In the Superior Court of Pennsylvania

Nos. 875 & 950 MDA 2015

PATRICIA BRITTAIN A.K.A. PATRICIA MAINES, Administrator of the Estate of BARBARA ANN MAINES,

Appellant,

v.

HOPE ENTERPRISES FOUNDATION INCORPORATED, and/or HOPE ENTERPRISE INC., and/or WILLIAM BIRT, and/or HEATHER PETERS and/or SELECTIVE INSURANCE COMPANY OF AMERICA

REPLY BRIEF FOR APPELLANT

On Appeal from the Judgment of the Court of Common Pleas of Luzerne County, Pennsylvania, entered April 30, 2015 in Civil Division No. 10467 CV 2010

Howard J. Bashman
2300 Computer Avenue
Suite G–22
Willow Grove, PA 19090
(215) 830–1458

Counsel for Appellant

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page

Cases

I. INTRODUCTION

Defendants Hope and Birt devote less than two pages, in which they cite no legal authorities whatsoever, of their Brief for Appellees to the first issue that plaintiff has raised on appeal — that the trial court erred in failing to hold a retrial limited to the issue of punitive damages under the survival act that this Court ordered in this Court's previous appellate adjudication of this case.

Moreover, Hope and Birt ignore without explanation their unambiguous assertions in their petition for allowance of appeal — directed toward overturning this Court's previous appellate adjudication of this case — that this Court's earlier ruling required the trial court on remand to conduct a retrial limited solely to the issue of punitive damages under the survival act.

Hope and Birt were correct when they told the Supreme Court of Pennsylvania, in seeking allowance of appeal, that this Court's earlier appellate adjudication in this case required the trial court on remand to conduct a new trial limited to punitive damages on plaintiff's survival act claim. Plaintiff agreed entirely with that understanding of the outcome resulting from this Court's earlier adjudication in this case. Only after the

trial court impermissibly refused to conduct the retrial that this Court's earlier adjudication required did Hope and Birt change their tune, without offering this Court any meaningful explanation for their new position that the trial court *was not* required to conduct a retrial limited to punitive damages on plaintiff's survival act claim.

In response to the second and final issue that plaintiff has raised on appeal, concerning the trial court's improper refusal to order Hope and Birt to pay the post–verdict interest to which plaintiff is unquestionably entitled, Hope and Birt have devoted less than three pages of their Brief for Appellees. They don't contend that plaintiff's calculation of the post–judgment interest to which plaintiff claims entitlement is incorrect. And they don't contend that they have paid any amount of post–verdict interest to plaintiff, because they have not. Rather, they claim that because plaintiff accepted payment of the undisputed compensatory damages amount of the judgment, defendants no longer have any obligation to pay any post–verdict interest on the jury's compensatory damages award.

The authorities on which Hope and Birt rely in making this nonsensical and unjust argument fail to support the outcome that these defendants seek. The judgment in this case has not been paid in full,

because plaintiff has not accepted defendants' tender of the original jury's $100,000 punitive damages award, given that plaintiff is pursuing her right to a new trial as to punitive damages on her survival act claim that this Court held plaintiff was entitled to when this Court decided the earlier appeal in this case. Because the amount of punitive damages that defendants owe to plaintiff remains to be finally determined, the judgment in this case has not been paid in full.

Moreover, plaintiff has not marked the judgment satisfied in the trial court, nor would Hope and Birt be entitled to an order from the trial court marking the judgment satisfied because the amount of punitive damages to which plaintiff is entitled remains to be finally adjudicated. Thus, Hope and Birt's argument on appeal that plaintiff no longer has any right to recover the undisputed amount of post–verdict interest, which defendants admit they have never paid, is meritless and gains no support from the cases Hope and Birt have cited, because plaintiff has not accepted payment of the judgment in full, nor has the judgment been marked as satisfied, nor could the judgment be marked as satisfied until a retrial on the issue of punitive damages on plaintiff's survival act claim occurs.

Instead of focusing their attention on the two issues that plaintiff has raised on appeal, Hope and Birt have devoted at least 16 pages of their 30–page brief to an issue that is not even properly before this Court, because Hope and Birt have themselves failed to file any cross–appeal. Rather, the two appeals pending before this Court are both appeals that the plaintiff took, while Hope and Birt did not file any appeal from the trial court's entry of judgment on remand.

Before the trial court entered judgment on remand, Hope and Birt raised the issue of plaintiff's supposed lack of standing, under the guise of constituting an alleged fraud on the court, at the hearing that immediately preceded the trial court's entry of judgment. The trial court refused to reopen this case to allow Hope and Birt to investigate further, and the trial court refused to delay entry of judgment on remand. Thereafter, Hope and Birt neglected to file any appeal to this Court from the trial court's refusals to reopen the matter to allow further investigation or to postpone the entry of judgment. In the absence of any appeal by Hope and Birt, this Court lacks the power to give them the relief in their favor that they are seeking.

A motions panel of this Court on August 6, 2015 already denied the "emergency" relief that Hope and Birt were seeking by refusing to order an

immediate remand of this matter to the trial court and by refusing to order a separate trial court in another county to refrain from distributing the already–recovered proceeds from this litigation to the beneficiaries thereof. *See* Exhibit One hereto (this Court's order dated August 6, 2015). Notwithstanding having already lost their urgent request for "emergency" relief, Hope and Birt persist in their Brief for Appellees in their misbegotten quest to cast doubt on plaintiff's ability to pursue a wrongful death claim, which is not even related to the issue on which plaintiff appealed — namely, plaintiff's entitlement to a new trial on plaintiff's claim for punitive damages under the survival act.

Even if this Court could grant affirmative relief in favor of defendants Hope and Birt, notwithstanding their failure to file any notice of appeal, the record now before this Court demonstrates that the allegations that Hope and Birt have raised, even if true, are legally insufficient to disturb the judgment in plaintiff's favor on her wrongful death claim. Therefore, this Court should reject Hope and Birt's request for a remand as failing to provide any valid basis for disturbing the wrongful death judgment in plaintiff's favor.

II. ARGUMENT IN REPLY

A. The Trial Court's Refusal To Conduct A New Trial Limited To Punitive Damages On Plaintiff's Survival Act Claim Is Directly Contrary To This Court's Earlier Ruling And Rests On A View Of The Jury's Wrongful Death Award That This Court Rejected

In responding to this argument, Hope and Birt's Brief for Appellees cites no legal authorities whatsoever. *See* Hope & Birt's Br. for Appellees at pages 24–26. Moreover, Hope and Birt's Brief for Appellees does not deny or even attempt to explain away the fact that Hope and Birt strenuously and unambiguously represented to the Supreme Court of Pennsylvania, in their petition for allowance of appeal, that this Court's previous appellate ruling in this case mandated that the trial court on remand conduct a retrial limited to punitive damages on plaintiff's survival act claim. R.160a–65a.

Hope and Birt's repeated original understanding of what this Court's previous appellate adjudication required once this case was remanded to the trial court was correct. By contrast, their newfound view that the trial court had the option of not conducting the very retrial that this Court's earlier decision mandated is unsupported by any authority whatsoever. Nor have they deigned to address the massive amount of authority that plaintiff's Brief for Appellant set forth demonstrating that such a retrial

should have already occurred and must now be specifically and unambiguously directed to occur.

As experienced appellate lawyers themselves, counsel for Hope and Birt should be fearful of the consequences to appellate litigation if their clients emerged victorious on this issue here. If a trial court can escape the consequences of a higher court's partial new trial order merely by invoking previously undisclosed intentions (that the trial court's original grant of a new trial as to punitive damages on the survival act claim was contingent on a new trial as to compensatory damages occurring on the wrongful death claim) or invoking grounds that the appellate court has already affirmatively rejected (that the jury's wrongful death award impermissibly contained a punitive component), then in every case the consequences of victory on appeal would be hollow indeed, always remaining subject to the creative whims of a trial court intent on thwarting the very outcome that the appellate court has directed.

For the reasons set forth above and in plaintiff's Brief for Appellant, this Court should reverse the trial court's order that refused to conduct a new trial limited to the issue of punitive damages on plaintiff's survival act claim and remand to the trial court for the purpose of conducting a new

trial limited to the issue of punitive damages on that claim, as required by this Court's April 25, 2014 decision in the earlier appeal in this case.

B. Plaintiff Is Entitled To Post–Judgment Interest From The Date Of The Jury's Verdict, And On Remand The Trial Court Should Be Instructed To Calculate And Award The Post–Judgment Interest Due To Plaintiff On The Jury's Verdict

Hope and Birt's Brief for Appellees does not dispute that the amount of post–verdict interest that they owed on the jury's compensatory damages judgment on the date the trial court entered judgment on remand from this Court's decision in the original appeal in this case totaled $453,535.94. Furthermore, Hope and Birt do not contend that they have paid that amount of post–verdict interest in full. In fact, they concede that they have not paid any post–verdict interest on the jury's compensatory damages award whatsoever.

According to Hope and Birt, because plaintiff accepted Hope and Birt's payment of the compensatory damages award (but not payment of the jury's $100,000 punitive damages award, which plaintiff rejected), plaintiff thereby became disentitled to recover the $453,535.94 in post–

verdict interest that defendants otherwise concede was due as of the date judgment was entered on remand.

Once again, Hope and Birt are seeking to foist a nonsensical argument on this Court. By paying the face amount of the jury's compensatory damages award, it was those defendants that were attempting to stem the continued accrual of post–judgment interest. Can those defendants seriously be contending that plaintiff should have forced those defendants to continue to incur 6% interest on the jury's entire compensatory damages award for months and months into the future in order to remain entitled to recover the post–verdict interest that had accrued through the date on which the trial court entered judgment?[1]

The caselaw on which Hope and Birt rely in arguing that their payment of the compensatory damages award terminated plaintiff's entitlement to recover any post–verdict interest simply does not apply to the facts and circumstances of this case. The three cases cited in their Brief for Appellees all involved mortgage foreclosure actions. *See Nationsbanc*

[1] Hope and Birt paid the full amount of the jury's compensatory damages award (not including any post–verdict interest) on the very same date that the trial court entered judgment on remand, which is why the entry of judgment date is the date on which post–verdict interest ceased to accrue.

Mortgage Corp. v. *Grillo*, 827 A.2d 489 (Pa. Super. Ct. 2003); *Morgan Guarantee Trust Co.* v. *Mowl*, 705 A.2d 923 (Pa. Super. Ct. 1998); *Chase Home Mortgage Corp.* v. *Good*, 537 A.2d 22 (Pa. Super. Ct. 1988). In all three cases, after the property involved was listed for sheriff's sale, the debtor tendered payment in full of the face amount due on the notice of sheriff's sale. *See Grillo*, 827 A.2d at 490; *Mowl*, 705 A.2d at 925; *Good*, 537 A.2d at 23–24. Thereafter, in each case the financial institution holding the mortgage asserted that the debt had not been paid in full because additional interest had accrued that was not reflected in the amount due as shown on the sheriff's sale notice. This Court ruled in all three cases that the financial institutions' failure to get the additional interest added into the amount shown as due on the sheriff's sale notice deprived the financial institutions of the ability to collect that interest once the amounts shown as due on the sheriff's sale notice had been paid in full. *See Grillo*, 827 A.2d at 493; *Mowl*, 705 A.2d at 927; *Good*, 537 A.2d at 23–24.

This is assuredly not a case in which Hope and Birt paid the judgment in full. They could not force plaintiff to accept, and plaintiff did not accept, payment of the jury's $100,000 punitive damages award, because plaintiff is pursuing on appeal her entitlement to a new trial on

punitive damages in accordance with this Court's earlier appellate decision in this case. Moreover, in this case the judgment that the trial court issued on April 28, 2015 on remand from this Court's earlier appellate ruling in this case specifically provided that plaintiff was entitled to recover in compensatory damages "the amount of $3,176,091.91, plus interest and costs as permitted by law." *See* Exhibit B to Brief for Appellant at page 2. Although the judgment did not further specify the precise amount of interests and costs due, it is undisputed that Hope and Birt have never paid the interest and costs due under the judgment, and thus they cannot accurately portray themselves as having satisfied in full even the compensatory damages portion of the judgment.

As a result, Hope and Birt's argument that they can escape responsibility for paying the undisputed amount of post–verdict interest that remains unpaid by them fails both as a factual matter (they haven't paid the judgment of the trial court in full, because the issue of punitive damages remains unresolved) and as a legal matter (here, plaintiff has properly preserved for appeal the question of whether the trial court's judgment should have specified the amount of post–verdict interest due and owing from defendants as of the date of entry of judgment).

Consequently, this Court should order the trial court on remand to issue an amended judgment that includes post–judgment interest totaling $453,535.94. Because defendants paid the face amount of the compensatory damages judgment on the day judgment was entered on remand, this precise calculation represents the exact amount of post–judgment interest that has accrued and continues to remain due to the plaintiff. R.82a–83a.

C. Hope And Birt's Failure To Appeal From The Trial Court's Refusal To Reopen The Record To Allow Additional Factual Development Pertaining To Plaintiff's Standing To Assert A Wrongful Death Claim Deprives This Court Of Jurisdiction Over Hope And Birt's Remand Request

The Supplemental Reproduced Record that Hope and Birt have filed demonstrates that on April 28, 2015, before the trial court later that day entered judgment on remand from this Court's earlier decision, the trial court held a hearing. The transcript of that hearing is contained in the Supplemental Reproduced Record (Supp.R.R.1b–20b), and it reveals that counsel for defendants Hope and Birt informed the trial court at that time of the grounds those defendants thought they had for calling into question plaintiff's standing to pursue a wrongful death claim in this suit. Supp.R.R.9b–12b.

Counsel for Hope and Birt then asked the trial court to reopen the record to enable those two defendants to conduct further investigation of those issues to develop the necessary factual record to allow the trial court to decide that issue on a fully informed basis. Supp.R.R.9b. And counsel for Hope and Birt also asked the trial court to refrain from entering final judgment until the facts relevant to plaintiff's supposed fraud on the court had been developed and presented to the trial court. Supp.R.R.19b–20b.

In response, the trial court refused both requests from counsel for Hope and Birt — to allow the creation of a relevant factual record and to postpone entry of judgment until after the relevant facts were known and considered by the trial court. Supp.R.R.19b–20b. Instead, later in the day on April 28, 2015, the trial court entered final judgment. See Exhibit B to Brief for Appellant. And even later in the day on April 28, 2015, to avoid the continued accrual of post–verdict interest, Hope and Birt voluntarily paid the compensatory damages judgment (not including any post–verdict interest) to plaintiff and her counsel.

For reasons that the Brief for Appellees fails to explain, Hope and Birt did not file any notice of appeal from the trial court's judgment, which encompassed the trial court's on–the–record refusal to allow the creation of

a relevant factual record pertaining to plaintiff's supposed fraud on the court and to postpone entry of judgment until after the relevant facts were known and considered by the trial court. Rather, the two appeals pending before this Court are both appeals that the plaintiff took (R.171a, 186a), while Hope and Birt did not file any appeal from the trial court's entry of judgment on remand.

It is well–established law that a party cannot obtain the entry of relief in its favor on appeal in the absence of having filed a timely notice of appeal. *See Nykiel* v. *Heyl*, 838 A.2d 808, 810 n.1 (Pa. Super. Ct. 2003) ("Appellee has no standing to assert that the granting of a new trial was error as one is obliged to take an appeal from an order that aggrieves the party to be eligible for the granting of relief"); *Royal–Globe Ins. Cos.* v. *Hauck Mfg. Co.*, 335 A.2d 460, 462–63 (Pa. Super. Ct. 1975) ("The Pennsylvania Supreme Court has clearly stated that an appellee who himself takes no appeal from the holding of the lower court cannot raise issues not raised by the appellant."). Here, of course, Hope and Birt have utterly failed to file any notice of appeal, timely or otherwise, from the trial court's on–the–record refusal to allow the creation of a relevant factual record pertaining to plaintiff's supposed fraud on the court and to postpone entry of

judgment until after the relevant facts were known and considered by the trial court.

Hope and Birt's unexplained failure to file any notice of appeal is of jurisdictional significance, depriving this Court of the power to grant in favor of Hope and Birt the very relief that the trial court refused to provide to them on April 28, 2015. As a result, this Court should deny Hope and Birt's request for a remand to develop a record pertaining to plaintiff's supposed fraud on the trial court. Hope and Birt could have and should have filed a notice of appeal from the trial court's failure to grant them that relief. In the absence of any such notice of appeal from them, this Court is powerless to address or reverse the trial court's denial of that relief.

D. The Supposedly 'Newly Discovered Evidence' On Which Hope And Birt Base Their So–Called 'Emergency' Request For Remand Is Legally Insufficient To Disturb The Judgment

Plaintiff Patricia Brittain filed this lawsuit as the administrator of the Estate of Barbara Ann Maines. Plaintiff asserted wrongful death and survival claims against the defendants. Plaintiff brought the wrongful death action in a representative capacity on behalf of the decedent's birth

mother, Sharon Moyer. The evidence remains undisputed to this day that Sharon Moyer was the birth mother of decedent Barbara Ann Maines.

At the trial of this case, the defendants opted not to challenge the capacity of plaintiff Patricia Brittain to assert wrongful death and survival claims. Defendants' so–called "emergency" request to remand challenges in substance only the trial court's wrongful death judgment in plaintiff's favor. Although defendants could have challenged plaintiff's capacity to bring a wrongful death claim on behalf of decedent's birth mother both before and during trial, defendants elected not to do so. The materials on which defendants now rely in their so–called "emergency" application requesting a remand — hearsay consisting of published obituaries of the decedent and the decedent's maternal grandmother; and pleadings filed in a publicly available guardianship proceeding in the year 2000 to have Barbara Ann Maines declared incapacitated — were equally available for defendants to review and access before or during the trial of this matter.[2]

[2] Indeed, an exhibit that defendants have attached to their "emergency" application establishes that defendant Hope Enterprises knew of Barbara Ann Maines's guardianship proceeding in 2001. Attached as a part of Exhibit G to that application is an affidavit sworn by Carol J. Drumheiser, a Vice President of Hope Enterprises, in support of Carol Ann Maines's request to be excused from having to attend the guardianship

Because defendants either knew or should have known this information, they could have and should have raised at trial the very challenge to plaintiff's capacity to sue that defendants are now improperly seeking to raise by means of their request for a remand in the absence of any notice of appeal from them.

According to Hope and Birt, the hearsay published obituaries of the decedent and the decedent's maternal grandmother and pleadings filed in the guardianship proceeding in Snyder County, Pennsylvania in 2000 refer to Madeline M. Maines, decedent's maternal grandmother, as decedent's mother. Defendants' proceed to surmise, based on that information, that

---

proceeding. Supp.R.R.111b. Thus, Hope Enterprises was directly on notice of that proceeding and had knowledge of both the case name and its docket number as of February 21, 2001, some nine years before this lawsuit was filed in the trial court.

Likewise, the notes of Hope Enterprises' insurance adjuster assigned to this claim, which defendants produced to plaintiff in discovery, show that on September 17, 2009 adjuster Thomas E. Dwyer, SCLA, made an entry in the file repeating the substance of The Daily Item newspaper's obituary for Barbara Ann Maines, including the following text: "She was born April 2, 1978, in Sunbury, a daughter of Sharon Melinda Maines Moyer. She was later adopted by Madeline Maines, who preceded her in death." It is outrageous for defendants to assert that they lacked any knowledge of The Daily Item's obituary notice from September 17, 2009 reporting that Barbara Ann Maines had been adopted by Madeline Maines when that information is reflected in their own insurance adjuster's notes created before this suit was filed.

decedent's maternal grandmother must have legally adopted decedent at some point, thereby supposedly terminating birth mother Sharon Moyer's legal capacity to recover as a wrongful death beneficiary for her daughter's death.

Defendants' request for a remand, which is not supported by any affidavit or verification under oath, contains not a single shred of conclusive evidence that maternal grandmother Madeline Maines actually became the legally recognized adopted mother of decedent. Common experience teaches that published obituaries are based on the input from family members, not provided under oath, and except for eliminating clear falsehoods a funeral home and newspaper perform no independent fact–checking of an obituary's contents. Similarly, the references in the guardianship proceeding from 2000 in Snyder County, Pennsylvania to Madeline Maines as Barbara Ann Maines's mother rather than her grandmother may have been colloquial, rather than technically accurate as a legal matter, given that it is undisputed that Madeline Maines raised decedent and served in the role of her mother because Sharon Moyer had her own developmental challenges that prevented Moyer from functioning as mother despite being decedent's birth mother.

In any event, as explained below, under applicable law defendants' collateral attack on the trial court's otherwise final judgment on plaintiff's wrongful death claim is untimely and clearly without merit. As a result, defendants' request for a remand for the trial court to consider supposedly "newly discovered" evidence of "possible fraud" should be denied on the merits if it is not denied due to Hope and Birt's failure to file a notice of appeal.

1. The Supposed "Newly–Discovered Evidence" On Which Defendants Predicate Their So–Called "Emergency" Application For Remand Is Legally Insufficient To Disturb The Judgment

Defendants fail as a matter of law to present any valid grounds for disturbing the trial court's otherwise final judgment in plaintiff's favor on her wrongful death claim, and therefore the request for remand should be denied.

Defendants have never disputed, and do not now dispute, that Sharon Moyer was decedent Barbara Ann Maines's birth mother. According to defendants, relying on caselaw from jurisdictions outside of Pennsylvania, plaintiff had the capacity to bring a wrongful death claim on

Moyer's behalf as decedent's birth mother unless decedent had been legally adopted by someone else. Defendants' appellate submission contains not a shred of evidence to conclusively establish that decedent was at some undetermined point legally adopted by her maternal grandmother.

As this Court recognized in *Drake Mfg. Co.* v. *Polyflow, Inc.*, 109 A.3d 250, 257–58 (Pa. Super. Ct. 2015), in order for a defendant to preserve a challenge to the plaintiff's capacity to sue, the defendant must raise the issue either at in preliminary objections or the answer to the complaint, and then the defendant must again raise the issue by means of a motion for nonsuit, a motion for a directed verdict, and a motion for judgment notwithstanding the verdict. In this case, defendants have not preserved any challenge to plaintiff's capacity to bring a wrongful death claim against defendants on behalf of Sharon Moyer, decedent's birth mother. Moreover, defendants did not challenge plaintiff's capacity to sue in their earlier appeal from the jury's verdict. R.37a–38a (this Court's non–precedential ruling on earlier appeals at pages 10–11) (listing issues raised in that appeal).

Defendants do not assert, nor could defendants credibly contend, that either the published obituary notices for Barbara Ann Maines or

Madeline Maines, or the guardianship pleadings for decedent's guardianship proceeding in Snyder County, Pennsylvania in 2000, were unavailable to defendants at any point during the pendency of this case. Defendants simply opted not to obtain or focus on those materials until it was too late to receive any consideration in determining the outcome of this case.

In *Simpson* v. *Allstate Ins. Co.*, 504 A.2d 335, 337 (Pa. Super. Ct. 1986), this Court recognized that "a judgment entered in an adverse proceeding ordinarily cannot be disturbed after it has become final." (internal quotations and brackets omitted). This Court's ruling in *Simpson* observes that a judgment becomes final in an adverse proceeding 30 days after entry, if no appeal is filed. *Id.* Here, defendants have not filed any appeal from the trial court's April 30, 2015 judgment. In fact, defendants have voluntarily paid the compensatory amounts due under that judgment to avoid the continued accrual of post–judgment interest.

As this Court explained in *Simpson*:

> "This doctrine, respecting judgments entered [in adverse proceedings], has a very definite function, namely, to establish a point at which litigants, counsel and courts ordinarily may regard contested lawsuits as being at an end." *Klugman v. Gimbel Brothers, Inc.*, *supra*, 182 A.2d at 225. *See also*: *Kappel v.*

> *Meth*, *supra*, 189 A. at 798. "A contested action yields a judgment in which the value of finality is greatest. There has been a decision following an examination of the critical issues through bilateral participation of the parties . . . . For all the reasons that finality of judgments is important, such a judgment should be invulnerable except upon a showing of extraordinary miscarriage." Restatement (Second) of Judgments, Introductory Note to Chapter 5, p. 152.

Id.

As the Supreme Court of Pennsylvania recognized in *Commonwealth ex rel. Meyers* v. *Stern*, 501 A.2d 1380, 1383 (Pa. 1985), "[t]o hold otherwise, would encourage losing parties to continually besiege trial courts with claims that the prevailing party lied, thereby requiring the second guessing of the fact finder's initial determination of credibility."

This Court's ruling in *Simpson* explains that the only exception to this finality principle is where "there has been fraud or some other circumstance *so grave or compelling* as to constitute '*extraordinary cause*' justifying intervention by the court." *Simpson*, 504 A.2d at 337 (emphasis added). Yet the type of alleged "possible fraud" about which defendants complain here is not the type of fraud that is sufficient to reopen a judgment based on supposedly newly discovered evidence.

In *McEvoy* v. *Quaker City Cab Co.*, 110 A. 366, 366–70 (Pa. 1920), the Supreme Court of Pennsylvania recognized, in a holding that remains good law today, that only "extrinsic" fraud, and not "intrinsic" fraud, can be used to reopen an otherwise final judgment. Quoting with approval from a ruling of the Supreme Court of Kansas, the Pa. Supreme Court's decision in *McEvoy* explained:

> 'The general rule is that an act for which a court of equity will set aside or annul a judgment between the same parties, rendered by a court of competent jurisdiction, has relation to fraud extrinsic or collateral to the matter tried by the first court, not to fraud in the matter on which the judgment was rendered. By the expression 'extrinsic or collateral fraud' is meant some act or conduct of the prevailing party which has prevented a fair submission of the controversy. Among these are the keeping of the defeated party away from court by false promise of compromise, or fraudulently keeping him in ignorance of the action. Another instance is where an attorney without authority pretends to represent a party, and corruptly connives at his defeat, or where an attorney has been regularly employed, and corruptly sells out his client's interest. The fraud in such case is extrinsic or collateral to the question determined by the court. The reason for the rule is that there must be an end to litigation; and, where a party has his day in court, and knows what the issues are, he must be prepared to meet and expose perjury then and there. Where the alleged perjury relates to a question upon which there was a conflict, and it was necessary for the court to determine the truth or falsity of the testimony, the fraud is intrinsic, and is concluded by the judgment . . . ."

Id. at 368 (citations omitted).

Pennsylvania's highest court concluded its decision in *McEvoy* by remarking, in language equally applicable to this case:

> The trial was a fair one, in which the defendant was fully advised by the pleading of the nature and character of the evidence the plaintiff would be required to produce to establish his case. If the verdict resulted from defendant's unpreparedness to meet the evidence produced, the fault, if any, rested neither with the court nor with the jury. The parties had their day in court, and we see no reason why the verdict should be disturbed.

Id. at 370.

More recently, Judge Brobson of the Commonwealth Court, writing for a unanimous three–judge panel in *City of Wilkes–Barre* v. *Wilkes–Barre Fire Fighters Ass'n*, 992 A.2d 246, 254 (Pa. Commw. Ct. 2010), referred to *McEvoy* as "an early leading case cited by many decisions in this area." The Commonwealth Court's opinion proceeded to explain:

> *McEvoy v. Quaker City Cab Company*, 267 Pa. 527, 110 A. 366 (1920), related the distinction between intrinsic and extrinsic fraud. The Court concluded that only evidence of extrinsic fraud supported the granting of a new trial based upon fraud. Extrinsic fraud, the Court opined, related to actions that prevented a losing party from presenting his case. Fraud is intrinsic and, therefore, an insufficient basis to grant a new trial, where the party had an opportunity to expose the alleged fraud at trial.

Id.

In this case, as explained above, defendants had the opportunity and ability to challenge plaintiff's standing to assert a wrongful death claim on behalf of Sharon Moyer, who indisputably was decedent's birth mother, during trial based on the very same supposedly "newly discovered" evidence on which defendants now rely in alleging fraud. For whatever reason, defendants decided not to pursue that line of inquiry until it was too late, after the judgment in question became final. Litigation must come to an end. Defendants are seeking to challenge plaintiff's capacity to sue now that it is too late for them to do so.

In *Claudio* v. *Dean Machine Co.*, 831 A.2d 140, 146 (Pa. 2003), Pennsylvania's highest court held that "[a] court should not grant a new trial based on after–discovered evidence unless the proponent can *convincingly show* that he was unable to obtain such testimony for the trial by use of reasonable diligence." (emphasis added; internal quotations omitted).

Similarly, in *In re Estate of Roart*, 568 A.2d 182, 187 (Pa. Super. Ct. 1989), this Court recognized that "To justify the grant of a new trial on the basis of after–discovered evidence, the evidence must have been discovered since the trial and must be such as would not have been

obtainable by the use of reasonable diligence and must not be cumulative or merely go to impeach the credibility of a witness." Here, the evidence on which defendants rely most assuredly would have been obtainable in time for trial through the use of reasonable diligence. Indeed, as explained above in this Reply Brief at page 16 n.2, the so–called "newly discovered" evidence was already known to defendants and in defendants' possession long before this case was even filed in court. That defendants failed to focus on the information in question until it was too late for it to be considered is something for which Hope and Birt are entirely responsible. The adversarial system exists, in part, to enable defendants to challenge the factual assertions of plaintiffs. If a defendant chooses to accept without challenge or investigation a particular factual assertion of the plaintiff, that is a choice for which the defendant bears sole responsibility.

Moreover, the decedent, Barbara Ann Maines, was a resident at one of the defendant's group residential facilities. Surely the group residential facility's records reflected that the decedent had a guardian and had been adjudicated incapacitated. Hope and Birt's submissions to this Court contain absolutely no explanation of why defendants could not have obtained in time for trial the documents on which they now rely, nor do

Hope and Birt even assert that those documents could not have been obtained in time for trial. In *Roart*, 568 A.2d at 188, this Court recognized that "information contained in newspaper articles" could be obtained at any time, and surely that observation also applies to Barbara Ann Maines's and Madeline Maines's obituary notices.

Lastly, as touched on above, defendants' supposed "emergency" is one of their own making. Counsel for defendants raised concerns about the identities of the decedent's relatives during the trial court proceeding on April 28, 2015. Supp.R.R. 9b–12b (hearing transcript at pages 30–45). The trial court responded that those matters would be for the Orphan's Court in Columbia County, Pennsylvania to consider. Supp.R.R.11b (*id.* at page 41). Defendants elected not to file any timely motion for reconsideration of the trial court's judgment entered April 30, 2015, and thereafter defendants also failed to file any appeal from the trial court's judgment entered April 30, 2015. Consequently, that judgment became final as to the jury's awards of compensatory damages on plaintiff's survival and wrongful death claims.

Thereafter, defendants decided to voluntarily pay the compensatory damages due on the April 30, 2015 judgment so as to avoid the continued

accrual of post–verdict interest. Had defendants instead appealed from the judgment, defendants could have posted a bond in an amount 120 percent of the judgment to prevent any execution on the judgment pending the outcome of their appeal.

Now defendants are breathlessly asserting that, because the money they voluntarily opted to pay to avoid the continued accrual of post–verdict interest may be on the verge of being disbursed by a Common Pleas court in another Pennsylvania county in a separate proceeding over which this appeal does not even give this Court jurisdiction, an "emergency" exists necessitating a remand and a stay issued to that other county's court. Surely, as this recitation of the relevant procedural background demonstrates, any "emergency" is solely of the defendants' own making and cannot properly be orchestrated by defendants to force this Court into action by further delaying the orderly resolution the two issues that plaintiff has properly raised and presented in this appeal.

For all of the reasons set forth above, this Court should deny — just as a motions panel of this Court has already done by refusing to order any immediate relief — defendants' request for a remand for a hearing on supposedly "newly discovered" evidence of "possible fraud," because the

unsworn allegations that defendants have presented do not provide any valid legal basis for disturbing the now final wrongful death judgment in this matter.[3]

III. CONCLUSION

For all of the reasons set forth above and in plaintiff's Brief for Appellant, this Court should reverse the trial court's order refusing to conduct a new trial limited to the issue of punitive damages on plaintiff's survival act claim, direct that the new trial limited to the issue of punitive damages on plaintiff's survival act claim occur promptly, and direct the trial court to amend its order of April 28, 2015 entering judgment to include the amount of $453,535.94 in post–judgment interest that had accrued as of that date. In addition, Hope and Birt's request for a remand in connection

[3] Defendant Heather Peters, by means of her own separately filed Brief for Appellee, asks this Court to specify that Ms. Peters should be excluded from any retrial that may occur due to the supposed "fraud on the court" that co–defendants Hope and Birt have alleged. Because Hope and Birt in their Brief for Appellees are not asking this Court to order a new trial, this Court will have no occasion to specify the terms on which any such new trial should occur. In the extraordinarily unlikely event that any new trial were necessary, it should be left to the discretion of the trial judge in the first instance to decide whether Ms. Peters would be required to participate. It is unnecessary and thus would constitute dicta for this Court to address that purely hypothetical question at this juncture.

with their unsupported claim of supposed fraud on the court should be rejected either for lack of jurisdiction, due to their failure to appeal, or on the merits as failing to offer any legally valid basis for setting aside the trial court's now–final wrongful death judgment.

Respectfully submitted,

Dated: December 21, 2015

/s/ Howard J. Bashman

Howard J. Bashman
2300 Computer Avenue
Suite G–22
Willow Grove, PA 19090
(215) 830–1458

Counsel for Appellant

CERTIFICATION OF COMPLIANCE WITH TYPE–VOLUME LIMITATION, TYPEFACE REQUIREMENTS, AND TYPE STYLE REQUIREMENTS

This brief complies with the type–volume limitations of Pa. R. App. P. 2135(a)(1) because this brief contains 6,428 words, excluding the parts of the brief exempted by Pa. R. App. P. 2135(b).

This brief complies with the typeface and the type style requirements of Pa. R. App. P. 124(a)(4) and 2135(c) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2010 in 14–point Book Antiqua font.

Dated: December 21, 2015

/s/ Howard J. Bashman
Howard J. Bashman

EXHIBIT ONE

Filed 08/06/2015

Patricia Brittain, a/k/a Patricia Maines, Administrator of the Estate of Barbara Ann Maines	:	IN THE SUPERIOR COURT OF PENNSYLVANIA
v.	:	(C.P. Luzerne County No. 10467-CV-2010)
Hope Enterprises Foundation, Inc., et al.	:	No. 875 MDA 2015 No. 950 MDA 2015

ORDER

Upon consideration of the emergency application for remand and stay filed by appellees, defendants below, and upon consideration of the answer filed by appellant, plaintiff below, the following is **ORDERED**:

Disposition of the application for remand is **DEFERRED** to the panel to be assigned to decide the merits of this appeal.

To the extent appellees request that this Court stay distribution of proceeds currently held pursuant to an order of the Court of Common Pleas of Columbia County, such request is **DENIED** without prejudice for appellees to request such relief in the appropriate court below.

Per Curiam

CERTIFICATE OF SERVICE

I hereby certify that I am this day serving a true and correct copy of the foregoing document upon the persons and in the manner indicated below which service satisfies the requirements of Pa. R. App. P. 121:

Service by PACFile or first class mail addressed as follows, as applicable:

Maureen M. McBride, Esquire
Lamb McErlane, PC
P.O. Box 565
West Chester, PA 19381–0565
(610) 430–8000
Counsel for appellees Hope Enterprises, Inc. and William Birt

John T. McGrath Jr., Esquire
Thomas A. Specht, Esquire
Marshall Dennehey Warner
Coleman & Goggin, P.C.
50 Glenmaura National Boulevard
Moosic, PA 18507
(570) 496–4603
Counsel for appellee Heather Peters

Andrew G. Cassidy, Esquire
Cassidy, Connor & Pitchford, LLC
295 East Swedesford Road, Suite 346
Wayne, PA 19087
(610) 783–3515
Counsel for appellee Selective Insurance Company of America

Dated: December 21, 2015

/s/ *Howard J. Bashman*

Howard J. Bashman
2300 Computer Avenue
Suite G–22
Willow Grove, PA 19090
(215) 830–1458