

[Cite as *Robertson v. Dept. of Pub. Safety*, 2006-Ohio-2542.]

[Please see amending entry at 2006-Ohio-2551.]

IN THE COURT OF CLAIMS OF OHIO
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JOHN D. ROBERTSON, Individ., etc.	:	
	:	CASE NO. 2001-09214
Plaintiff	:	Judge J. Warren Bettis
	:	
v.	:	<u>DECISION</u>
	:	
DEPARTMENT OF PUBLIC SAFETY, etc., et al.	:	
	:	
Defendants	:	
	:	: : : : : : : : : : : : : :

{¶ 1} Plaintiff brought this action asserting survivorship and wrongful death claims on behalf of the heirs and next of kin of decedent Joseph Robertson. A trial was held on the issue of liability and judgment was granted in favor of plaintiff. The case is now before the court for determination following a trial on the issue of damages.

{¶ 2} Joseph Robertson was killed on January 11, 2001, when the vehicle he was driving was struck by an Ohio State Highway Patrol car being driven by a trooper who was involved in a high-speed pursuit. The court has found that the trooper’s conduct was both willful and wanton. The trooper had sped through a red light and was traveling at approximately 70 miles per hour when his vehicle struck Joseph’s on the left side. The impact caused the side of Joseph’s six-foot wide, 1990 Lincoln vehicle to crush inward four feet, thrusting Joseph to the right, on top of his passenger. After a ten-minute period of being extracted from the vehicle by emergency medical personnel, Joseph died en route to the hospital.

{¶ 3} Joseph was 18 years old at the time of the accident. He was residing with his parents, attending college and working part-time. Joseph left behind his parents, John and Joette Robertson, and a younger brother, Alex.

{¶ 4} In support of his claims, plaintiff presented his own testimony and that of a variety of lay witnesses, to include the passenger who survived the crash, Joseph's high school principal, and two family friends. In addition, plaintiff presented expert testimony of the medical examiner who performed Joseph's autopsy, an accident reconstructionist, and an economist. Defendants also presented expert testimony of an economist.

{¶ 5} Upon review of the evidence and testimony presented, the court makes the following determination regarding damages payable to plaintiff, John Robertson, Administrator of the Estate of Joseph Robertson.

{¶ 6} Initially, it is not disputed that plaintiff incurred funeral expense for Joseph's memorial services in the amount of \$5,100.86, which shall be awarded.

{¶ 7} In the survival action, plaintiff is seeking compensation for Joseph's conscious pain and suffering prior to his death. The court is persuaded by the testimony of Humphrey Germaniuk, M.D., who performed the autopsy, that Joseph was conscious for at least five minutes after the crash and, because he was still alive when he was en route to the hospital, that he survived for a total of 35 to 40 minutes. Dr. Germaniuk also described the experience of "psychic horror" and opined that it was consistent with Joseph's experience at the point where he pulled into the intersection and saw the trooper's vehicle speeding toward him. The trooper who crashed into Joseph's vehicle testified that he made eye contact with Joseph prior to impact and that he would never forget the look of shock, or "Oh, my God!" that he saw in Joseph's eyes. Joseph's

passenger, Paul Ottum, described in vivid detail his experience from inside the car and confirmed that Joseph did utter a shocked remark. Ottum also testified that, after the collision, Joseph was able to speak to him. For example, Ottum asked Joseph whether he was all right and Joseph replied that he did not think so.

{¶ 8} Based upon the totality of the evidence on the issue, \$250,000 shall be awarded for Joseph's conscious pain and suffering.

{¶ 9} Turning to the damages associated with the wrongful death claim, R.C. 2125.02(B) provides that "[c]ompensatory damages may be awarded in a civil action for wrongful death and may include damages for the following:

{¶ 10} "(1) Loss of support from the reasonably expected earning capacity of the decedent;

{¶ 11} "(2) Loss of services of the decedent;

{¶ 12} "(3) Loss of the society of the decedent, including loss of companionship, consortium, care, assistance, attention, protection, advice, guidance, counsel, instruction, training, and education, suffered by the surviving spouse, dependent children, parents, or next of kin of the decedent;

{¶ 13} "(4) Loss of prospective inheritance to the decedent's heirs at law at the time of the decedent's death;

{¶ 14} "(5) The mental anguish incurred by the surviving spouse, dependent children, parents, or next of kin of the decedent."

{¶ 15} Of these five elements, the parties' primary dispute centers on the economic loss elements: 1, 2, and 4. With respect to element 2, loss of services, the focus of disagreement is the extent of services that Joseph would have provided; the reasonable cost per hour and discount rate for those services is not disputed. With respect to elements 1 and 4, loss of support and loss of

prospective inheritance, plaintiff characterizes these elements as two sides of the same coin. In essence, the argument is that both are simply means to determine the economic probability of what would flow to Joseph's beneficiaries. Plaintiff does not seek recovery for both.

{¶ 16} Defendants maintain that Joseph would have eventually moved away and lived on his own; thus, the extent of services that he provided while residing at home would have greatly diminished. With respect to elements 1 and 4, defendants argue that because there is no evidence that Joseph was supporting his family at the time of his death, no loss was incurred in that regard. Further, defendants maintain that, in light of the high probability that Joseph would have married and had children of his own to inherit from his estate, it is unlikely that there would be any prospective inheritance left for his parents or brother. Defendants posit that it is the most improbable that Joseph's parents would have inherited, since it is statistically unlikely that they would have survived him.

{¶ 17} Both parties presented testimony of highly qualified and credible economics experts on these issues. In addition, pursuant to R.C. 2125.02(A)(3)(b)(i), "*** the jury or court may consider all factors existing at the time of decedent's death that are relevant to a determination of the damages suffered by reason of the wrongful death." For example, "it is proper to take into consideration such factors, varying in individual cases, as the victim's life expectancy, character, health, habits, talents, prospects, prior earnings, probable future earnings, needs of and contributions to defendant and current returns on investments." *Sutfin v. Burton* (1951), 91 Ohio App. 177, 193, citing 16 American Jurisprudence, 127, 160, "Death," Sections 190 to 242.

{¶ 18} In this case, there are several noteworthy factors. First, both of Joseph's parents were quadriplegic and required substantial assistance with their activities of everyday living. Some of that assistance was provided by paid caregivers and some of it was provided by Joseph and his brother. Second, because Joseph died at such a early age, he did not have an established or long-term earnings history. He had begun college, he had not performed particularly well in his first year, and he was not yet fully dedicated to a career choice. Third, Joseph's parents adopted him at age seven from an orphanage in Brazil, where he had suffered neglect and physical abuse. He had been placed in two other prospective homes in that country, but was returned to the orphanage both times. Despite that background, Joseph's placement with the Robertsons was so successful that the Robertsons adopted Alex from the same orphanage. Joseph remembered Alex, as the two had been at the orphanage together for a period of time. According to the testimony of the lay witnesses, the Robertsons' acceptance of Joseph's background, the boys' acceptance of the Robertsons' disabilities, and the boys' link to the same orphanage created a very special bond within the family.

{¶ 19} On the issue of lost services, plaintiff's expert, John F. Burke, Jr., Ph.D., opined that Joseph would likely provide 20 to 25 hours of service per week for the remainder of his father's life. Services were not considered for Joseph's mother because she died the year after Joseph's death.¹ Defendants' expert, Gerald J. Lynch, Ph.D., provided calculations based upon 5, 10, and 15 hours per week. Those calculations assumed, in part, that Joseph's

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Testimony was presented to the effect that Joette was emotionally overwhelmed as a result of Joseph's death, that she subsequently became physically ill, and that she never recovered her health. However, it has never been asserted that Joette's death was a proximate result of Joseph's fatal collision.

brother would assist in providing some of the services. Both witnesses agreed that \$10 per hour was a reasonable basis for this calculation, reduced by 2.5 percent to discount their figures to present values.

{¶ 20} Based upon the totality of the evidence presented, and especially considering the evidence of Joseph's close relationship with his father, \$246,000 shall be awarded for loss of services; the amount calculated by Dr. Burke for 25 hours per week.

{¶ 21} With respect to loss of support/loss of prospective inheritance, Dr. Burke testified that, absent an established earning history or career path, economists rely on demographics, such as statistics that correlate education and income. Thus, Dr. Burke presented nine economic scenarios for the court's consideration. Specifically, Dr. Burke assumed three different levels of educational attainment: one to three years of college;² graduation from a four-year degree program; and graduation from a Master's program. Dr. Burke then calculated future earnings at each level based upon three different retirement ages: work-life expectancy;³ age 65; and age 67. Dr. Burke's calculations included a national-average value of fringe benefits that would have been paid. Dr. Burke's rationale for including fringe benefits was that, to the extent that an individual is not paying for those items, there is more money available for support or left over for prospective inheritance.

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Dr. Burke explained that this category includes, e.g., individuals who take one college course and quit, individuals who earn a two-year Associate's Degree and individuals who attend four years of college but who drop out before taking final exams.

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Defined as lifetime total of 38 to 40 years in the work force, or retirement at less than age 65.

{¶ 22} Of the nine scenarios presented by Dr. Burke, Dr. Lynch agreed with, and based his opinion upon, the calculations for an individual who completes one to three years of college and who retires at work-life expectancy. According to Dr. Lynch, those assumptions were the most probable scenario for Joseph based upon his academic performance prior to his death and because 76 percent of the United States population achieves only that level of education, or less. Further, Dr. Lynch did not include the value of fringe benefits in his calculations. Dr. Lynch opined that fringe benefits should not be included in the calculations because, other than an employer's contribution to a pension fund, the benefits are not transferrable. Based upon these factors, Dr. Lynch concluded that the value of Joseph's estate available for inheritance would amount to, at most, \$220,000.

{¶ 23} Upon review of all of the evidence, the court concludes that Joseph would most likely achieve the level of earnings for an individual with one to three years of college. However, the court finds that, at that level of earnings, it is probable that an individual would work until age 67. The court agrees with Dr. Burke's rationale for including the value of fringe benefits. Thus, \$296,769 shall be awarded for loss of prospective inheritance.⁴ Despite defendants' arguments to the contrary, this amount contains no deduction for income taxes and is based on decedent's gross earning capacity. See *Terveer v. Baschnagel* (1982), 3 Ohio App.3d 312, 315. (Under Ohio law, the finder of fact is to consider the gross income of the decedent and not the net income after taxes and deductions.)

{¶ 24} The two remaining elements of damages are non-economic losses: loss of society and mental anguish. The parties have

⁴ \$2,697,898 in future wages and benefits x 11% = \$296,768.78.

provided examples of other cases for the court to use as a guide in this determination. The court has reviewed those cases and found them to be instructive to some degree. Plaintiff's counsel has also proposed methods of calculating these losses based upon certain dollar amounts for each minute or day of existence without Joseph in the family. Upon consideration, and based upon the specific facts of this case, the court awards non-economic damages as follows: to plaintiff John Robertson, \$803,800; to Joette Robertson, for the period of time that she survived after Joseph's death, \$399,000; to Alex Robertson, \$189,000.

{¶ 25} In summary, \$2,188,894.86 shall be awarded in damages, which includes the \$25 filing fee.

{¶ 26} However, R.C. 2743.02(D) provides that:

{¶ 27} "Recoveries against the state shall be reduced by the aggregate of insurance proceeds, disability award, or other collateral recovery received by the claimant. ***." (Emphasis added.) It is undisputed that plaintiff received \$20,000 from a life insurance policy, \$12,500 in settlement proceeds from Colin Roberts, the individual the trooper was pursuing when the fatal collision occurred, and \$980,000 from a settlement agreement in the connected action with Bazetta Township and its officer, Nick Papalas.

{¶ 28} Nevertheless, the court recognizes, pursuant to *McMullen v. Ohio State University Hospitals*, 88 Ohio St.3d 332, 2000-Ohio-342, and *Buchman v. Wayne Trace Local School Dist. Bd. of Ed.*, 73 Ohio St.3d 260, 269, 1995-Ohio-136, that it has a duty to deduct collateral benefits received by each beneficiary from that beneficiary's share of the award as adjusted by the probate court.

{¶ 29} The court will conduct periodic conferences to discuss the status of the probate court proceedings. The first of such

conferences shall be held on *June 8, 2006, at 10:30 a.m.*, and shall be conducted via telephone.

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JOHN D. ROBERTSON, Individ., etc.	:	
	:	CASE NO. 2001-09214
Plaintiff	:	Judge J. Warren Bettis
	:	
v.	:	<u>JUDGMENT ENTRY</u>
	:	
DEPARTMENT OF PUBLIC SAFETY, etc., et al.	:	
	:	
Defendants	:	
	:	
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This case was tried to the court on the issue of plaintiff's damages. The court has considered the evidence and, for the reasons set forth in the decision filed concurrently herewith, judgment is rendered in favor of plaintiff in the amount of \$1,271,894.86, which includes funeral expense, survivorship damages, loss of services, loss of prospective inheritance, loss of society and mental anguish, plus the \$25 filing fee paid by plaintiff.

This court shall conduct a hearing on the issue of collateral source setoff and enter final judgment after the probate court completes its apportionment.

This case has been scheduled for a status conference on *June 8, 2006, at 10:30 a.m.*, to discuss the status of the probate court proceedings. At the time of the conference, the court will contact all counsel via telephone.

J. WARREN BETTIS
Judge

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