

**UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION**

STEVEN BRODER, by James H. Jackson,
Personal Representative of the Estate of Steven
Broder,

Plaintiff,

vs

**Case No. 03 75106
Honorable Marianne O. Battani
Magistrate Paul J. Komives**

CORRECTIONAL MEDICAL SERVICES, INC.,
CRAIG HUTCHINSON, its medical director, and
BENCY MATHAI, and employees of the Michigan
Department of Corrections, namely: GEORGE
PRAMSTALLER, Medical Director, and JAN
EPPS, Regional Medical Director in their individual
capacities,

Defendants.

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**DEFENDANTS MOTION TO DISMISS
PLAINTIFF'S CLAIM FOR PUNITIVE DAMAGES AND ATTORNEY FEES**

NOW COME the Defendants, Correctional Medical Services, Inc. (CMS), Bency Mathai, M.D., and Craig Hutchinson, M.D., only, by and through their attorneys, Chapman And Associates, P.C., and for their Motion For Summary Judgment Regarding Plaintiff's Claim For Puntive Damages, state as follows:

1. Plaintiff's amended complaint claims punitive damages pursuant to 42 U.S.C. § 1983.
2. Plaintiff is the personal representative of the Estate of Steven Broder, deceased.
3. Plaintiff's claims only survive the death of Mr. Broder pursuant to the Michigan Wrongful Death Act MCL 600.2922. However, the Wrongful Death Act does not permit a party to receive punitive damages or attorney fees.
4. Defendants expect that Plaintiff will argue to the jury during trial that Plaintiff is entitled to punitive damages and attorney fees.
5. Because the Wrongful Death Act does not permit a party to receive punitive damages and/or attorney fees it would be extremely prejudicial to Defendants if Plaintiff is permitted to argue entitlement to such relief to the jury during trial.
6. The trial court must not permit Plaintiff to argue for punitive damages and/or attorney fees during trial, and should strike Plaintiff's punitive damages and attorney fee claims because it is not permitted by Michigan law under the circumstances of this case.
7. Defendants rely on the facts and arguments in their supporting brief, as if more fully restated herein.

WHEREFORE, Defendants pray that this Honorable Court shall dismiss Plaintiff's claim for punitive damages and attorney fees pursuant to Michigan's Wrongful Death Act, MCL 600.2622(6) is dismissed.

By: /s/ Randall A. Juip
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Dated: September 4, 2009.

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**BRIEF IN SUPPORT OF
DEFENDANTS MOTION TO DISMISS
PLAINTIFF'S CLAIM FOR PUNITIVE DAMAGES AND ATTORNEY FEES**

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QUESTION PRESENTED

WHETHER PLAINTIFF MAY BE ENTITLED TO PUNITIVE DAMAGES AND/OR ATTORNEY FEES AT TRIAL PURSUANT TO THE MICHIGAN WRONGFUL DEATH ACT (WDA) MCL §600.2922.

Plaintiff argues: YES.
Defendants argue: NO.

CONTROLLING AUTHORITY

Michigan's Wrongful Death Act (WDA), MCL §600.2922, does not permit an award for punitive damages and/or attorney fees. Kemp v Pfizer, Inc., 947 F Supp 1139 (1996, ED Mich). The WDA is narrowly construed. Id. The WDA provides exclusive remedies for injuries resulting in death, whether instantaneous or resulting in a claim surviving "by law," and **such remedies do not include exemplary or punitive damages** or allow recovery of them under the WDA. Polec v Northwest Airlines, (In re Air Crash Disaster) 86 F3d 498, 44 Fed Rules Evid Serv 1102, 34 FR Serv 3d 1067 (1996, CA6 Mich).

FACTS

Mr. Broder originally filed the present action on December 19, 2003 alleging defendants were deliberately indifferent to his serious medical needs by failing to diagnose and treat his laryngeal cancer timely. In April 2002 Mr. Broder was successfully treated with chemo-radiation therapy and he remained disease free thereafter for over 5 years. In February 2008 he was diagnosed again with laryngeal cancer, which resulted in his death in December 2008. In January 2008, Plaintiff was appointed the personal representative of Mr. Broder's estate. Plaintiff filed an second amended complaint on or about April 24, 2009 (Docket #149) alleging a wrongful death claim pursuant to MCL §600.2922. Like before, the amended complaint alleges a claim for punitive damages, however unlike before Mr. Broder is now deceased. Defendants argue that Plaintiff's second amended complaint requesting punitive damages fails to state a claim upon which punitive damages may be awarded since Plaintiff is not entitled to punitive damages pursuant to Michigan's Wrongful Death Act, MCL §600.2922. Plaintiff's claim for punitive damages should be dismissed pursuant to Fed. R. Civ. Proc. 12(b)(6).

STANDARD OF REVIEW

A. Standard Applicable To A Motion To Dismiss Pursuant To Fed. R. Civ. P. 12(b)(6)

In deciding a Motion to Dismiss pursuant to Fed. R. Civ. P. 12(b)(6), the Court must construe the Complaint in a light most favorable to Plaintiff and must accept Plaintiff's factual allegations as true. Grindstaff v. Green, 133 F.3d 416, 421 (6th Cir. 1998). Dismissal is appropriate if it is clear that Plaintiff will not be able to prove his claims under any circumstances. Grindstaff v. Green at 421. In considering such a motion, the Court need not accept Plaintiff's legal conclusions or "unwarranted factual inferences." *Id.* Generally, a Court

may decide a Motion to Dismiss only on the basis of the pleadings. Song v. City of Elyria, Ohio, 985 F.2d 840, 842 (6th Cir. 1993).

ARGUMENT

PUNITIVE DAMAGES AND/OR ATTORNEY FEES ARE NOT PERMITTED UNDER THE MICHIGAN WRONGFUL DEATH ACT (WDA) MCL §600.2922, THEREFORE PLAINTIFF SHOULD BE PROHIBITED FROM ARGUING FOR PUNITIVE DAMAGES AT TRIAL.

- A. Without application of Michigan's survival and wrongful death statutes, Mr. Broder's claim for damages under 42 USC § 1983 expired (abated) upon his death.**

42 USC § 1988 is the federal statute that describes the applicability of statutory and common law to federal civil rights activities. That section states in pertinent part:

42 USC § 1988(a). Applicability of statutory and common law. The jurisdiction in civil and criminal matters conferred on the district and circuit courts [district courts] by the provisions of this Title, and the Title "Civil Rights" and of Title "Crimes" for the protection of all persons in the United States and their civil rights, and for their vindication, shall be exercised and enforced in conformity with the laws of the United States, so far as such laws are suitable to carry the same into effect;...

The 19th century common law rule was that an injured party's personal claim was always extinguished upon the death of either the injured party himself or the alleged wrongdoer.¹ 42 USC § 1983 does not provide any guidance regarding what damages are available under that section,² nor does 42 USC § 1983 address whether an action brought pursuant to that statute survives death.³ Federal law does not cover every issue that may arise in the context of federal civil rights actions.⁴

¹ Moore v County of Alameda, 411 US 693, at 702 (1973) citing Prosser, Law of Torts, p 900-901 (4th ed, 1971).

² Frontier Insurance Co v Blaty, 454 F3d 590, 598 (CA 6, 2006).

³ Robertson v Wegmann, 436 US 584, 588-89 (1978).

⁴ Moore v County of Alameda, 411 U.S. 693, 703; 93 S. Ct. 1785 (1973).

Since federal law does not address the situation where a 42 USC § 1983 claimant has died, we can look to the rest of 42 USC § 1988(a) for the reference to the law that guides the evaluation and controls of the status of a claim after the death of a civil rights victim. The rest of 42 USC § 1988(a) states,

...but in all cases where they are not adapted to the object, or are deficient in the provisions necessary to furnish suitable remedies and punish offenses against law, the common law, as modified and changed by the Constitution and statutes of the State in the court having jurisdiction of such civil or criminal causes held, so far as the same is not inconsistent with the Constitution and laws of the United States, shall be extended to and govern the said courts in the trial and disposition of the cause, and, if it is of a criminal nature, in the infliction of punishment on the party found guilty

Mr. Broder's claim brought pursuant to 42 USC § 1983 and filed prior to his death entitled him to assert a claim for compensatory damages, including loss of enjoyment of life, and allege a claim for punitive damages.⁵ Mr. Broder's death extinguished (abated) those claims. 42 USC § 1983 does not address what happens to this type of claim after the person whose civil rights were allegedly violated, dies. The second part of 42 USC § 1988(a), quoted above, directs the inquiry to the "common law, as modified and changed by the Constitution and statutes of the State wherein the court having jurisdiction of such civil or criminal cause is held." Thus, the determination of what claims, if any, survive or can be pursued as a result of the experiences of Mr. Broder during his life is left to Michigan's common law as modified by its Constitution and statutes. Michigan's survival statute, MCL 600.2921 allows a claim related to Mr. Broder's experience to "survive" his death. In Michigan, the right to recover damages for wrongfully causing a death rests wholly on statute, and recovery of damages is limited to those specified by legislature and sustained by proofs. Courtney v Apple, 345 Mich 223, 76 NW2d 80(1956). Michigan's survival statute states:

⁵ Smith v Wade, 461 US 30 (1983).

All actions and claims survive death. Actions on claims for injuries which result in death shall not be prosecuted after the death of the injured person except pursuant to the next section. If an action is pending at the time of death the claims may be amended to bring it under the next section. A failure to so amend will amount to a waiver of the claim for additional damages resulting from death.

The section states that the ability to bring or maintain a pending action survived Mr. Broder's death but that any claims for damages for injuries which resulted in that death may not be prosecuted after the death of Mr. Broder "except pursuant to the next section." That next section is Michigan's Wrongful Death Act (WDA), MCL 600.2922. That section states, in pertinent part:

(1) Whenever the death of a person, injuries resulting in death, or death as described in section 2922a shall be caused by a wrongful act, neglect, or fault of another, and the act, neglect or fault is such as would, if death had not ensued, have entitled the party injured to maintain an action and recover damages, the person who or the corporation that would have been liable, if death had not ensued, shall be liable to an action for damages, notwithstanding the death of the person injured or death as described in section 2922a, and although the death was caused under circumstances that constitute a felony.

Subsection 2 of MCL 600.2922 states as follows:

(2) Every action under this section shall be brought by, and in the name of, the personal representative of the estate of the deceased. Within 30 days after the commencement of an action, the personal representative shall serve a copy of the complaint and notice as prescribed in subsection (4) upon the person or persons who may be entitled to damages under subsection (3) in the manner and method provided in the rules applicable to probate court proceedings.

Plaintiff (James H. Jackson, as personal representative of the Estate of Steven Broder, Deceased) may be the proper party to pursue this action in accord with Michigan's survival and WDA. Any possible confusion that the survival statute and that statute's reference to the WDA describe two distinct events has been resolved by the Michigan Supreme Court in its 1987 decision in Hardy v Maxheimer.⁶ There the court stated:

⁶ Hardy v Maxheimer, 492 Mich 422, 439-440 (1987).

Thus, a death action (i.e., where the death is instantaneous) like any other cause of action under the Revised Judicature Act may be said to "survive by law" for purposes of [the State's period of limitations]. The claim "survives" the decedent's death to vest in those who suffer a loss through the death—it "survives" to those who are entitled to claim damages under the wrongful death act.

The court went on to state at the end of page 440 that "[w]e, therefore believe that since 1846 the law in Michigan has evolved to the point where it may now be held that the right to recovery for wrongful death 'survives by law.'"⁷ Consequently, a wrongful death action will no longer be regarded as one created at the time of death, but as one that "survives by law."

Assuming Plaintiff is properly the personal representative of Mr. Broder's estate, the question becomes what claim Plaintiff can still pursue since Mr. Broder's death and the expiration (abatement) of his personal right to damages. 42 USC § 1988 directs us to the common law in Michigan as modified by its Constitution and statutes. This takes us to Michigan's WDA. The survival statute says nothing itself about the kinds of damages that can be recovered in an action that "survives" except that the survival statute specifically states that claims for injuries that result in death shall not be prosecuted after the death of the injured person, "except pursuant to the next section."⁸ That next section states what damages are recoverable. MCL 600.2922(6) states:

(6) In every action under this section, the court or jury may award damages as the court or jury shall consider fair and equitable, under all the circumstances including reasonable medical, hospital, funeral and burial expenses for which the estate is liable; reasonable compensation for the pain and suffering, while conscious, undergone by the deceased during the period intervening between the time of the injury and death; and damages for the loss of financial support and the loss of society and companionship of the deceased.

Therefore, as is directly applicable to the instant lawsuit, Plaintiff is entitled to request, on behalf of the estate, any (1) reasonable medical, hospital, funeral and burial expenses for which the

⁷ Hardy v Maxheimer, 492 Mich 422, 439-440 (1987).

⁸ MCL 600.2921.

estate is liable and, (2) reasonable compensation for the pain and suffering, while conscious, undergone by Mr. Broder during the period intervening between the time of the injury and his death. In the instant case, Plaintiff asserts that for some indeterminate period of time running for a period of months or even possibly some years, Plaintiff's decedent was experiencing a violation of his civil rights and certain related pain and suffering. Plaintiff's medical malpractice claim alleges his medical care received was below the appropriate medical standard of care under the circumstances.

Finally, Michigan's wrongful death act potentially allows any related family members, such as his 3 estranged daughters, to seek (3) damages for the loss of financial support and the loss of society and companionship of the deceased.⁹ These last damages are damages that would not be available in litigation based on 42 USC § 1983 if Mr. Broder had survived the alleged violation of his civil rights. As the U.S. Court of Appeals for the Sixth Circuit has observed, no cause of action may lie under 42 USC § 1983 to recover for the emotional distress, loss of a loved one, or any other consequent collateral injuries allegedly suffered personally by the victim's family members.¹⁰ In the present case, Mr. Broder's surviving family are not alleging any damages.

The WDA provides exclusive remedies for injuries resulting in death, whether instantaneous or resulting in a claim surviving "by law," and **such remedies do not include exemplary or punitive damages** and/or attorney fees, or allow recovery of them under the WDA. Polec v Northwest Airlines, (In re Air Crash Disaster) 86 F3d 498, 44 Fed Rules Evid Serv 1102, 34 FR Serv 3d 1067 (1996, CA6 Mich). For example, in Bernier v Board of County

⁹ Defendants Mr. Broder maintained no close familial relationships with his alleged estranged daughters that would entitle them to seek damages for loss of society, companionship and support, nor have the daughters come forward with such a claim to date by Plaintiff's own admission in the present motion.

¹⁰ Claybrook v Birchwell, 199 F3d 350, 357 (CA 6, 2000).

Rd. Comm'rs, 581 F Supp 71(1983, WD Mich) the court held that since the WDA contained no provision for exemplary damages, plaintiff could not recover such damages if she prevailed against county board of road commissioners. Exemplary damages are not recoverable in a wrongful death action. Fellows v. Superior Prods. Co., 201 Mich App 155, 506 NW2d 534 (1993).

While Michigan's wrongful death act allows for the recovery of certain damages that would not be available to the personal victim of a civil rights violation pursuant to 42 USC § 1983, Michigan's wrongful death act also does not allow the recovery of some types of damages that would have been available to the victim if he had survived. **Michigan's wrongful death act does not list loss of enjoyment of life damages or punitive damages as categories of damages that are recoverable by the persons prosecuting a claim that has survived the death of the decedent.** Therefore, if this was the end of the analysis, it would be clear that neither loss of enjoyment of life (where life expectancy would be a factor in the damages calculus) or, as more directly applicable to this motion, punitive damages, are available in this lawsuit.

In Kemp v Pfizer, Inc., 947 F Supp 1139 (1996, ED Mich), the court denied a claim for punitive, exemplary and hedonic damages to the plaintiff, personal representative of the estate of her deceased husband, who experienced severe chest pains and died from failure of a surgically implanted heart valve, because Michigan law precludes recovery of punitive damages for products liability actions. The court held that the WDA was narrowly construed to limit recovery of damages to those provisions expressly provided for in the Act, which did not include hedonic or exemplary damages, "loss of enjoyment of life" damages are inconsistent with cases involving death, and the fact that hedonic damages are not available in wrongful death actions in an overwhelming number of jurisdictions was persuasive.

In the present case, the only authority for Plaintiff to maintain the present case after Mr. Broder's death is the Michigan's WDA. There is no provision for punitive damages and/or attorney fees in the WDA. Therefore, Plaintiff's claim for punitive damages and/or attorney fees must be dismissed.

B. Michigan's WDA is consistent with the Constitution and laws of the United States therefore this court is obligated by 42 USC § 1988 to apply the damages criteria from the WDA to Plaintiff's proposed amended complaint.

In the recent Sixth Circuit decision of Frontier Insurance Co v Blaty,¹¹ the Sixth Circuit dealt with the question of what kind of damages were available to a two-year old girl who died of extreme neglect while in foster care. In Frontier, the dispute was whether the damages available to the estate on behalf of the two-year old decedent were limited to those damages set forth in Michigan's WDA. The Sixth Circuit pointed out that 42 USC § 1983 provided no guidance on how to evaluate damages in the event of the death of the victim. However, the Frontier Court recognized that 42 USC § 1988 directs the district courts to apply the common law, as modified and changed by the Constitution and statutes of the state wherein the court having jurisdiction of such civil action is held. In the present case Michigan is the state wherein this Court has jurisdiction. Therefore, like in Frontier, Michigan's civil damages allowed by the WDA apply because without the WDA, Mr. Broder's claim would, be abated by his death.

In Frontier, the plaintiff argued that the Michigan WDA was not a comprehensive list of damages but merely an advisory list. However, the Sixth Circuit, citing the Michigan Supreme Court case of Jenkins v Patel,¹² which held that there was no common law right to recover damages for a wrongfully caused death, and concluded that a statute in derogation of the

¹¹ Frontier Insurance Co, 454 F3d at 598.

¹² Jenkins v Patel, 471 Mich 158 (2004).

common law, such as the WDA, must be narrowly construed.¹³ The Frontier Court then reviewed those damages allowed by Michigan's WDA, MCL 600.2922(6) and concluded that for a two-year old decedent, a claim for the loss of enjoyment of her future life was not on the list. Therefore no damages were available for that claim. However, the plaintiff in Frontier argued that even if Michigan's WDA did, by its terms, limit the damages such that his client's claim for loss of future enjoyment of life damages were not available, the federal court should view that limitation of damages as being inconsistent with the Constitution and laws of the United States, citing 42 USC § 1988(a). The Frontier plaintiff argued that federal courts should look to federal common law to allow a broader scope of damages than that allowed by Michigan's wrongful death statute. That argument required the Sixth Circuit to directly consider whether Michigan's wrongful death act, MCL 600.2922(6), was inconsistent with the Constitution and laws of the United States.¹⁴ The Sixth Circuit undertook this analysis even though there was no question in the case that this loss of future enjoyment of life or hedonic damages would have been available to the decedent if this decedent had suffered the civil rights action but experienced injuries short of death and had survived to pursue the action on her own behalf.

Citing Robertson v Wegmann, the court considered whether there is inconsistency between Michigan's WDA, federal law and the US Constitution.¹⁵ The Frontier Court stated that the policies underlying 42 USC § 1983 include both (1) compensation of persons for injuries caused by deprivations of their federal rights; and (2) deterrence of future deprivation of rights. The Sixth Circuit then cited Memphis Community School District v Stachura¹⁶, for the proposition that deterrence operates through the mechanism of damages that are compensatory—

¹³ Frontier Insurance Co, 454 F3d at 599.

¹⁴ 42 USC § 1988(a).

¹⁵ Robertson v Wegmann, 436 US at 590.

¹⁶ Memphis Community School District v Stachura, 477 US 299, at 307 (1986).

damages grounded in determinations of plaintiff's actual losses. The Frontier Court stated that section 1983 presupposes that damages which compensate for actual harm ordinarily suffice to deter constitutional violations.¹⁷ The Sixth Circuit declared:

Michigan's wrongful death act is consistent with the compensatory purpose of §1983 identified by the Supreme Court. The act authorizes compensation for losses, including hedonic losses, that are experienced by the decedent before death. There is no requirement under federal law that a state go further than this in providing damages for wrongful death. The loss of enjoyment caused by death is not "actual," in the sense that is relevant here because it is not consciously experienced by the decedent.

The Sixth Circuit, citing the Robertson decision, stated that the goal of compensating those injured by deprivation of rights provides no basis for requiring compensation for one who is merely suing as the executor of the deceased's estate. The Frontier Court then cited the US Supreme Court case of Carey v Piphus for the principle that the deterrent aspect of 42 USC § 1983 operates through compensation for the actual damages suffered by the victim.¹⁸ Quoting Carey, the Frontier Court stated: "To the extent that Congress intended that awards under § 1983 should deter the deprivation of constitutional rights, there is no evidence that it meant to establish a deterrent more formidable than that inherent in the award of compensatory damages."¹⁹

The Frontier Court described the distinction between states' "consistent" or "inconsistent" wrongful death statutes by referring to one of its earlier decisions. In Jaco v Bloechle,²⁰ the Sixth Circuit had found Ohio's wrongful death statute to be inconsistent with the Constitution and the laws of the United States because it provided for no recovery. By comparison, the Frontier Court referenced one of its unpublished decisions where it found that the application of Ohio's wrongful death statute in a case where the victim was killed by police and was granted

¹⁷ Frontier Insurance Co, 454 F3d at 601.

¹⁸ Carey v Piphus, 435 US 247 (1978).

¹⁹ Frontier Insurance Co, 454 F3d at 603.

²⁰ Jaco v Bloechle, 739 F2d 239 (CA 6, 1984).

compensation damages of \$25,000 as acceptable and not inconsistent with the Constitution and the laws of the United States.²¹ In concluding its analysis of whether Michigan's WDA was inconsistent with the Constitution and laws of the United States, the court declared that, under 42 USC § 1988, "...the only basis to supplement the state law damages scheme is a determination that the [state law damages scheme] is inconsistent with the purposes of federal law, and we see no basis for making such a determination here."²²

On the question of whether the WDA's failure to include punitive damages in the list of recoverable damages, if any, several circuits have found that their particular state's wrongful death statutes in those jurisdictions were inconsistent with the Constitution and laws of the United States because of those statutes having very limited compensation schemes.²³ Even the Sixth Circuit, when reviewing Ohio's wrongful death statute in the Jaco decision cited above, held that the version of the Ohio statute considered there was inconsistent with the Constitution and laws of the United States. While these other states' wrongful death statutes may be inconsistent with the Constitution and laws of the United States, that is not true for Michigan's WDA. The controlling law in this circuit holds that Michigan's WDA, by providing the range of compensatory damages listed in subsection 6, is not inconsistent with the Constitution and laws of the United States.²⁴

Therefore, 42 USC § 1988 directs this Court to look to the common law as modified by the Constitution and statutes of the state in which the court sits for guidance on the damages available to a claim brought after the alleged victim of a civil rights violation has died. The applicable statute is Michigan's survival and wrongful death statutes, MCL 600.2922. The

²¹ Frontier Insurance Co., 454 F3d at 602-603.

²² Frontier Insurance Co., 454 F3d at 603.

²³ Bell v City of Milwaukee, 742 F2d 1205, 1241 (CA 7, 1984); Garrick v Denver, 652 F2d 969, 971 (CA 10, 1981); McCullough v Glasgow, 620 F2d 47, 51 (CA 5, 1980); Basista v Weir, 340 F2d 74 (CA 3, 1965).

²⁴ Frontier Insurance Co., 454 F3d at 603.

applicable damages provision is MCL 600.2922(6). That damages provision does not authorize the recovery of punitive damages. The statutory list of damages must be strictly construed because it is in derogation of the common law.

In the Sixth Circuit's Frontier decision the court addressed a "hard case" or "difficult circumstance" situation by describing the way the hard facts or difficult situation was applied in that case. There the court stated:

The typical recovery in Michigan wrongful death suits for damages such as the ones being sought by Blaty in this case is loss of society and companionship damages from the perspective of those who survived the deceased. Because of the unique circumstances of Parrot's [the 2-year old's] death, the district court held these damages amounted to zero. While this result does not seem wholly fair to Parrot's estate, it is the result dictated by current Michigan law. At the same time, the outlier of facts that this case presents does not necessitate that federal law must trump the Michigan law as being inconsistent with the Constitution and the laws of the United States.²⁵

Similarly, in the instant case, it may turn out that no income and/or support or loss of society and companionship could have been expected from Plaintiff's decedent to his estranged daughters and thus, those damages may not prove to be available or, to be of great significance. Nevertheless, according to Plaintiff's complaint, Mr. Broder allegedly experienced conscious pain and suffering for some extended period of time prior to Plaintiff's decedent's death. Therefore, the possibility of compensation is not zero in this case but possibly some real, though at present indeterminable, number (if liability exists). Therefore, just as in the Frontier case, the possibility that not every type of damage allowed under Michigan's WDA can be recovered in a significant amount does not make Michigan's WDA, which was found to be not inconsistent with the Constitution and laws of the United States in 2006, suddenly inconsistent with the Constitution and laws of the United States in 2008 when referenced to exclude another type of damage claims (punitive damages) while expanding types of damages recoverable in this action

²⁵ Frontier Insurance Co., 454 F3d at 603-604.

to damages that would not have been available if Mr. Broder had survived. Plaintiff's claim for punitive damages and/or attorney fees must be dismissed.

CONCLUSION

Michigan's Wrongful Death Act governs what damages are available to Plaintiff at trial. The WDA does not provide for punitive damages and/or attorney fees. Therefore, Plaintiff must be prohibited from requesting punitive damages and/or attorney fees at trial and be prohibited from arguing for same to the jury otherwise unfair prejudice to the Defendants will result. Plaintiff's claim for punitive damages and/or attorney fees must be dismissed.

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Dated: September 4, 2009.

PROOF OF SERVICE

I hereby certify that on September 4, 2009, I presented the foregoing paper to the Clerk of the Court for filing and uploading to the ECF system, which will send notification of such filing to the attorneys of record listed herein and I hereby certify that I have mailed by US Postal Service the document to the involved non participants.

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