthermore, the fact-finder will be aware that any award of punitive damages would be assessed against the tortfeasor's estate.<sup>141</sup>

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.<sup>142</sup>

Furthermore, the jury may decline to award punitive damages altogether.<sup>143</sup> Where the court finds the award outrageous, the judge may grant a remittitur or new trial.<sup>144</sup>

In all, minority jurisdictions offer several arguments in support of allowing punitive damages to be assessed against estates. Some states differ in their purposes for awarding punitive damages. A few jurisdictions do not impose punitive damages solely to punish and deter certain conduct and instead place more emphasis on the plaintiff. The reasoning adopted by most minority courts in these cases is the theory of general deterrence. In other words, discouraging others in society from committing similar conduct is enough to justify awarding punitive damages against a decedent's estate.

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curiam) (citing *Hayes-Albion Corp. v. Kuberski*, 364 N.W.2d 609 (Mich. 1984)).

137. *Id.*

138. *Id.* at 923-24 (citing *Kewin v. Mass. Mut. Life Ins. Co.*, 295 N.W.2d 50 (Mich. 1980)).

139. *See generally* Iversen, *supra* note 86.

140. *G.J.D. v. Johnson*, 713 A.2d 1127, 1131 (Pa. 1998).

141. *Id.*

142. *Haralson v. Fisher Surveying, Inc.*, 31 P.3d 114, 119 (Ariz. 2001) (en banc).

143. *Id.*

144. *Id.*

### III. THE IMPOSITION OF PUNITIVE DAMAGES AGAINST TORTFEASORS' ESTATES

“[T]he realm of the dead is not invaded, and punishment [is not] visited upon the dead.”<sup>145</sup> Ohio’s survival statute ensures that a plaintiff will likely retain an interest in a cause of action against a deceased tortfeasor. However, a plaintiff should have no personal interest in the punishment of the deceased. This section discusses and analyzes the two main purposes of punitive damages in Ohio and the seminal Ohio cases that discuss punitive awards where a party to the case is deceased. An examination of the foregoing leads to the conclusion that imposing punitive damages against deceased tortfeasors’ estates is contrary to Ohio statutory and common law and raises major policy concerns.

#### A. *The Whetstone Holding is Contrary to Ohio Common Law*

Punitive damages are similar in nature to criminal punishments. Punishment for committing a crime is a general principle of criminal law.<sup>146</sup> The theory of retributive justice provides that the wrongdoer should be punished in proportion to the crime committed.<sup>147</sup> The doctrine of punitive damages was developed on similar principles, and punishment remains an integral purpose for awarding such damages in most jurisdictions.<sup>148</sup> However, the punishment aspect of punitive damages is thwarted where the tortfeasor is deceased. The wrongdoer cannot be reprimanded for the tort when that person is not alive to accept the punishment. Similarly, some courts have held that a criminal proceeding abates upon the death of the accused because any further action would be moot.<sup>149</sup> Because the Supreme Court of Ohio has consistently held that punishment is one aspect of punitive damages, awarding such damages where the tortfeasor is deceased would be contrary to that expressed purpose.

Deterrence is also a principle of criminal law.<sup>150</sup> There are two

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145. *Hewellette v. George*, 9 So. 885, 887 (Miss. 1891), *abrogated by* *Glaskox v. Glaskox*, 614 So. 2d 906 (Miss. 1992).

146. See 21A AM. JUR. 2D *Criminal Law* § 870 Westlaw (database updated Nov. 2015).

147. *Id.*

148. See *Dardinger v. Anthem Blue Cross & Blue Shield*, 98 Ohio St. 3d 77, 2002-Ohio-7113, 781 N.E.2d 121, ¶ 178.

149. *State v. Hoxsie*, 1997 SD 119, ¶ 14, 570 N.W.2d 379, 382. The defendant in *Hoxsie* died during a pending appeal of his conviction. In holding that any further action was moot, the South Dakota Supreme Court highlighted the majority and minority views concerning the abatement of criminal proceedings following the death of the accused. *Id.* at ¶ 5-12, 570 N.W.2d at 379-82.

150. See 21A AM. JUR. 2D *Criminal Law* § 870 Westlaw (database updated Nov. 2015).

types of deterrence: specific and general. In penalizing the wrongdoer, specific deterrence discourages the criminal from committing the crime again.<sup>151</sup> In contrast, general deterrence discourages others in society from committing similar conduct.<sup>152</sup> For the same reasons that a deceased tortfeasor cannot be punished, the tortfeasor cannot be specifically deterred from committing similar conduct again in the future. However, many minority courts rely on the theory of general deterrence alone in justifying the allowance of punitive damages against a deceased tortfeasor's estate.<sup>153</sup>

The Supreme Court of Ohio has acknowledged a plaintiff's right to recover punitive damages in tort actions since as early as 1857.<sup>154</sup> In developing the common law doctrine, the Court has repeatedly reinforced the traditional twin aims of awarding punitive damages: punishment and deterrence.<sup>155</sup> Specifically, "[t]he 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.'"<sup>156</sup> Furthermore, the Court has expressed that punitive awards are "more about a defendant's behavior than the plaintiff's loss."<sup>157</sup> The purposes for which Ohio courts impose punitive damages are consistent with the majority position that punitive damages do not survive the death of the tortfeasor. Thus, the *Whetstone* holding to the contrary is inconsistent with Ohio common law.

The Supreme Court of Ohio has never opined on the issue of whether punitive damages should be imposed against a decedent's estate. Disallowing the recovery of such damages, however, would be consistent with the Court's historical interpretation of punitive damages. Punishment and deterrence are the only espoused purposes for exemplary damages in Ohio.<sup>158</sup> The tortfeasor must be chastised for

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151. JOSHUA DRESSLER, UNDERSTANDING CRIMINAL LAW 51 (6th ed. 2012).

152. *Id.* at 50.

153. *See, e.g., Whetstone v. Binner*, 2014-Ohio-3018, 15 N.E.3d 905, ¶ 27 (5th Dist.); G.J.D. v. Johnson, 713 A.2d 1127, 1131 (Pa. 1998); *Haralson v. Fisher Surveying, Inc.*, 31 P.3d 114, 119 (Ariz. 2001) (en banc).

154. *See Timberlake v. Cincinnati Gazette Co.*, 12 Ohio Dec. Reprint 646 (1857).

155. *See Dardinger v. Anthem Blue Cross & Blue Shield*, 98 Ohio St. 3d 77, 2002-Ohio-7113, 781 N.E.2d 121, ¶ 178; *Wightman v. Consol. Rail Corp.*, 715 N.E.2d 546, 553 (Ohio 1999); *Moskovitz v. Mt. Sinai Med. Ctr.*, 635 N.E.2d 331, 343 (Ohio 1994); *Preston v. Murty*, 512 N.E.2d 1174, 1176 (Ohio 1987).

156. *Preston*, 512 N.E.2d at 1176 (citing *Detling v. Chockley*, 436 N.E.2d 208, 209 (Ohio 1982), *overruled on other grounds*).

157. *Wightman*, 715 N.E.2d at 553.

158. *See Dardinger* at ¶ 178; *Wightman*, 715 N.E.2d at 553; *Moskovitz*, 635 N.E.2d at 343;

wrongdoing, discouraged from committing the act again, and publicly made an example of to deter others from similar conduct. However, under the minority view, there is only a potential, not a certainty, that society may be deterred from similar conduct.

The Ohio appellate court stated, in *Whetstone*, that “the death of the tortfeasor does not completely thwart the purposes underlying the award of punitive damages.”<sup>159</sup> The court was satisfied by the fact that punitive damages *might* deter others from committing similar conduct.<sup>160</sup> However, the court’s rationale is inconsistent with the Supreme Court of Ohio’s interpretation of punitive damages. General deterrence is aimed at the behavior of *others* in society, while specific deterrence addresses the tortfeasor specifically. Although “society” or “the general public” inherently includes the tortfeasor, general deterrence is more concerned with discouraging others in society from committing similar conduct. Though the tortfeasor’s malicious behavior remains the cause for recovery of punitive damages, such damages cannot be justified solely on the theory of general deterrence. In declining to award punitive damages against an estate based on deterring society in general, one court held that “punitive damages by way of example to others should be imposed only on *actual* wrongdoers.”<sup>161</sup>

If courts must resort to the theory of general deterrence to justify awarding punitive damages against an estate, traditional compensatory damages should suffice. The threat of compensatory damages alone should be sufficient to deter the general public from committing similar conduct. In *Whetstone*, the trial court awarded the plaintiffs \$500 for lost wages, \$1,000 for emotional distress, and \$50,000 for physical injury, emotional harm, and distress.<sup>162</sup> The \$51,500 in compensatory damages assessed against the deceased’s estate should be sufficient to generally deter others from like behavior. It would be a rare situation where a potential tortfeasor would not be deterred by the threat of compensatory damages, but, nevertheless, would be deterred by the possibility of punitive damages for the same conduct. It would be the extremely wealthy tortfeasor, indeed, who would be discouraged by punitive damages alone.

General deterrence alone is too removed from the tortfeasor’s

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*Preston*, 512 N.E.2d at 1176.

159. *Whetstone v. Binner*, 2014-Ohio-3018, 15 N.E.3d 905, ¶ 27 (5th Dist.).

160. *Whetstone*, 2014-Ohio-3018 at ¶ 27.

161. *Evans v. Gibson*, 31 P.2d 389, 395 (Cal. 1934) (per curiam) (emphasis added). The phrase “actual wrongdoers” referred to living tortfeasors.

162. *Whetstone*, 2014-Ohio-3018 at ¶ 10.

actions to justify an award of punitive damages. It is unlikely that a potential wrongdoer would consider the effects of her actions on the heirs of her estate before committing a tort. In contrast, punishment of the tortfeasor is directly related to the tortfeasor's actions. Retribution for wrongdoing can be monetarily assessed against the tortfeasor and is a necessary component to an award for punitive damages. Thus, because Ohio courts emphasize punishment *and* deterrence, rather than punishment *or* deterrence, as the goals of punitive damages, the *Whetstone* holding is contrary to the established state common law.

*B. The Rubeck Decision is Not Binding on the Issue in Whetstone*

The *Whetstone* court found support for its decision from the Supreme Court of Ohio decision in *Rubeck v. Huffman*<sup>163</sup> and R.C. 2305.21.<sup>164</sup> In *Whetstone*, the court conceded that both the survival statute and the *Rubeck* decision are silent as to the imposition of punitive damages against an estate.<sup>165</sup> Nevertheless, the *Whetstone* court held that the statute and case, taken together, provided persuasive authority to dispose of the issue.<sup>166</sup>

In *Rubeck*, the defendant, Huffman, was driving an automobile in the wrong direction on a state highway when he struck and killed Rubeck in a head-on collision.<sup>167</sup> Rubeck's next of kin filed a wrongful death action against Huffman for negligence and sought \$400 in property damage and personal injuries, \$97,700 in pecuniary damages, and \$100,000 in punitive damages.<sup>168</sup> The trial court awarded the plaintiff both compensatory and punitive damages.<sup>169</sup> In Ohio, punitive damages are not recoverable in a wrongful death action.<sup>170</sup> Thus, for the trial court's award of punitive damages to be upheld, Rubeck's estate had to prove "that the deceased suffered personal injury or property loss

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163. 374 N.E.2d 411 (Ohio 1978) (per curiam). *See also* *Shaefer v. D & J Produce, Inc.*, 403 N.E.2d 1015, 1019 (Ohio Ct. App. 1978) (holding, on facts similar to *Rubeck*, that the owner of a truck involved in a fatal accident may be liable for punitive damages due to injuries sustained by plaintiff's decedent who allegedly died as a result of the accident).

164. OHIO REV. CODE ANN. § 2305.21 (West, Westlaw through Files 1-29 of 131st Gen. Ass. 2015-2016).

165. *Whetstone*, 2014-Ohio-3018 at ¶ 26.

166. *Whetstone*, 2014-Ohio-3018 at ¶ 26.

167. *Rubeck*, 374 N.E.2d at 412.

168. *Id.*

169. *Id.*

170. OHIO REV. CODE ANN. § 2125.02 (West, Westlaw through Files 1-29 of 131st Gen. Ass. 2015-2016). *See also* *Rubeck*, 374 N.E.2d at 413.

as a result of the collision and before he died . . . .”<sup>171</sup> The court held, pursuant to R.C. 2305.21, that “the right to . . . [punitive] damages continues even when the person so injured has died and the personal injury or property loss is pursued by the representative of his estate . . . .”<sup>172</sup>

The *Whetstone* court opined that *Rubeck*, in conjunction with R.C. 2305.21, stands for the proposition that *all* causes of action, including *all* elements of recovery, survive the death of the plaintiff or the tortfeasor.<sup>173</sup> In essence, the court held that because a claim for punitive damages survives the death of a plaintiff under R.C. 2305.21, then the same claim can survive the death of a tortfeasor for the same reasoning.<sup>174</sup> However, the court’s reliance on *Rubeck* is inconsistent with the purposes for awarding punitive damages and the Supreme Court of Ohio’s prior decisions.

The death of a plaintiff before trial should be distinguished and treated differently than the death of a defendant in a tort action where the plaintiff seeks punitive damages. Simply put, in Ohio, a punitive award is not concerned with the harm to the plaintiff. The plaintiff is merely responsible for presenting evidence that the defendant acted maliciously, which entitles the plaintiff to punitive damages. Thus, whether the plaintiff is living or deceased is immaterial to the fact-finder’s decision to award punitive damages. In contrast, punitive awards in Ohio are based solely on the defendant’s behavior.<sup>175</sup> Where the defendant is deceased, the reasons behind punitive damages are no longer furthered. In a case such as *Rubeck*, where the plaintiff’s estate (or next of kin) seeks punitive damages from a living defendant, the goals of punishment and deterrence of the defendant are not frustrated. A living defendant can be punished and made “an example to others that they might be deterred from similar conduct.”<sup>176</sup>

Also, the facts of *Whetstone* are distinguishable from the facts of *Rubeck*. *Whetstone* involved a living parent-guardian and two living minors as plaintiffs. The tortfeasor in *Whetstone* was alive at the time of the misconduct but died before the commencement of a hearing on the

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171. *Rubeck*, 374 N.E.2d at 413-14.

172. *Id.* at 413. The Court nevertheless held that the plaintiff did not prove that the decedent suffered property damage or personal injury as a result of the collision. *Id.* at 414. Thus, *Rubeck* was not entitled to punitive damages. *Id.*

173. *Whetstone v. Binner*, 2014-Ohio-3018, 15 N.E.3d 905, ¶ 26 (5th Dist.).

174. *Id.*

175. *Dardinger v. Anthem Blue Cross & Blue Shield*, 98 Ohio St.3d 77, 2002-Ohio-7113, 781 N.E.2d 121, ¶ 178.

176. *Preston v. Murty*, 512 N.E.2d 1174, 1176 (Ohio 1987) (internal quotation marks omitted).

issue of damages.<sup>177</sup> In contrast, the plaintiff in *Rubeck* was deceased at the time of the trial while the defendant-tortfeasor was still living.<sup>178</sup> The position of the deceased party as plaintiff or defendant directly affects the efficacy of a punitive damages award. In a case like *Rubeck*, the twin aims of punishment and deterrence can be pursued against a living defendant. However, those same purposes are severely frustrated where the tortfeasor is deceased, as was the case in *Whetstone*.

### C. *The Whetstone Holding is Not Supported by Ohio Statutory Law*

The Ohio legislature has adopted a statute that expressly provides the elements of recovery for punitive damages.<sup>179</sup> However, the punitive damages statute gives no guidance as to the recovery of punitive damages against an estate. Ohio courts deciding the issue, therefore, look exclusively to the survival statute, R.C. 2305.21. The *Whetstone* court found support for its conclusion in R.C. 2305.21, which is silent as to the recovery of punitive damages.<sup>180</sup> Revised Code 2305.21 allows plaintiffs to recover compensatory damages as if the deceased party were alive at the time of the trial.<sup>181</sup> However, punitive damages are different in nature from compensatory damages. In Ohio, where compensatory damages are awarded to make the plaintiff whole, punitive damages are meant only to punish and deter the defendant. In awarding punitive damages, the finder of fact assumes compensatory damages are not only necessary, but have already been awarded to the injured party.<sup>182</sup> Because the survival statute does not expressly allow claims for punitive damages against estates, Ohio courts should be hesitant to include them because such inclusion upsets the established doctrine of punitive awards.

Allowing the recovery of compensatory damages pursuant to R.C. 2305.21 is necessary for the proper administration of justice. Compensating a plaintiff for a legally recognized harm is the basis for an action in tort. If R.C. 2305.21 forbade the injured party from being made whole, one important goal of filing suit, obtaining damages would be completely extinguished. However, in order to recover punitive damages

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177. *Whetstone*, 2014-Ohio-3018 at ¶¶ 3, 6.

178. *Rubeck v. Huffman*, 374 N.E.2d 411, 412 (Ohio 1978) (per curiam).

179. OHIO REV. CODE ANN. § 2315.21 (West, Westlaw through Files 1-29 of 131st Gen. Ass. 2015-2016).

180. *Whetstone*, 2014-Ohio-3018 at ¶ 26.

181. *Whetstone*, 2014-Ohio-3018 at ¶ 26.

182. § 2315.21(C)(2) (Westlaw). Compensatory damages are a necessary prerequisite to punitive damages. See § 2315.21(B)(1)(b) (Westlaw).

in Ohio, compensatory damages must have already been awarded.<sup>183</sup> The compensatory award should have, then, already made the plaintiff whole.<sup>184</sup> In contrast, punitive damages go far beyond the purposes of compensatory damages. Such awards are further removed from the plaintiff and are not necessary to make the injured party whole. Awarding punitive damages after the death of the party liable thereto is, therefore, inconsistent with the doctrine of punitive damages and unnecessary to further compensate the injured plaintiff.

The *Individual Business Services v. Carmack* case,<sup>185</sup> an Ohio Common Pleas Court decision cited in *Whetstone*, held that even though R.C. 2305.21 is silent as to the recovery of punitive damages, such damages are a “component” of an action for fraud, and thus, the statute allowed for the recovery of punitive damages against an estate.<sup>186</sup> The *Individual Business Services* court essentially concluded that because R.C. 2305.21 allows an action for fraud to survive the death of a litigant and because one can recover punitive damages for fraud, such damages may automatically be recovered against a deceased tortfeasor’s estate in all causes of action under R.C. 2305.21.<sup>187</sup> However, the court’s analysis bypasses the issue. While it is true that punitive damages can be recovered in a fraud case, that fact alone is no basis for concluding that punitive damages can be awarded against an estate. Punitive damages are a “component” of several causes of actions in that it is possible for the plaintiff to recover them. The *Individual Business Services* court, however, declined to address the propriety of issuing punitive damages against an estate and did not reconcile the fact that a punitive award in that situation frustrates both the retributive and deterrent aspects of such damages.<sup>188</sup> Instead, the court took the easy way out by holding that because an action for fraud survives the death of a litigant, punitive damages can be recovered for fraud, and thus, punitive damages survive as well.

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183. *Niskanen v. Giant Eagle, Inc.*, 122 Ohio St. 3d 486, 2009-Ohio-3626, 912 N.E.2d 595, ¶ 13.

184. There are, of course, some circumstances, such as where the plaintiff seeks injunctive relief, where monetary damages are an insufficient remedy to make the plaintiff whole.

185. *Montgomery C.P. No. 2004 CV 08159*, 2009 WL 8235992 (Dec. 17, 2009).

186. *Id.* at \*3.

187. *Id.*

188. *Id.*

*D. A Claim for Punitive Damages is Not a “Cause of Action” for Purposes of Ohio’s Survivor Statute*

A “cause of action” describes “[a] group of operative facts giving rise to one or more bases for suing” or “a factual situation that entitles one person to obtain a remedy in court from another person.”<sup>189</sup> It is simply the theory for a lawsuit. Damages, in contrast, are awards “claimed by, or ordered to be paid to, a person as compensation for loss or injury.”<sup>190</sup> Thus, a plaintiff has no ability to institute a cause of action simply “for damages.” Rather, a plaintiff must sue a defendant under a distinct cause of action and, through that mechanism, *seek* damages. Actionable offenses include, among countless others, assault, battery, negligence, and breach of contract. A proven assault entitles a plaintiff to a remedy in court from another person. A cause of action for assault gives the victim a basis for suing, while damages are merely the remedy. The cause of action is usually the beginning of the judicial process, while an award of damages likely ends the process.

The Iowa Supreme Court was recently faced with a case analogous to *Whetstone* involving many of the same arguments.<sup>191</sup> Iowa, like Ohio, codified the justification for recovering punitive damages.<sup>192</sup> Furthermore, the Iowa legislature enacted a survival statute nearly identical to that of Ohio.<sup>193</sup> In *In re Estate of Vajgrt*, the Iowa Supreme Court considered whether the right to recover punitive damages survives the death of the tortfeasor.<sup>194</sup> The proponent for recovering exemplary damages argued, among other things, that Iowa’s survivor statute should allow the recovery of punitive damages against a deceased tortfeasor’s estate.<sup>195</sup> Nevertheless, the court reaffirmed its position with the majority jurisdictions in holding that punitive damages could not be awarded against the estate.<sup>196</sup> The court held that “punitive damages do not constitute a distinct ‘cause of action’” for purposes of the Iowa Survival Statute.<sup>197</sup> Instead, the court classified exemplary damages as “a form of relief incidental to the main cause of action” that is not encompassed by

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189. BLACK’S LAW DICTIONARY 251 (9th ed. 2009).

190. *Id.* at 444.

191. *In re Estate of Vajgrt*, 801 N.W.2d 570 (Iowa 2011).

192. IOWA CODE ANN. § 668A.1 (West, Westlaw through end of 2015 Reg. Sess.).

193. “All causes of action shall survive and may be brought notwithstanding the death of the person entitled or liable to the same.” § 611.20 (Westlaw).

194. 801 N.W.2d at 572.

195. *Id.* at 573-74.

196. *Id.* at 577-78.

197. *Id.* at 574.

the statute.<sup>198</sup>

In contrast, the *Whetstone* court held that R.C. 2305.21, taken together with the *Rubeck* opinion, stands for the proposition 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 decedent and against the estate of the tortfeasor.”<sup>199</sup> However, the court’s blanket inclusion of “all causes of action” is inconsistent with both the text and judicial interpretations of the statute. The statute allows all common law actions to survive.<sup>200</sup> In addition, actions for mesne profits, injuries to the person or property, deceit, and fraud also survive the death of the person entitled or liable thereto.<sup>201</sup> All other causes of action not mentioned do not survive pursuant to R.C. 2305.21.<sup>202</sup> Furthermore, Ohio courts have held that several causes of action do not survive under the statute.<sup>203</sup> The *Whetstone* court’s interpretation of the statute’s language is more consistent with other states’ survival statutes, such as Michigan’s, which provides that “[a]ll actions and claims survive death.”<sup>204</sup> The Michigan legislature’s inclusion of all actions *and claims* provides a clearer intent that all elements of recovery are intended to survive the tortfeasor’s death. However, the Ohio statute, which merely refers to “causes of action,” provides a much weaker basis for the inclusion of claims for punitive damages.

It follows, then, that there can be no cause of action for punitive damages in Ohio under the survivor statute. The “causes of action” and “actions” described by R.C. 2305.21 expressly include common law causes of action, causes of action for mesne profits, personal and proprietary injuries, fraud, and deceit.<sup>205</sup> Remedies, specifically punitive damages, are not mentioned in the statute as a cause of action, and a

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198. *Id.* (citing *Sebastian v. Wood*, 66 N.W.2d 841, 844 (Iowa 1954)).

199. *Whetstone v. Binner*, 2014-Ohio-3018, 15 N.E.3d 905, ¶ 26 (5th Dist.).

200. OHIO REV. CODE ANN. § 2305.21 (West, Westlaw through Files 1-29 of 131st Gen. Ass. 2015-2016).

201. § 2305.21 (Westlaw).

202. § 2305.21 (Westlaw).

203. *See Hook v. Springfield*, 750 N.E.2d 1162, 1167 (Ohio Ct. App. 2001) (worker’s compensation); *Oakwood v. Makar*, 463 N.E.2d 61, 64 (Ohio Ct. App. 1983) (slander); *Stein-Sapir v. Birdsell*, 673 F.2d 165, 167 (6th Cir. 1982) (per curiam) (applying Ohio law) (libel); *Alsup v. Int’l Union of Bricklayers*, 679 F. Supp. 716, 721 (N.D. Ohio 1987) (applying Ohio law) (violation of civil rights); *State ex rel. Crow v. Weygandt*, 162 N.E.2d 845, 848 (Ohio 1959) (malicious prosecution).

204. MICH. COMP. LAWS § 600.2921 (West, Westlaw through P.A. 2015, No. 172 of the 2015 Reg. Sess., 98th Legislature). *See also Iversen*, *supra* note 75, at 838.

205. OHIO REV. CODE ANN. § 2305.21 (West, Westlaw through Files 1-29 of 131st Gen. Ass. 2015-2016).

cause of action distinctly seeking damages does not coincide with the text of the statute or the meaning of “cause of action.” Thus, merely because the statute permits certain actions to survive the death of a litigant does not also mean that all elements of recovery in those actions automatically survive as well.

#### IV. POLICY AND PRESCRIPTION OF IMPOSING PUNITIVE DAMAGES AGAINST AN ESTATE IN OHIO

This section discusses the policy implications of the *Whetstone* decision and offers ways to achieve change. Part A discusses the negative outcomes that flow from imposing punitive damages against deceased tortfeasors. Part B discusses the positive policy implications of the majority view. Part C offers methods of changing the current Ohio law, including through the courts and legislature.

##### *A. Negative Ramifications of the Minority Position*

Majority jurisdictions have repeatedly held that “[t]here is a strong policy against the assessment of punitive damages against an estate on account of the wrongful conduct of the decedent.”<sup>206</sup> Where the core principles of any legal doctrine are not furthered, there is bound to be a negative impact on society. The holding in *Whetstone* is no different as it allows punitive awards to punish the tortfeasor’s innocent heirs and denies the tortfeasor the ability to repudiate the claim.

“To allow exemplary damages now would be to punish his legal and personal representatives for his wrongful act, but the civil law never inflicts vicarious punishment.”<sup>207</sup> The law should not delegate the punishment of one party (the tortfeasor) to an innocent third party (the tortfeasor’s heirs). In effect, the minority view reaches far beyond the wrongdoer, possibly into the lives of the tortfeasor’s family, friends, and other loved ones. A punitive award should only punish the tortfeasor, not innocent third parties. Punishing the estate’s innocent heirs has the unwanted policy effect of allowing a claim for punitive damages to survive the death of the tortfeasor that “waters down or dilutes any . . . effect” of punitive damages.<sup>208</sup> Furthermore, “to punish the estate ignores the central purpose of punitive damages, which is to punish the

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206. *Flaum v. Birnbaum*, 582 N.Y.S.2d 853, 857 (N.Y. App. Div. 1992).

207. *In re Estate of Vajgrt*, 801 N.W.2d 570, 573 (Iowa 2011) (quoting *Sheik v. Hobson*, 19 N.W. 875, 875-76 (Iowa 1884) (internal quotation marks omitted)).

208. *Whetstone v. Binner*, 2014-Ohio-3018, 15 N.E.3d 905, ¶ 33 (5th Dist.) (Wise, J., dissenting).

*tortfeasor* and to deter *him* from repeating the wrongful act.”<sup>209</sup>

In addition, a deceased defendant is no longer available to testify.<sup>210</sup> Typically, in an adversarial justice system, both the plaintiff and defendant are able to tell their side of the story, ensuring a truer form of justice. However, where the defendant is deceased, one side of the story is silenced.<sup>211</sup> This poses no problem for a compensatory award as such an award is focused on the plaintiff and making the plaintiff whole, rather than the defendant’s wrongdoing. Although others may testify to the facts surrounding the case, only the defendant can effectively combat a claim for punitive damages. The wrongdoer must be present to testify as to how he did not act maliciously in order to refute the elements for the recovery of punitive damages. Where punitive damages may be awarded against an estate, the fact-finder is able to punish the estate’s innocent heirs, and the tortfeasor has no chance to personally repudiate the claim.

#### *B. Positive Ramifications of the Majority Position*

A holding that punitive damages cannot be imposed against an estate would create positive policy implications. Most importantly, the majority view reinforces the traditional aims of punitive awards. Both punishment *and* deterrence can be accomplished by imposing punitive damages against a living defendant. In addition, the minority’s over-emphasis on the deterrent effect of punitive damages in this situation ultimately undermines the policy behind the substantive law.<sup>212</sup> The majority view, in contrast, stays true to the twin aims, rather than placing too much weight and importance on deterrence alone. That is, under the majority view, the goal is efficient and effective deterrence, not deterrence at all costs. On the other hand, the minority view clings to the theory of general deterrence and, in turn, overplays the traditional reasons for imposing punitive damages. While the minority view strays from the express purposes of punitive damages and focuses solely on general deterrence, the majority position furthers the purposes for punitive awards that have been repeatedly accepted by Ohio courts.

Furthermore, this issue goes beyond the realm of the law and into

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209. *Jaramillo v. Providence Wash. Ins. Co.*, 871 P.2d 1343, 1351 (N.M. 1994) (emphasis added).

210. *Vajgrt*, 801 N.W.2d at 573.

211. This is, of course, true in any action where a litigant is deceased. However, as the express purposes of punitive damages are different than any other civil remedy, it is worth noting that the tortfeasor is prohibited from testifying.

212. The underlying policy is, of course, the punishment and deterrence of the tortfeasor.

the realm of the dead.<sup>213</sup> Rather than add insult to injury (or more accurately, add insult to death), the law should afford some level of respect to the deceased. The majority view does just that. Punishment for wrongdoing must stop at the grave, and the wrongdoer's friends and family must not be subjected to additional pain and suffering at the hands of the law. In order to maintain the integrity of the deceased and provide the respect that they deserve, no Ohio law should go as far as punishing the dead. The majority view upholds these basic principles.

### *C. Prescription for Change*

This subsection discusses the possible avenues for achieving change in the current Ohio laws concerning the imposition of punitive damages against estates. Part 1 examines change through the courts, which is the most likely possibility because this issue is currently under consideration in the Supreme Court of Ohio. Part 2 discusses a viable alternative: change through legislative action.

#### 1. Achieving Change Through the Courts

The Ohio Supreme Court's holding in *Whetstone* provides no certainty to the law in Ohio, except in the limited circumstances of that case. The Court did not announce a bright line rule as to whether punitive damages may be imposed against an estate. A different set of facts could bring the issue before the Court again in the future. For example, the Court's holding in *Whetstone* would not be applicable in a case where the tortfeasor dies after the trial court renders a judgment against her. In that case, an Ohio court would not be bound by the Court's decision, unless the court is in the Fifth Appellate District.<sup>214</sup> If given another opportunity, the Supreme Court should reconcile the holding in *Rubeck*<sup>215</sup> with more recent decisions, including the appellate decision in *Whetstone*,<sup>216</sup> *Mongold*,<sup>217</sup> and *Individual Business Services*.<sup>218</sup> Given the possibility of future inconsistent decisions among Ohio courts, the Supreme Court of Ohio should declare the state's

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213. See *Hewellette v. George*, 9 So. 885, 887 (Miss. 1891), *abrogated by* *Glaskox v. Glaskox*, 614 So. 2d 906 (Miss. 1992).

214. See Section IV.C.2, *infra*.

215. *Rubeck v. Huffman*, 374 N.E.2d 411 (Ohio 1978) (per curiam).

216. *Whetstone v. Binner*, 2014-Ohio-3018, 15 N.E.3d 905 (5th Dist.).

217. *Mongold v. Estate of Gilbert*, 114 Ohio Misc. 2d 32, 758 N.E.2d 1245 (Ohio Ct. Com. Pl. 2000).

218. See *Individual Bus. Servs., Inc. v. Carmack*, Montgomery C.P. No. 2004 CV 08159, 2009 WL 8235992 (Dec. 17, 2009).

position once and for all.

## 2. Achieving Change Through the Legislature

As aforementioned, uncertainty remains after the Supreme Court's decision in *Whetstone*. The rule expressed by the appellate court in *Whetstone* is now the law of the Fifth Appellate District in Ohio. Though the court's holding is not legally binding on the entire state, other appellate districts may look to *Whetstone* in forming an opinion as to whether punitive damages may be imposed against estates. An appellate decision can be persuasive to other appellate districts, especially when the deciding district has not opined on the issue. Given the likelihood that other appellate courts will be faced with the problem of whether to assess punitive damages against an estate, the Ohio legislature may be better suited to decide the issue than the courts.

Ohio is composed of twelve appellate districts.<sup>219</sup> If faced with the issue, each district court of appeals could arrive at different conclusions. Furthermore, each court could employ different reasoning for its disposition. Such conflicting opinions would further confuse the purposes and policies of punitive damages in Ohio. The Ohio General Assembly could curtail future problems with an amendment to an existing statute or the adoption of a new law addressing whether punitive damages can be awarded against a deceased tortfeasor's estate. Ohio could look to other jurisdictions in crafting a bright-line rule on the issue.

Sixteen other states have settled the issue through statute.<sup>220</sup> The legislatures in those states have addressed the specific question of whether courts and juries can impose punitive damages against a deceased tortfeasor's estate. Nearly ninety percent of them codified the conclusion that punitive damages *do not* survive the death of the tortfeasor.<sup>221</sup> The California survival statute, last amended in 1992, states that all damages are recoverable against a decedent's estate as if the decedent were living "except . . . punitive or exemplary damages."<sup>222</sup> The New York survival statute, last amended in 1982, provides: "For any injury, an action may be brought or continued against the personal

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219. See The Supreme Court of Ohio & The Ohio Judicial System, *Ohio Courts of Appeal*, SUPREMECOURT.OHIO.GOV, <http://www.supremecourt.ohio.gov/judsystem/districtcourts/> (last visited Nov. 16, 2015).

220. See *infra* Appendices B and D.

221. See *infra* Appendix B.

222. CAL. CIV. PROC. CODE § 377.42 (West, Westlaw through emergency leg. through Ch. 807 of 2015 Reg. Sess.).

representative of the decedent, but punitive damages shall not be awarded nor penalties adjudged in any such action brought to recover damages for personal injury.”<sup>223</sup>

Most other jurisdictions addressing the imposition of punitive damages after the death of the tortfeasor have remedied the issue through the state’s survival statutes. Ohio’s survival statute (R.C. 2305.21) has not been revised since its adoption in 1953,<sup>224</sup> and there have been no issues that call for a reinterpretation of the statute until *Whetstone*. The Ohio legislature, however, has passed a lengthy statute addressing the recovery of punitive damages, which was last amended in 2005.<sup>225</sup> The General Assembly revised Ohio’s punitive damages law, but declined to address the issue here. Nevertheless, the Supreme Court of Ohio “places little weight on legislative inaction as a barometer for determining legislative intent . . . .”<sup>226</sup> Therefore, the legislature’s silence on whether to impose punitive damages against estates does not indicate its intent to side with the majority or minority.

Though an Ohio appellate court had not yet decided if punitive damages could be imposed against an estate in 2005 (when the punitive damages statute was revised), the Supreme Court had considered whether a plaintiff’s estate was entitled to such damages in *Rubeck*, and at least one Ohio trial court had opined that punitive damages could not survive the death of the tortfeasor.<sup>227</sup> If the Ohio legislature intended a result to the contrary, it has had ample opportunities to add a provision to either the punitive damages statute or the survival statute.

However, the Supreme Court of Ohio has held that “legislative inaction in the face of longstanding judicial interpretations of that section [of a statute] evidences legislative intent to retain existing law.”<sup>228</sup> Furthermore, “[i]n interpreting the meaning of legislative language, it is not unimportant that the General Assembly has failed to amend the legislation subsequent to a prior interpretation thereof by [the Supreme Court of Ohio].”<sup>229</sup> Based on the court’s longstanding statutory

223. N.Y. EST. POWERS & TRUSTS LAW § 11-3.2 (McKinney’s, Westlaw through L.2015, chps. 1 to 417).

224. OHIO REV. CODE ANN. § 2305.21 (West, West, Westlaw through Files 1-29 of 131st Gen. Ass. 2015-2016).

225. OHIO REV. CODE ANN. § 2315.21 (West, West, Westlaw through Files 1-29 of 131st Gen. Ass. 2015-2016).

226. *Roosevelt Prop. Co. v. Kinney*, 465 N.E.2d 421, 425 (Ohio 1984) (per curiam).

227. *Mongold v. Estate of Gilbert*, 114 Ohio Misc. 2d 32, 758 N.E.2d 1245 (Ohio Ct. Com. Pl. 2000).

228. *State v. Cichon*, 399 N.E.2d 1259, 1261 (Ohio 1980).

229. *Seeley v. Expert, Inc.*, 269 N.E.2d 121, 129 (Ohio 1971) (citing *Mahoning Valley Ry. Co. v. Van Alstine*, 83 N.E. 601 (Ohio 1908)).

interpretation law, it seems clear that the General Assembly has acquiesced to the 1978 *Rubeck* decision due to its failure to subsequently amend the law. Yet, the legislature's silence on the issue here provides no guidance as to legislative intent because the issue has not reached the Supreme Court of Ohio and has only recently been reviewed by an Ohio appellate court. In any event, if the legislature decides to address the issue, it should adopt the majority view.<sup>230</sup> Ohio statutory and common law support the position that punitive damages should not be imposed against a deceased tortfeasor's estate.

## V. CONCLUSION

In Ohio, only two specific purposes justify an award for punitive damages. Both punishment *and* deterrence must be satisfied in order for a fact-finder to impose punitive damages against a tortfeasor. However, where the tortfeasor dies before the damages are awarded, these purposes are severely frustrated. Punitive damages cannot punish a deceased tortfeasor because the wrongdoer can no longer be physically reprimanded. Furthermore, a deceased tortfeasor can no longer be deterred from similar conduct in the future. General deterrence is the only reasonable justification for awarding punitive damages against an estate. Yet, it seems highly unlikely that the distant threat of punitive damages will deter others in society from maliciously committing torts.

Ohio statutory law is also consistent with the majority view. Ohio's punitive damages statute and survival statute are both silent as to the issue at bar. However, the express language of each statute, considered separately or taken together, align with the position that does not allow punitive damages to survive the death of the tortfeasor. In addition, negative policy implications arise from the minority view, while the majority view suggests positive policy outcomes. Given the recent Supreme Court decision in *Whetstone* and the continuing potential for conflicting opinions among Ohio appellate courts, the legislature may be in a better position than the courts to dispose of the matter. In any event, whether accomplished judicially or statutorily, Ohio should align with the majority of jurisdictions in holding that a claim for punitive damages cannot survive the death of the tortfeasor.

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230. The issue would certainly be ripe for legislative action if another Ohio appellate court issues a conflicting opinion.

VI. APPENDICES<sup>231</sup>**Appendix A—Majority View-Judicial Adoption**

Alaska—Doe v. Colligan, 753 P.2d 144 (Alaska 1988).

District of Columbia—Jonathan Woodner Co. v. Breeden, 665 A.2d 929 (D.C. 1995), *opinion amended on denial of rehearing by Jonathan Woodner Co. v. Breeden*, 681 A.2d 1097 (D.C. 1996).

Florida—Lohr v. Byrd, 522 So. 2d 845 (Fla. 1988).

Indiana—Crabtree *ex rel.* Kemp v. Estate of Crabtree, 837 N.E.2d 135 (Ind. 2005).

Iowa—*In re* Estate of Vajgrt, 801 N.W.2d 570 (Iowa 2011).

Kansas—Fehrenbacher v. Quackenbush, 759 F. Supp. 1516 (D. Kan. 1991) (applying Kansas law).

Kentucky—Stewart v. Estate of Cooper, 102 S.W.3d 913 (Ky. 2003).

Minnesota—Thompson v. Estate of Petroff, 319 N.W.2d 400 (Minn. 1982).

Missouri—Tietjens v. Gen. Motors Corp., 418 S.W.2d 75 (Mo. 1967).

New Mexico—Jaramillo v. Providence Wash. Ins. Co., 871 P.2d 1343 (N.M. 1994).

North Carolina—Harrell v. Bowen, 655 S.E.2d 350 (N.C. 2008).

South Dakota—Olson-Roti v. Kilcoin, 2002 SD 131, 653 N.W.2d 254.

Tennessee—Hayes v. Gill, 390 S.W.2d 213 (Tenn. 1965).

Wyoming—Parker v. Artery, 889 P.2d 520 (Wyo. 1995).

**Appendix B—Majority View-Statutory Adoption**

California—CAL. CIV. PROC. CODE § 377.42 (West 2014).

Colorado—COLO. REV. STAT. ANN. § 13-20-101 (West 2014).

Georgia—GA. CODE ANN. § 9-2-41 (West 2014).

Idaho—IDAHO CODE ANN. § 5-327 (West 2014).

Maine—ME. REV. STAT. ANN. tit. 18, § 3-818 (2014).

Massachusetts—MASS. GEN. LAWS ANN. ch. 230, § 2 (West 2014).

Mississippi—MISS. CODE ANN. § 91-7-235 (West 2014).

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231. The empirical data is based on several sources and my own research on the subject. See G.J.D. v. Johnson, 713 A.2d 1127, 1129-30 & nn.4 & 6 (Pa. 1998); Emily Himes Iversen, Note, *Invading The Realm Of The Dead: Exploring The (Im)propriety Of Punitive Damages Awards Against Estates*, 47 U. MICH. J.L. REFORM 827, 831-35 (2014); Timothy R. Robicheaux & Brian H. Bornstein, *Punished, Dead or Alive: Empirical Perspectives on Awarding Punitive Damages Against Deceased Defendants*, 16 PSYCHOL., PUB. POL'Y & L. 393, 410 (2010); Jay M. Zitter, Annotation, *Claim for Punitive Damages in Tort Action as Surviving Death of Tortfeasor or Person Wronged*, 30 A.L.R. 4TH 707 (1984).

Nevada—NEV. REV. STAT. ANN. § 41.100 (West 2014).

New York—N.Y. EST. POWERS & TRUSTS LAW § 11-3.2 (McKinney's 2014).

Oregon—OR. REV. STAT. ANN. § 30.080 (West 1983).

Rhode Island—R.I. GEN. LAWS ANN. § 9-1-8 (West 2014).

Vermont—VT. STAT. ANN. tit. 14, § 1454 (West 2014).

Virginia—VA. CODE ANN. § 8.01-25 (West 2014).

Wisconsin—WIS. STAT. ANN. § 895.02 (West 2014).

**Appendix C—Minority View-Judicial Adoption**

Alabama—Ellis v. Zuck, 546 F.2d 643 (5th Cir. 1977) (applying Alabama law).

Arizona—Haralson v. Fisher Surveying, Inc., 31 P.3d 114 (Ariz. 2001) (en banc).

Hawaii—Kaopuiki v. Kealoha, 87 P.3d 910 (Haw. Ct. App. 2003).

Illinois—Penberthy v. Price, 666 N.E.2d 352 (Ill. App. Ct. 1996).

Montana—Tillett v. Lippert, 909 P.2d 1158 (Mont. 1996).

Ohio—Whetstone v. Binner, 2014-Ohio-3018, 15 N.E.3d 905 (5th Dist.).

Pennsylvania—G.J.D. v. Johnson, 713 A.2d 1127 (Pa. 1998).

South Carolina—In re Thomas, 254 B.R. 879 (D.S.C. 1999) (applying South Carolina law).

West Virginia—Perry v. Melton, 299 S.E.2d 8 (W. Va. 1982).

**Appendix D—Minority View-Statutory Adoption**

Texas—TEX. CIV. PRAC. & REM. CODE ANN. §§ 71.008, 71.009 (West 2014).

Oklahoma—OKLA. STAT. ANN. tit. 12, § 1053 (West 2014).