**No. 19CAS8**

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**OHIO SIXTH DISTRICT COURT OF APPEALS**

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CHARLES R. HUTCHINGS,

Plaintiff-Appellee,

v.

JOHN HUTCHINGS,

Defendant-Appellant.

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**On Appeal from the Sandusky County Court of Common Pleas, Probate Division, Case No. 2016-9001**

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# BRIEF OF APPELLANT JOHN HUTCHINGS

***ORAL ARGUMENT REQUESTED***

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## ASSIGNMENTS OF ERROR

The trial court's judgment in plaintiff's favor on the conversion claim was contrary to law and against the manifest weight of the evidence because plaintiff did not own or have a possessory interest in tangible personal property at the time of the alleged conversion.

The trial court reversibly erred by applying the wrong burden and standard of proof to plaintiff's conversion claim.

The trial court reversibly erred by applying a greater-weight-of-the-evidence standard to plaintiff's claim for punitive damages.

Even discounting all of the aforementioned errors, the trial court's judgment was contrary to the manifest weight of the evidence.

## STATEMENT OF THE ISSUES

Whether the trial court's judgment in plaintiff's favor on the conversion claim was contrary to law and against the manifest weight of the evidence where plaintiff did not own or have a possessory interest in the property at issue at the time of the alleged conversion and where that property was not tangible personal property.

Whether the trial court reversibly erred by placing the burden upon *defendant* to prove by *the greater weight of the evidence* that conversion did not occur because he acted "appropriately" where the law instead required *plaintiff* to prove by *clear and convincing evidence* that the transfer at issue was the result of undue influence.

Whether the trial court reversibly erred by applying a greater-weight-of-the-evidence standard to the punitive damages claim where the Revised Code and Ohio Supreme Court precedent both require proof of punitive damages by clear and convincing evidence.

Whether, even assuming (contrary to fact) that the standards and burdens imposed by the

trial court were correct, the trial court's judgment was still contrary to the manifest weight of the evidence where there was (1) no evidence that the defendant exceeded his authority as attorney-in-fact but (2) abundant documentary and testimonial evidence that he acted within that authority, and also where a valid *in terrorem* clause existed.

## STATEMENT OF THE CASE

This appeal concerns the validity of an irrevocable trust executed by Appellant John Hutchings as attorney-in-fact for his father, Charles F. Hutchings ("Charles"). The parties agree that the power-of-attorney document at issue was duly executed and valid. Unhappy with the ultimate division of assets under the terms of the trust, John's brother, Charles R. Hutchings ("Chip"), sued John, who also served as trustee of the at-issue trust.

Chip brought claims for an accounting, for conversion, unjust enrichment, declaratory judgment, and punitive damages in the Probate Division of the Sandusky County Court of Common Pleas in January 2016. The parties' motions for summary judgment were denied, as were John's motions for a directed verdict. But only the claim of conversion and the request for punitive damages were ultimately put to the jury. Following a three-day trial held in February 2018, the jury wrongly found that John did *not* "act[] within his fiduciary duty in executing the . . . Trust" and erroneously concluded that his executing the trust constituted conversion of *Chip's* property. It awarded compensatory damages on the conversion claim and found that John also was liable for punitive damages in the form of Chip's attorney's fees and costs.

John filed a detailed motion for judgment notwithstanding the verdict on March 28, 2018. The trial court denied the motion on January 4, 2019 without discussion, and John filed his timely notice of appeal on January 30, 2019.

## STATEMENT OF FACTS

Charles and Elise Hutchings both passed away in 2014. Trial Tr., Vol. I at 84:6-10. John and Chip are their sons and only children. *See id.* at 47:4-7. In 2012, Elise began to suffer from dementia. *Id.*, Vol. II at 301:17-25. Charles became her full-time caregiver shortly thereafter. *Id.* at 416:1-8. Due to their age, Elise's failing health, and Charles's commitment to her full-time care, Charles and Elise both executed fairly sweeping powers of attorney appointing John as attorney-in-fact. *See, e.g., id.* at 306:9-20, 307:13-17. John, a financial advisor by trade (though he had been forced to take an earlier retirement due to Parkinson's disease, *id.* at 364:8-9, 306:2-3), had provided his parents with financial advice in the past and was the natural choice for the job. *Id.*, Vol. I at 170:11-14. This was also consistent with past practice: Though he was the younger son, his parents had for many years consistently chosen John as their go-to attorney-in-fact and trustee. *See, e.g.*, 2008 POA, Jt. Ex. 5; 1999 Trust, Jt. Ex. 8, § II.2.02. For his part, Chip unfortunately did not have a reputation for financial acumen. He had been involved, for example, in a failed business venture and a personal bankruptcy, and had lived for many years in a home purchased for him but owned by his parents. *Id.* at 71:6-72:3, 141:14-142:5.

The powers of attorney granted John broad authority to manage his parents' finances. Drafted by Charles and Elise's attorney, Louis Borowicz, among other things, the powers of attorney gave John the authority to "create a new revocable or irrevocable inter vivos trust, under whatever terms [the] attorney-in-fact deems advisable, by transferring in trust . . . any or all of my assets, without limitation," "[t]o make gifts and qualified transfers," and "[t]o self deal with respect to any, or all of my real, or personal property, without restriction." *Id.*, Vol. II at 298:19-299:7, 306:9-20; Charles POA, Jt. Ex. 11, p. 2.; Elise POA, Jt. Ex. 12, p. 2. The powers of attorney were duly executed, and Chip has not challenged their validity. Trial Tr., Vol. I at

170:15-171:11, Vol. II at 240:24-241:5, 352:15-19.

To, among other things, put himself and Elise in the best position to attain eligibility for long-term care benefits, Charles, with John's assistance, enlisted Mr. Borowicz to draft an irrevocable trust. *E.g.*, *id.* at 306:4-20. While, in light of his health and duties as Elise's caregiver, Charles did not meet with Mr. Borowicz in person during the drafting process (Mr. Borowicz was located near Columbus, while Charles and Elise lived in Fremont), Charles and Mr. Borowicz communicated regarding the trust over the phone. *Id.* at 304:1-306:20.

Finalizing and executing the new, irrevocable trust gained even greater urgency when debt collectors began pursuing Charles for past-due student loans. *See, e.g.*, *id.*, Vol. I at 187:22-25, Vol. II at 419:4-420:12. At Charles's undisputed direction, John investigated the matter and discovered that Chip's daughter, Alexandra, had listed her grandfather—Charles—as a co-signor on roughly $100,000 in student loans without Charles's knowledge or permission. *Id.*; Charles Aff., Ex. B, p. 1. While Charles had agreed to co-sign one loan for $17,920, he averred that he never agreed to cosign six later loans to which his name was added electronically (the single loan he did cosign was signed by hand). *See* Charles Aff., Ex. B, p. 1. In light of the prospect of liability for $100,000 in defaulted student loan debt, Mr. Borowicz advised that the irrevocable trust be executed immediately to protect against any other hidden liabilities that might be incurred by third parties unbeknownst to Charles. Trial Tr, Vol. II at 420:19-23. Thus, on August 12, 2013—a full ten months after the POAs were executed, *see* Charles and Elise POAs, Jt. Exs. 11-12, p. 5—John, rather than incurring the additional delay of driving the document to his elderly father for execution, himself executed the irrevocable trust, as attorney-in-fact, at Mr.

Borowicz's direction.[1] *See id.* at 423:11-20; Trust, Jt. Ex. 15, p. 15. A few days later, Charles, back in Fremont, executed deeds to convey his home to the new trust. Deeds, Jt. Exs. 16, 18.

The trust contained two clauses at issue in this litigation. First, like Charles and Elise's prior revocable trust drafted 14 years earlier, Prior Trust, Jt. Ex. 8, § 8.03, it included an *in terrorem*, or "no contest," clause providing that any would-be beneficiary who challenged the validity of the trust would be deemed to have, along with his progeny, predeceased Charles and Elise. Trust, Jt. Ex. 15, § 7.3. Second, the trust contained a gift-balancing clause, which provided that, in order to ensure overarching equal treatment, lifetime gifts to John and Chip should be taken into account in dividing the trust's asset between the brothers (the only two beneficiaries). *Id.* § 3.1.1. John and Chip's parents—particularly Elise—had expressed many times over the years the desire to treat their sons even-handedly by providing them with equivalent, or nearly equivalent, total assets. Trial Tr., Vol. II at 391:14-392:21. Their prior attorney had recommended they begin to consider equalized asset allocation at least as early as 1999, Ltr. from Atty. Peele, Jt. Ex. 6, pp. 2-3, though the revocable trust Charles and Elise put in place back then did not yet contain such a provision. *See generally*, 1999 Trust, Jt. Ex. 8.

After Charles and Elise passed away—much more quickly than hoped or expected—in 2014, John, as trustee, went about administering and winding down the trust. The somewhat-challenging task of applying the gift-balancing clause was simplified by the fact that Elise was a

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[1] Though Attorney Borowicz also advised John to report the misconduct to Sallie Mae's fraud division immediately, out of familial concern John insisted instead on giving Chip and Alexandra six months to remove Charles as cosignor, and sent Chip and Alexandra a letter to that effect. *Id.* at 421:18-422:12. They did not respond. *Id.* at 422:10-15.

meticulous recordkeeper. Beginning in 1951 (the year she and Charles married), Elise maintained detailed ledgers of even the most mundane family financial transactions.[2] Trial Tr., Vol. I at 99:3-4, Vol. II at 318:14-25, 433:21-435:8. The ledgers included entries on many lifetime gifts that Charles and Elise had made to John and Chip and their families. *Id.* In conducting the gift balancing, John relied on these ledgers and consulted with Chip to ensure that his calculations were as accurate as possible.[3] *E.g.*, *id.* at 433:17-436:23. In the end, he sent a letter to Chip, including a detailed spreadsheet of all lifetime gifts to both brothers, informing him of the results. John Aff. & Lifetime Gifts Table, Jt. Ex. 14, p. 16; Trial Tr., Vol. I at 98:16-21. While both brothers and their families had received substantial lifetime gifts, the gifts to Chip and his family exceeded those to John and his by hundreds of thousands of dollars. John Aff. & Lifetime Gifts Table, Jt. Ex. 14, p. 16. The upshot, then, was that application of the trust's gift-balancing clause meant that Chip would not receive any payout from the trust in light of the magnitude of the lifetime gifts he had received. *See* Trust Inventory, Jt. Ex. 21, p. 1.

After receiving a copy of the trust during this time period, Chip took it to his own

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[2] As an example of this detail, John's trial counsel had mown the Hutchingses' lawn as a youth, and the records of Elise's cash payments to him were precisely recorded in the ledgers.

[3] While Chip claimed he didn't remember if he and John had had any conversations regarding gift-balancing, it is beyond question that the brothers had at least one 20-minute call about it. John sought to introduce a recording of that call to impeach at trial, but the court forbade it because Chip did not unequivocally deny the conversation, responding when asked if they'd had such a call, "It could have happened, I don't recall. I don't remember, I'm going to say, no." Trial Tr., Vol. I at 163:21-23. *See also id.* at 216:2-6, Vol. II at 233:17-237:18.

attorney, who said the provisions it contained were "standard boilerplate stuff." Trial Tr., Vol. I at 160:15-21. Unhappy with this assessment—and rather than only contesting John's gift-balancing calculations or his handling of his role as trustee—Chip hired another attorney to bring a lawsuit attacking the validity of the trust itself. *See, e.g.*, Trial Tr., Vol. II at 241:13-15. These actions triggered the trust's *in terrorem* clause, and thus Chip was deemed to have predeceased his parents, making him doubly ineligible to take under the trust. *See id.*, Vol. I at 123:1-8.

Chip nevertheless persisted in this litigation. John's motion for summary judgment and motions for a directed verdict, referred to in the argument section below, were denied. Mag.'s Decision & JE p. 5. On February 28, 2018—as a result, John contends, of fundamental errors including misapprehension of the law, use of incorrect standards and burdens of proof, and a desire by the jury to simply "split the difference" between the brothers in defiance of the gift-balancing and *in terrorem* clauses—Chip received a jury verdict awarding him half the proceeds of the trust ($153,730.14) plus attorney's fees. Interrogatory & Jury Verdict Form ("Form") Nos. 7-8 (Post Jury Trial JE pp. 9-10). Interrogatories and verdict forms crafted by the trial court asked the jury whether "by the greater weight of the evidence, . . . John Hutchings[] appropriately acted within his fiduciary duty in executing the . . . Trust." Form #1 (Post Jury Trial JE p. 3). The jury answered that inquiry in the negative. Again pursuant to the strictures of the court's forms, the jury found that John's execution of the trust constituted an act of conversion and also found, "by the greater weight of the evidence," that John had acted with malice and was thus liable for punitive damages. Form Nos. 6, 8 (Post Jury Trial JE pp. 8, 10). The jury did not render any verdict specific to the *in terrorem* and gift-balancing clauses.

John subsequently filed a motion for judgment notwithstanding the verdict, which the trial court denied without explanation. JE on Post Trial Mot. p. 2. This appeal followed.

## SUMMARY OF ARGUMENT

The trial court made several fundamental errors that were profoundly prejudicial to John and can only be remedied by reversal. Ohio law states that a conversion claimant must prove ownership of, or right to possess, the property at issue at the time of the alleged conversion. But it is a legal certainty that plaintiff didn't own or have a right to possess his parent's property when the supposed conversion—which took place, if at all, when the trust was executed—occurred. Ohio law likewise says that the property in a conversion case must consist solely of tangible personal property, but that is also not the case here. In short, a conversion claim doesn't square with the facts of this case.

Second, the trial court made thoroughgoing errors regarding both the burden and standard of proof applicable to plaintiff's "conversion" claim. In light of the uncontested validity of the power of attorney at issue here, its plain language permitting the actions taken by John, and other facts discussed below, the law required *plaintiff* to prove by *clear and convincing evidence* that John exerted undue influence over his father. Instead the trial court doubly erred by directing the jury to apply a *greater-weight-of-the-evidence* standard to the overarching question of whether John acted "appropriately" and by placing the burden of proof on *John.*

Third, the Ohio Supreme Court and the Revised Code both require proof of the malice necessary to award punitive damages by clear and convincing evidence. But the trial court applied the greater-weight-of-the-evidence standard instead. The facts here were insufficient to prove malice by clear and convincing evidence (or even by the greater weight of the evidence).

Finally, even if none of the above were true, the trial court's judgment should still be reversed because, even by the trial court's own standards, the judgment in plaintiff's favor was contrary to the manifest weight of the evidence and barred by the *in terrorem* clause.

## ARGUMENT

### I. The Trial Court's Judgment on the Conversion Claim Should Be Reversed Because Plaintiff Did Not Own or Have a Possessory Interest in Tangible Personal Property at the Time of the Alleged Conversion.

For a conversion claim to succeed, Ohio law plainly requires that the plaintiff prove he owned or had a right to possess the at-issue property at the time of the alleged conversion. Plaintiff offered no such proof here, and thus the trial court's judgment in his favor on the conversion claim is contrary to law and against the manifest weight of the evidence.

#### A. A Conversion Claim Requires Proof of Present Ownership.

"Conversion is the wrongful exercise of dominion over property to the exclusion of the rights of the owner . . . ." *Joyce v. Gen. Motors Corp.*, 49 Ohio St.3d 93, 96, 551 N.E.2d 172 (1990). "The elements of . . . conversion . . . are: (1) plaintiff's ownership or right to possession of the property at the time of the conversion; (2) defendant's conversion by a wrongful act or disposition of plaintiff's property rights; and (3) damages." *Shinaberry v. Toledo Edison Co.*, 6th Dist. Lucas No. L-97-1389, 1998 Ohio App. LEXIS 3245, at *7 (July 17, 1998). "It is fundamental that a plaintiff in a conversion action must show title or rightful ownership of the chattel, including money, *at the time of the alleged conversion*." *Levens Corp. v. Aberth*, 9th Dist. Summit No. 15661, 1993 Ohio App. LEXIS 727, at *7 (Feb. 10, 1993) (emphasis added). *See also, e.g., RAE Assocs. v. Nexus Commc'ns, Inc.*, 2015-Ohio-2166, 36 N.E.3d 757, ¶ 30 (10th Dist.) (same); *Hoffman v. Sandusky Packing Co.*, 14 Ohio Law Abs. 436, 1933 Ohio Misc. LEXIS 1525, at *6 (6th Dist.1933) (conversion plaintiff must prove "that he was the owner . . . *at the time of the alleged conversion*" (emphasis added)).

Thus, courts across the state consistently reject conversion claims where a plaintiff has failed to prove that he or she owned or had a present possessory right to the property when the alleged conversion occurred. *See, e.g., Thompson v. Faddis*, 11th Dist. Portage No. 2006-P-36,

2007-Ohio-891, ¶ 20 (affirming summary judgment for defendant on conversion claim where plaintiff's lease of a chattel had expired and thus she neither "owned nor had a legitimate right to possess the property"); *Collins v. Nat'l City Bank*, 2d Dist. Montgomery No. 19884, 2003-Ohio-6893, ¶ 20 (no valid conversion claim against defendant bank where plaintiff was allegedly owed money from an account but did not own the account itself); *Levens*, 1993 Ohio App. LEXIS 727, at *7-9; *Young v. Eich*, 7th Dist. Mahoning No. 10-MA-191, 2012-Ohio-1687, ¶ 25 (no conversion where plaintiff "failed to prove [her] ownership" of the allegedly converted vehicle).

### B. Plaintiff's Conversion Claim Fails for Failure to Prove Ownership and For Additional Factual Reasons.

Application of this principle to the case at bar means that the jury's verdict in favor of plaintiff on the conversion claim must be reversed. Contrary to what the jury found, John's execution of the trust agreement did not constitute a "wrongful exercise of dominion over property" that belonged to plaintiff because, at the time the trust was executed, all of the property at issue belonged exclusively to John and Chip's parents. *Joyce*, 49 Ohio St.3d at 96. Thus Chip cannot—and, most importantly, at trial, *did not*—prove ownership at the time of the alleged conversion. Indeed, Charles and Elise's ownership of the property up to the moment it was placed in the newly executed trust (and their beneficial ownership thereafter) is undisputed.

This issue was meticulously preserved in the court below, as trial counsel consistently and clearly pointed out this fatal flaw in plaintiff's case, arguing that it required judgment in John's favor. *See* Deft.'s Summary Judgment Mot. p. 9 (Plaintiff failed to prove the "elements [of] . . . a conversion claim. At the time that the Defendant created the irrevocable trust, Plaintiff was not a vested beneficiary and had no ownership or right to possession over any of the property owned by his parents or his parents' trust . . . ."); Trial Tr., Vol. II at 263:8-265:16 (arguing for directed verdict on these grounds); Deft.'s Mot. for Judgment Notwithstanding the

Verdict ("JNOV") p. 12-13 (same). But the trial court, in rejecting the argument out of hand, never actually addressed it. The magistrate's decision denying John's motion for summary judgment makes no mention of it. Magistrate's Decision & JE pp. 1-5. And the trial judge likewise rejected it without a word of explanation. *See id.* p. 5 (adopting opinion); Trial Tr., Vol. II at 270:18-23; JE on Post Trial Mots. p. 2 (denying JNOV without *any* analysis of *any* issue).

Because plaintiff did not own his parents' property at the time of "conversion," the law is clear that the jury's verdict was against the manifest weight of the evidence. The conversion verdict (and thus the related punitive-damages verdict as well) must be reversed.

Plaintiff may argue, as he did before the trial court, that the "act of . . . conversion" was not "complet[ed]" until after Charles and Elise had passed away, their possessions were liquidated, and John received the monetary proceeds from the trust in light of the gift-balancing clause and the magnitude of the lifetime gifts given to plaintiff. *See* Trial Tr., Vol. II at 266:18-267:18. But any such argument must fail. First, the argument attempts to blur the distinction between two separate acts: the execution of the disputed trust and the later disposition of trust assets pursuant to the trust's terms. As stated, plaintiff must show, among other things, "conversion by a *wrongful act or disposition* of plaintiff**'**s property rights." *Shinaberry*, 1998 Ohio App. LEXIS 3245, at *7. But disposition of the trust assets pursuant to the terms of the trust cannot be wrongful if the trust itself is valid. *See id.* (conversion claim failed where the defendant's "acts" "were in compliance with the rights granted to [the defendant]" pursuant to a governing agreement and thus were not wrongful). Therefore the wrongful act, if any, must have been the execution of the trust itself. Second, and more important, the verdict form plainly states that the conversion claim is premised solely on the execution of the trust agreement itself, not on the later disposition of assets in accordance with the terms of the trust agreement. The jury

forms posed the following interrogatory to the jury:

> Do you find, by the greater weight of the evidence, that the Defendant, John Hutchings, either individually or as trustee, wrongly "converted" property that rightfully belonged to the Plaintiff . . . , *through any of the actions already addressed*?

Form #6 (Post Jury Trial JE p. 8) (emphasis added). The jury answered in the affirmative. But note that the finding is explicitly and exclusively premised on "any of the actions already addressed" by the jury on the preceding verdict forms. *Id.* The only "action[] already addressed" in the verdict forms by the jury was whether John "appropriately acted . . . *in executing the . . . Trust.*" Form #1 (Post Jury Trial JE p. 3) (emphasis added). The conversion verdict in plaintiff's favor is thus premised exclusively—and impermissibly—on John's execution of the trust agreement as attorney-in-fact for his father.[4]

Further, even if this were not the case and plaintiff had had vested property rights in his parents' property at the time of the alleged conversion, he still should not be able to recover here, as "conversion claims are generally limited to those based upon the taking of tangible, personal property." *Kelley v. Ferraro*, 188 Ohio App.3d 734, 2010-Ohio-2771, 936 N.E.2d 986, ¶ 70 (8th Dist.) (citing *Landskroner v. Landskroner*, 154 Ohio App.3d 471, 2003-Ohio-5077, 797 N.E.2d 1002, ¶ 27 (8th Dist.)). Here, plaintiff alleged not the conversion of identifiable personal

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[4] That a conversion claim does not sound on these facts does not mean those similarly situated to plaintiff are without remedy (assuming they can, unlike plaintiff, produce evidence of wrongful conduct). Rather, litigants like plaintiff may raise, *e.g.*, claims for intentional interference with expectancy of inheritance ("IIEI"). *See Firestone v. Galbreath*, 67 Ohio St.3d 87, 88, 616 N.E.2d 202 (1993) (recognizing IIEI tort and setting forth elements).

property but rather conversion of the cash proceeds of the trust.[5]

## II. The Trial Court Also Committed Reversible Errors with Respect to Both the Burden and Standard of Proof Applied to the "Conversion" Claim.

Though urged to do otherwise, the trial court also applied the wrong burden and standard of proof to the "conversion" claim, resulting in the erroneous denial of John's motion for summary judgment and in fatally flawed jury instructions and verdict forms.

### A. A Plaintiff in Chip's Position Must Prove Undue Influence by Clear and Convincing Evidence.

"Where . . . [a] principal has made an express grant of authority to an attorney-in-fact to make gifts to third persons, including the attorney-in-fact, the attorney-in-fact may, in the absence of evidence of undue influence upon the principal, make such gifts." *MacEwen v. Jordan*, 1st Dist. Hamilton No. C-20431, 2003-Ohio-1547, ¶ 12. Attorneys-in-fact may "bear the initial burden of proving the validity of a transfer to themselves under the power of attorney," but "the party attacking the transfer retains the ultimate burden of proving undue influence by clear and convincing evidence." *Id.* ¶ 13. *See also Miller v. Paul*, 5th Dist. Muskingum No.

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[5] Plaintiff may argue that he alleges conversion of the tangible property held by the trust. This assertion is belied by his own testimony. *E.g.*, Trial Tr., Vol. I at 89:2-4 (Chip purchased items from parents' sale "assuming that the *money* that I was spending I would get half of it back" under the trust (emphasis added)). But if this Court were for some reason to disagree and find that plaintiff alleged conversion of tangible assets, not the proceeds from the sale of those assets, his claim still must fail with respect to the cash accounts held by the trust as well as the trust proceeds derived from the sale of his parents' home: "Real estate is not subject to conversion." *Ohio Dist. Cncl. v. Speelman*, 2018-Ohio-4388, 114 N.E.3d 285, ¶ 22 (12th Dist.).

CT2014-0024, 2014-Ohio-5789, ¶ 32 (same); *In re Estate of Buckner*, 12th Dist. Clermont No. CA2008-07-074, 2009-Ohio-2447, ¶ 27 (same). That is, "when a gifting clause is present, the party attacking the transfer retains the burden of proving undue influence" by clear and convincing evidence. *Miller*, 2014-Ohio-5789, ¶ 35.

To determine whether a defendant has met his initial burden of showing that a transfer was facially valid, "a court must first look to the express grant of authority in the text of the power of attorney" to determine whether the plain language of the power of attorney empowered the attorney-in-fact to self-gift. *MacEwen*, 2003-Ohio-1547, ¶ 14. A court may then "look to other considerations" specific to the case, which "may include" the following:

> whether a transfer depleted assets necessary to maintain the principal's lifestyle; whether the principal knew of the gift and authorized it in some manner; whether the recipient of the transfer was the natural object of the principal's bounty and affection; whether the transfer was consistent with the principal's estate plan; whether the gift was a continuation of the principal's pattern of making gifts; and whether the transfer was made for another legitimate goal, such as the reduction of estate taxes.

*Id.* ¶ 14. Once the facial validity of the transfer is shown, the party challenging the transfer must prove by clear and convincing evidence that the attorney-in-fact exerted undue influence on the principal. *E.g., id.* ¶ 13. Without this showing by the plaintiff, the claim must fail.

*MacEwen*, itself a dispute between siblings, is a prime example of how this regime works in practice. In *MacEwen*, a brother sued his sister, who had taken care of, and served as attorney-in-fact for, the siblings' father. *Id.*, 2003-Ohio-1547, ¶ 2. Under the governing power-of-attorney, the father granted the sister the power "[t]o make gifts at any time, or from time to time, to anyone, including my Attorney-in-Fact, in such amounts and using such property as my Attorney-in-Fact shall determine." *Id.* While the brother had been named as successor attorney-in-fact under the terms of a prior power-of-attorney, the POA at issue substituted the sister's husband, a lawyer, as successor. *Id.* Pursuant to this express grant of authority, the sister "made

gifts to herself and to her children . . . in excess of $100,000." *Id.* ¶ 3. When the brother discovered these gifts during estate administration, he sued his sister, but the trial court entered summary judgment in his sister's favor. *Id.* ¶ 1.

The First District affirmed. Applying the principle that, "[w]here . . . [a] principal has made an express grant of authority to an attorney-in-fact to make gifts to third persons, including the attorney-in-fact, the attorney-in-fact may, in the absence of evidence of undue influence upon the principal, make such gifts," the appellate court looked to the language of the power-of-attorney, which plainly allowed the gifts. *Id.* ¶ 12. It also applied some of the factors, discussed, *supra* at 14, to conclude that the gifts were facially valid. *Id.* ¶ 15. Among other things, the sister was a natural object of the father's bounty, and there was no evidence that the gifts "depleted assets necessary to maintain" the father's lifestyle. *Id.*

In light of the facial validity of the transfer, the court turned its attention to the complaining brother, who, the court said, had utterly failed to prove by clear and convincing evidence—indeed, "presented no evidence"—that the sister "had exerted undue influence on their father when he granted the power of attorney or at any subsequent time." *Id.* ¶ 15. Accordingly, the court affirmed the grant of summary judgment in favor of the sister.

The *MacEwen* framework makes good sense, as it carefully balances competing public policy goals. A more lenient framework (one favoring attorneys-in-fact) could open the door to manipulation and undue influence by would-be attorneys-in-fact, while a harsher framework, like that applied in this case, *see infra* at 20-23, could chill legitimate transactions and effectively negate the free choices of elderly, disabled, and other individuals who have made explicit, written determinations as to how and by whom their financial affairs should be administered. *MacEwen* avoids the former extreme by requiring that the power of attorney at issue explicitly

permit self-dealing and by giving the plaintiff an opportunity to prove undue influence. It guards against the latter extreme by requiring clear and convincing proof of undue influence before a principal's free will—as evidenced by the power of attorney itself—regarding how his or her affairs should be conducted, and by whom, can be overridden.[6]

A result similar to *MacEwen* obtained in *In re Estate of Buckner*, 12th Dist. Clermont No. 2008-07-074, 2009-Ohio-2447, a dispute between two sisters and a brother. There, the siblings' mother was admitted to a nursing home after a stroke. One of her daughters then had a power of attorney prepared that allowed her to manage her mother's finances. The POA, among other things, granted the daughter the authority "[t]o make gifts to any or all of [the mother's] children." *Id.* ¶ 7. Both daughters frequently visited their mother in the nursing home, but their brother did not. *Id.* ¶ 3. Using the power of attorney, the sister who served as attorney-in-fact transferred stock worth $125,000 into accounts that were still in her mother's name but payable on death to the two sisters. *Id.* ¶¶ 6, 8-11. She testified that, after the stroke, her mother told the sisters, "if anything like this ever happens again, I want you two to have my stock." *Id.* ¶ 12.

Following the mother's death, the brother sued, alleging the attorney-in-fact sister "breached her fiduciary duty to the decedent" by transferring the stock to the account payable on death to the sisters. *Id.* ¶ 15. But the trial court entered judgment in favor of the sisters. *Id.* ¶ 16.

The Twelfth District, applying the *MacEwen* framework, affirmed the trial court's conclusion that the claim failed because the plaintiff brother didn't prove undue influence by

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[6] The trial court inexplicably eschewed the *MacEwen* framework, tailor-made for precisely this type of case, and instead utilized jury instructions explicitly drafted for a different type of claim and thus not even fully applicable to the case at bar. *See infra* at 28.

clear and convincing evidence. *Id.* ¶¶ 16, 41. Specifically, it found the transfer facially valid, pointing to the language in the power of attorney permitting gifting to the decedent's children. *Id.* ¶ 33. And it affirmed the trial court's application of the *MacEwen* facial-validity factors, including "whether the transfer was consistent with the principal's estate plan." *MacEwen*, 2003-Ohio-1547, ¶ 14. Though dispersal of the stock only to the sisters "was not wholly consistent with the decedent's intent in her Will to divide her estate equally between the children," the sisters "were expressly contemplated by the decedent, in her Will, as being entitled to a sizable share of her estate," and this was enough to support the validity of the transfers. *Buckner*, 2009-Ohio-2447, ¶ 30. The court of appeals pointed out that, "[c]ontrary to [the brother's] argument, [the attorney-in-fact] was not required to show, by clear and convincing evidence, a present intention on the part of the decedent to make a gift." *Id.* ¶ 29.

Given this facial validity, the court turned to whether the brother had proven undue influence via clear and convincing evidence. Concluding that he had failed to present such evidence "either at the time of the grant of the power of attorney, or at any other time subsequent," it affirmed the judgment for the sisters. *Id.* ¶ 31 (internal quotation marks omitted).

### B. Like the Complainants in *MacEwen* and *Buckner*, Plaintiff Here Utterly Failed to Prove Undue Influence.

Applying *MacEwen* and *Buckner*, the case for granting summary judgment (or a directed verdict) for the defense was even stronger here than it was in either of those precedents. The validity of the power of attorney here is undisputed, as admitted by plaintiff himself. Trial Tr., Vol. I, 170:23-171:11. *See also* 172:9-10 (plaintiff "was glad to have [John] in that position [*i.e.*, the position of attorney-in-fact]"). It granted John the authority "[t]o make gifts and qualified transfers" and explicitly permitted him "[t]o self deal with respect to any, or all of [his parents'] real, or personal property, without restriction." Charles POA, Jt. Ex. 11, p. 2. Even *Chip*

admitted at trial that the POA permitted John to execute *this very trust*. Trial Tr., Vol. I at 174:22-175:5. Moreover, the *MacEwen* factors, set forth *supra* at 14, only solidify the facial validity of the "transfer" here (which was not a contemporaneous transfer, of course, but the execution of a trust with a gift-balancing clause that would permit a future transfer).

As to the first *MacEwen* factor, far from "deplet[ing] assets necessary to maintain the principal's lifestyle," inclusion of the gift-balancing clause in the trust did not deplete *any* of Charles's assets, as the clause only affected distribution of assets post mortem. *See* Trust, Jt. Ex. 15, § 3.1 (gift-balancing applies "[u]pon the death of the second to die of my spouse and me"). Indeed, the irrevocable trust was designed to *preserve and protect* assets. *Supra* at 4. As to whether the principal knew of the "gift," Charles was well aware of the trust's existence and even personally executed the deeds removing his home from a previous trust and placing it into this one. *See* Deeds, Jt. Exs. 16, 18. The third factor—whether the recipient of the gift was a "natural object of the principal's bounty and affection"—also weighs in favor of validity, as John and Chip were Charles and Elise's only children. *Cf. MacEwen*, 2003-Ohio-1547, ¶ 15. The next two factors—whether the gift was consistent with the principal's estate plan and whether the gift was a continuation of the principal's gifting practice—likewise weigh in favor of the trust's, and the gift-balancing clause's, validity. As had their 1999 trust, the 2013 trust provided that all of Charles and Elise's assets would go to their two sons. *Compare* 1999 Trust, Jt. Ex. 8, § VII.B *with* 2013 Trust, Jt. Ex. 15, §§ 3.1, 3.1.1. Moreover, the 2013 trust is consistent with Charles's estate plan because it *was* his estate plan. That is, he explicitly gave John authority to execute the trust, was aware it was executed, and personally deeded property to the trust. *Supra* at 3-5.

That the 2013 trust contained a gift-balancing provision altering the details of distribution does not change this analysis. Elise had kept detailed records of the lifetime gifts made to her

children and desired that everything be evened out upon her death, *supra* at 6, and the evidence showed that Charles and Elise were considering a form of gift-balancing as early as 1999. *See* Ltr. from Atty. Peelle, Jt. Ex. 6, pp. 2-3; Trial Tr., Vol. I at 134:14-21. Further, *Buckner* makes clear that a change in allocation, even a substantial change, does not affect facial validity where the donees are still from the original pool. *See Buckner*, 2009-Ohio-2447, ¶ 30 (while gifting of stock to two sisters but not to brother "was not wholly consistent with the decedents' intent in her Will to divide her estate equally between [her] children," transfer was nevertheless facially valid, as the sisters "were expressly contemplated by the decent, in her Will, as being entitled to a sizable share of her estate").

In sum, then, the validity of the power of attorney itself was undisputed; the power of attorney contained unequivocal language permitting the execution of the 2013 trust; Charles was aware of the new trust and personally transferred property to it; the new trust did not deplete Charles and Elise's assets in any way; in fact, the new trust protected Charles and Elise's assets from potential creditors and put them in a better position to receive long-term-care benefits; unchanged from prior estate plans, the prospective beneficiaries under the new trust were their two sons, the natural objects of their bounty; and Charles and Elise's records and past statements indicated a desire to ensure the sons received equal total gifts. The facial validity of the transfer here is accordingly beyond cavil.[7] This meant that the burden was on Chip to prove by clear and convincing evidence that John exerted undue influence over his parents. But Chip, like the

[7] Note that the gift-balancing clause technically was not a transfer but rather merely a mechanism by which the parents' assets were to be distributed between their children in the future. This is a milder measure than the direct, immediate gifts of cash approved in *MacEwen*.

complainants in *MacEwen* and *Buckner*, produced no evidence that John had exerted undue influence "either at the time of the grant of the power of attorney, or at any . . . time subsequent." *Buckner*, 2009-Ohio-2447, ¶ 31. *See also MacEwen*, 2003-Ohio-1547, ¶ 15 (same).

### C. The Trial Court Reversibly Erred in Failing to Grant Summary Judgment in Favor of John on This Issue.

In light of this fundamental failure of proof, Chip's claims should never have made it to the jury, as the trial court, applying the proper standards and burdens of proof, should have granted John's motion for summary judgment (or his motion or renewed motion for directed verdict), in which trial counsel argued for judgment on these very grounds. *See* Deft.'s Mot. for Summary Judgment pp. 10-11; Deft.'s Reply ISO Mot. for Summary Judgment pp. 3-5.[8] But the magistrate's decision (subsequently adopted by the trial court) denying John's motion for summary judgment made no mention of the *MacEwen-Buckner* line of cases or the standard and burden of proof they require. The opinion instead was based, at least in part, on inappropriate judicial speculation. For example, the magistrate asserted, without citation, that John's signing of the trust as attorney-in-fact was "[im]prudent," that Charles should have signed it himself instead, and that "failure to obtain the signature of Charles on . . . [the] trust, raises a level of suspicion." Magistrate's Decision & JE p. 3. This conclusion not only ignores *MacEwen-Buckner*, it also ignores the entire body of law pertaining to attorneys-in-fact.

This court reviews a denial of summary judgment *de novo*. *E.g., Fowler v. Williams Cnty. Comm'rs*, 113 Ohio App.3d 760, 767, 682 N.E.2d 20 (6th Dist.1996). Here, the burdens

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[8] *Miller v. Paul*, 5th Dist. Muskingum No. CT2014-0024, 2014-Ohio-5789, referred to by trial counsel in the summary-judgment briefs, is a third case in the *MacEwen-Buckner* line.

and standards of proof set forth in *MacEwen-Buckner* should be applied and the trial court's denial of John's motion for summary judgment reversed, as there was no evidence proffered prior to trial (or at trial) showing facial invalidity of the "transfer" or undue influence by John.

### D. The Trial Court Reversibly Erred by Improperly Instructing the Jury Regarding Both the Burden and Standard of Proof.

The trial court also reversibly erred by failing to properly instruct the jury regarding the burdens and standards of proof discussed in *MacEwen*, *Buckner*, and *Miller*. John explicitly requested instructions on, and verdict forms reflecting the requirements of, *MacEwen-Buckner* proof. *See* Deft.'s Request for Jury Rogs p. 5, 6; Deft.'s Resp. to Pltf.'s Proposed Jury Instr. & Proposed Jury Rogs p. 3; Deft.'s Resp. to Court's Draft Jury Instr. pp. 3-4, 8; Deft.'s Resp. to Court's Draft Jury Rogs & Verdict Forms p. 3, 7. But the trial court rejected John's request to instruct the jury that, once the facial validity of the gift-balancing clause was established (as it surely was here, *see supra* at 17-19), plaintiff was required to prove undue influence by clear and convincing evidence. *See* Post Jury Trial JE pp. 3-10 (verdict forms omitting any reference to *MacEwen-Buckner* proof or clear-and-convincing evidence); Trial Tr., Vol. I at 212:9-213:6.

The trial court rejected application of the *MacEwen-Buckner* standards and burdens on the grounds that in the case at bar there was "no[] . . . action taken under the gifting even though there was a gifting clause, I don't view the clause as being what triggers it; it's the action under the clause that I view as absent." Trial Tr., Vol. I at 213:2-6. It appears from this somewhat opaque reasoning that the trial court refused to instruct the jury regarding *MacEwen-Buckner* because the trust gift-balancing clause only facilitated the gift during the lifetime of the principal (Charles) and did not result in the immediate giving of a gift to John. But there are multiple fatal flaws with this analysis. First, the case at bar involves use of an actual gifting—*i.e.*, an allotment of trust proceeds to John following his parents' deaths—and there is no logical reason why the

fact that the gift is effected after, rather than prior to, the death of the principal should affect the application the *MacEwen-Buckner* line of cases. If anything, the burden on the plaintiff in this situation should be *higher*, as the issue is not the legitimacy of an outright gift but rather the legitimacy of instituting a formula by which the property will be divided later (a formula that by no means guaranteed John would receive more of his parents' remaining property than did Chip, for the gift balancing did not occur until long after the trust was executed, *see, e.g.*, Trial Tr., Vol. II at 435:1-437:20). Second, *Buckner* itself involved the same sort of scenario—that is, a gift that was not consummated until after the death of the principal. In *Buckner*, the bulk of the stock at issue was transferred to accounts that were still owned by the principal but payable on death to the attorney-in-fact and her sister, *id.*, 20009-Ohio-2447, ¶¶ 9-10, just as here the trust provided that the trust property was not to be apportioned pursuant to the gift-balancing clause until after Charles and Elise had passed away, Trust, Jt. Ex. 15, §§ 3.1, 3.1.1. Accordingly, the trial court's attempt to distinguish the *MacEwen-Buckner* line of cases in order to justify its refusal to apply them in the jury instructions and verdict forms falls flat. Its use of the greater-weight-of-the-evidence standard instead was reversible error.

Moreover, the trial court not only erred by ordering the jury to use the wrong standard of proof (applying a greater-weight-of-the-evidence standard instead of the clear-and-convincing standard required by the *MacEwen* line of cases), it compounded its error by reversing the *burden* of proof as well. Thus, rather than instructing, per *MacEwen-Buckner*, that *plaintiff* bore the burden of proving by *clear and convincing evidence* that John unduly influenced his father, the trial court discarded the careful facial validity/undue influence framework and instructed that *John* bore the burden of proving by the *greater weight of the evidence* the overarching proposition that the trust was "appropriate[]." The first interrogatory to the jury was the basis for

the entire verdict. It was phrased thus:

> Do you find, by *the greater weight of the evidence*, that *the Defendant*, John Hutchings, *appropriately acted* within his fiduciary duty in executing the August 12, 2013 Hutchings Family Irrevocable Trust . . . ?

Form #1 (Post Jury Trial JE p. 3) (emphasis added). The jury answered the question by checking "NO." The court's form then instructed that this response required the jury to "check 'WAS NOT[']" with respect to the following "VERDICT":

> We, the Jury, find the . . . Irrevocable Trust . . . WAS NOT . . . appropriately executed by the Defendant, John Hutchings, under his fiduciary duty . . . using the power of attorney.

*Id.* The jury was thus asked whether it had been proved (presumably by John, for who else would seek to proffer such proof?) that John "appropriately acted" in executing the trust. Accordingly, even if the jury had concluded that the evidence was split right down the middle, pursuant to the court's interrogatory it still would have been obligated to find for plaintiff. But that is precisely backwards: "Where [as here] the plaintiff has the burden of proof, he fails when the evidence balances." *Hoffman*, 1933 Ohio Misc. LEXIS 1525, at *13.

"'It is the duty of the trial court to instruct the jury as to the burden of proof, and it is well-settled that an instruction which improperly places the burden of proof is reversible error upon complaint of the party prejudiced thereby.'" *Young v. Frank's Nursery & Crafts, Inc.*, 6th Dist. Lucas No. L-88-405, 1990 Ohio App. LEXIS 57, at *12 (Jan. 12, 1990) (quoting *Montanari v. Haworth*, 108 Ohio St. 8, 14, 140 N.E. 319 (1923)), *rev'd on other grounds*, 58 Ohio St.3d 242, 246, 569 N.E.2d 1034 (1991). *A fortiori*, reversal is the proper remedy where a trial court improperly instructs as to burden *and* standard of proof despite counsel's repeated request that the proper burden and standard be utilized.

## III. The Trial Court Reversibly Erred by Applying a Greater-Weight-of-the-Evidence Standard to Plaintiff's Claim for Punitive Damages.

Because, as shown above, the verdict in plaintiff's favor on the conversion claim must be

reversed, it follows that the award of punitive damages, in the form of attorney's fees and costs, must be reversed as well. "It is axiomatic that punitive damages cannot be awarded absent an award of actual or nominal damages on a plaintiff's underlying claims." *Avery v. City of Rossford*, 145 Ohio App.3d 155, 166, 762 N.E.2d 388 (6th Dist.2001). No "claim for punitive damages can[] stand alone." *Id.* *See also* R.C. 2315.21(C)(2). But the award of punitive damages fails for yet another reason: Though Ohio law is clear that punitive damages may only be awarded upon clear and convincing proof, the jury was instructed to apply the plaintiff-friendly greater-weight-of-the-evidence standard instead.

"To sustain a punitive damages claim, a plaintiff must prove, by clear and convincing evidence, that the defendant acted with actual malice." *Wright v. Suzuki Motor Corp.*, 4th Dist. Meigs No. 03CA2, 2005-Ohio-3494, ¶ 102. *See also Cabe v. Lunich*, 70 Ohio St.3d 598, 601, 1994-Ohio-4, 640 N.E.2d 159 ("The legislature has specifically established that the burden of proving entitlement to an award of punitive damages in a tort action is upon the plaintiff, and must be satisfied by clear and convincing evidence."); R.C. 2315.21(D)(4). But here the trial court told the jury that plaintiff need only prove malice, and thus entitlement to punitive damages, by the greater weight of the evidence. Court's Final Jury Instructions p. 12. Accordingly, the punitive damages verdict form revolved around the following interrogatory:

> Do you find, *by the greater weight of the evidence*, that the Defendant . . . acted with malicious intent, so that the Plaintiff . . . is entitled to receive Punitive Damages, being the amount of the Plaintiff's attorney fees and costs . . . ?

Form #8 (Post Jury Trial JE p. 10) (emphasis added).

This is no mere error in instruction—*e.g.*, an erroneous definition or a technically muddled explication of the elements of a claim—but a fundamental failure to apply the correct standard of proof. As such, the punitive damages award should be reversed for this reason as

well. *See Montanari*, 108 Ohio St. at 14. *Cf. Harbine v. Hughes*, 26 Ohio Law Abs. 685, 1938 Ohio Misc. LEXIS 1262, syllabus (2d Dist.1938) ("[i]t is reversible error to charge that a preponderance of the evidence must be clear and convincing"); *Harding v. Talbott*, 57 Ohio App. 21, 25, 11 N.E.2d 266 (5th Dist.1936).

But even if one were to treat this as a mere instructional error and review only for plain error (given that use of the clear-and-convincing standard on Form #8 was not explicitly objected to below), reversal would still be warranted. Reversal for plain error is only appropriate "under exceptional circumstances and only to prevent a manifest miscarriage of justice." *Reichert v. Ingersoll*, 18 Ohio St.3d 220, 223, 480 N.E.2d 802 (1985). The doctrine "permits correction of judicial proceedings when error is clearly apparent on the face of the record and is prejudicial to the appellant." *Id.* While most often used in criminal cases, the Ohio Supreme Court "has stated that the doctrine may also be applied in civil causes, even if the party seeking invocation of the doctrine failed to object to the jury instruction in question, if the error complained of would have a material adverse [e]ffect on the character and public confidence in judicial proceedings." *Id.*

The requirements for plain-error reversal have been met here. There can be no doubt that the error here is "clearly apparent on the face of the record": The jury, per the verdict form, applied the greater-weight-of-the-evidence standard to the claim for punitive damages, but the Ohio Supreme Court and the Revised Code plainly state that clear-and-convincing evidence is the required standard. This error inarguably worked to John's prejudice, as it watered down the proof that plaintiff was required to produce. The error, if allowed to stand, would also have "a material adverse [e]ffect on the character and public confidence of judicial proceedings." *Id.* The public is keenly aware of the various legal standards of proof applied by courts, and requiring the payment of punitive damages based on application of the wrong standard due to a

technical failure to maintain an objection smacks of exalting form over substantive justice. And, on the facts of this case, no reasonable factfinder could possibly find by clear and convincing evidence that John acted with malice in executing the trust on behalf of his father.[9]

To reiterate, the validity of the power of attorney in this case is unquestioned. *Supra* at 3-4. And Chip himself testified that he was glad to have John serving as attorney-in-fact. *Supra* at 17. Both John and his parents' attorney, Mr. Borowicz, testified that all of John's decisions with respect to the trust were made on Mr. Borowicz's advice. *E.g.*, Trial Tr., Vol. II at 308:4-6, 311:6-10 ("Q[:] And who decided what language [would] go into the trust? . . . [Attorney Borowicz:] I did."), 319:6-23, 420:19-23. Mr. Borowicz consulted with Charles prior to drafting the trust. Trial Tr., Vol. II at 304:1-306:20. Charles was mentally competent and sharp, and was living independently when the power of attorney *and*, later, the trust were executed, and no evidence to the contrary was proffered. *E.g.*, *id.*, Vol. I, at 82:15-19. He even personally transferred his home into the trust after it was created. Deeds, Jt. Exs. 16, 18. Elise had maintained detailed ledgers of the gifts she and her husband had made over the years and had told John she would leave records that he could use to piece together past gifts to ensure he and Chip were treated equally. *Supra* at 5-6. Charles and Elise's previous attorney had, years earlier, advised them to consider how they would go about gift-balancing. *Supra* at 5. After his parents passed away, John, as trustee, discussed administration of the trust with Chip and attempted to work collaboratively with him. *E.g.*, Trial Tr., Vol. II at 435:9-17; *supra* at 6 n.3.

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[9] As the facts that follow also show, no reasonable factfinder could find malice here even by a preponderance, and thus, even under a preponderance standard, the punitive-damages award should also be reversed as against the manifest weight of the evidence.

Further, John did not review his mother's detailed financial ledgers for purposes of conducting the gift-balancing review until after his parents' passing and, thus, at the time the gift-balancing clause was put in place, it was unknown whether or to what extent it would ultimately "benefit" Chip or himself. *See, e.g.*, *id.* at 435:1-437:20. In short, all of the evidence weighs *against* malice. Indeed, the proposition that one's execution of a trust was malicious because it included a clause providing for equal treatment of the beneficiaries borders on facial absurdity.[10]

## IV. Even By the Trial Court's Own Standards, the Judgment Should Be Reversed as Contrary to the Manifest Weight of the Evidence.

Even if one were to set aside the reversible errors of law discussed above, the trial court's judgment should still be reversed as contrary to the manifest weight of the evidence. As previously discussed, the conversion verdict in plaintiff's favor (and thus the punitive damages finding as well) rests on the jury's generalized conclusion, on Form #1, that John did not "appropriately act[] within his fiduciary duty in executing the . . . Trust[] on behalf of his father."

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[10] One must remember that to avoid reversal on this point plaintiff must prove that John maliciously *executed* the trust. Evidence (though there is none) that he later acted with malice in, *e.g.*, the way he applied the clause to divvy up the trust proceeds, will not do, as the verdict here was *not* based on any allegation that the gift-balancing clause was applied inaccurately or unfairly. Because of its misguided conclusion on the conversion claim writ large, the jury never reached the issue of whether the gift-balancing clause was properly applied. *See* Form #1 (Post Jury Trial JE p. 3) (directing the jury to *skip* Forms 2 through 5 if, as was the case, they answered the interrogatory on Form #1 in the affirmative); Form #5 (Post Jury Trial JE p. 7) (form asking whether John "correctly and fairly applied the 'gift balancing' clause" left blank).

Form #1 (Post Jury Trial JE p. 3). This is reversible error for the reasons discussed above. But even assuming, contrary to law, that executing the trust could constitute conversion and that the trial court applied the proper burdens and standards of proof, by its own standards the trial court's judgment should still be reversed because the evidence did not show that John exceeded his authority as attorney-in-fact. As to the scope of that authority, the court instructed as follows:

> An action by the agent is considered to be within the scope of authority when it is substantially within the stated details, terms and limits the principal has put forth. If an action taken by an agent is within the scope of authority it is binding on the principal.
>
> An action by the agent is not within the scope of his authority, and is then not binding on his principal when any of the following apply:
>
> a. It was contrary to or went beyond the principal's express authority.
> b. It was not reasonably necessary to do the agent's job.
> c. It was a complete departure from the business the agent was to do.
> d. It was performed solely for the benefit of the agent.

Court's Final Jury Instr. pp. 8-9. *See also* Trial Tr., Vol. IV at 604:8-22. Taken from comments 5 and 7 to *Ohio Jury Instructions*, CV § 423.01, these instructions were drafted for claims of vicarious liability against principals.[11] They thus do not fit well with the facts of a case like this one—yet further reason to apply *MacEwen-Buckner*. But setting this and the other errors discussed above aside, even by the terms of these instructions, the jury acted contrary to the manifest weight of the evidence when it concluded that John did not act "appropriately . . . in executing the . . . Trust." Form #1 (Post Jury Trial JE p. 3).

First, executing the trust was not "contrary to" or "beyond" the express authority granted John by the POA. That document, whose validity is unquestioned, explicitly gave him

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[11] They pertain "only [to] a principal's vicarious liability for a contract made by his agent and for his agent's breach of contract." Comment Preamble, *Ohio Jury Instr.*, CV § 423.01.

permission "to create a[n] . . . irrevocable inter vivos trust, under whatever terms [he] deem[ed] advisable." Charles POA, Jt. Ex. 11, p. 2. Even Chip admitted that the POA permitted John to execute *this* trust. Trial Tr., Vol. I at 174:22-175:5. The second inquiry, whether executing the trust was "not reasonably necessary to do the agent's job," does not apply directly to the facts here (given it comes from form instructions intended for a different scenario). But analogizing the instruction to this case, it is clear that executing the trust was a core responsibility of John's "job" as attorney-in-fact. The POA gave him explicit authority to execute the trust. *Supra* at 17. Indeed, counsel's advice, his parents' long-term care planning needs, and the specter of liability for third party debts made executing the trust both prudent and necessary. Along these same lines, executing the irrevocable trust was not a "complete departure from the business [John] was to do," it was a core power granted by the POA. No contrary evidence was presented.

Finally, the fourth category from the court's instruction: whether executing the trust "was performed solely for the benefit of the agent." Here too the answer is clear. John and Attorney Borowicz both testified that the new, irrevocable trust was created in order to put John's parents in the best position to receive Veterans Affairs and Medicaid long-term care benefits. Trial Tr., Vol. II at 307:18-308:9, 321:24-322:7, 408:24-411:3. This testimony was supported by documentary evidence and went uncontroverted. *E.g.*, *id.* at 409:20-23; Chart Prepared for Charles, Jt. Ex. 24 p.1. John further testified—backed up by documentary evidence including loan documents and an affidavit from Charles himself—that plaintiff's daughter had fraudulently added Charles as a consigner on $100,000 in student loans, and thus another reason the irrevocable trust was established was to protect assets from other future creditors. *Supra* at 4. Accordingly, the trust certainly was not executed "solely for the benefit of [John]." It was executed in the best interests of Charles and Elise.

Plaintiff may argue that, while the trust as a whole was executed for the benefit of Charles and Elise, the gift-balancing clause was not.[12] As already discussed, however, there was testimonial and documentary evidence presented at trial to show that Charles and Elise did in fact want to ensure their sons were treated equally by taking lifetime gifts into account. *Supra* at 5. More importantly for these purposes, however, the jury verdict form asked whether executing the *trust itself* was within John's authority as attorney-in-fact. Form #1 (Post Trial JE p. 3). The jury's answer in the negative is thus as to the trust *as a whole* and not as to the gift-balancing clause in particular (the interrogatory and verdict form specific to the gift-balancing clause were never completed, Form #4 (Post Jury Trial JE p. 6)). The conclusion that John exceeded his authority in executing the trust is plainly against the manifest weight of the evidence.

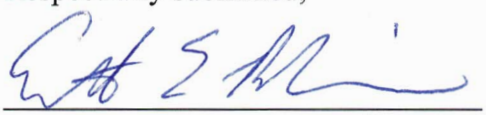
## CONCLUSION

For all of these reasons, Defendant-Appellant John Hutchings respectfully requests that this Court reverse the judgment of the trial court or, in the alternative, vacate that judgment and remand for a new trial free of the pervasive, fundamental errors discussed above.

[12] Even if this were the case, plaintiff's claims still are contrary to the manifest weight of the evidence. The trust, like the revocable trust Charles and Elise had executed 14 years earlier, also included a separate *in terrorem* clause, and rather than simply challenging, *e.g.*, John's calculations pursuant to the gift-balancing clause, plaintiff attacked the validity of the trust itself via litigation, thus removing himself as a beneficiary. *See supra* at 5, 7; Trust, Jt. Ex. 15, § 7.3.

Dated: May 10, 2019

Respectfully submitted,



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## CERTIFICATE OF SERVICE

I hereby certify that on May 10, 2019, this Brief of Appellant John Hutchings was mailed to Plaintiff-Appellee Charles R. Hutching's counsel via regular and electronic mail at the following addresses:

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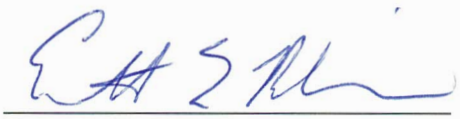

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