

# HANDING DOWN HELP

In Ohio, 'Curative Damages' Are Embraced  
by Tort Plaintiffs and the Supreme Court

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**V**ICKY AND DENNY MOORE NEVER dreamed they would someday hear a jury place a dollar amount on the value of their son's life. It's not cliché to say that no money in the world would fill the void left by the death of their youngest child, 16-year-old Ryan.

So in 1997, little prepared the Salineville, Ohio, couple for the \$10 million award meant to compensate them and punish the railroad for that fatal day in 1995 when a Conrail freight train collided with the car their son was riding in.

It was a devastating event. And, in many respects, the money only added to the pain.

"We did not want to take that money and gain personally," Vicky Moore says.

Her husband agrees. "We couldn't have bought a house or a car," he says. "It's blood money. It's nothing you can enjoy."

So what did the Moores do with their award? On the suggestion of their lawyer, they turned it over to a foundation to improve railroad safety. The Angels on Track Foundation—with the slogan "Bad crossings kill good drivers"—has since spent hundreds of thousands of dollars to improve more than a dozen railroad crossings and to pay for public service announcements on radio and billboards.

What's peculiar about this case is that the jury got to hear about the Moore family's spending plans. Sandusky, Ohio, lawyer Tom Murray, who represented the Moores, has dubbed the concept "cur-

ative damages." The idea is that damage awards are used to "cure" a problem rather than provide punitive relief in the traditional sense. It's an idea that promotes more constructive interaction between a negligent defendant and harmed individuals.

Professor David T. Link of University of Notre Dame Law School is a fan of Murray's and of curative damages. He says curatives are often part of an "apology hearing."

"What the plaintiff really wants is not so much money as they want an apology," says Link, who heads the International Centre for Healing and the Law in Kalamazoo, Mich.

In those instances, sometimes before any litigation has ensued, a company might say, "We're really sorry this has happened, and we're happy to put some of this money into a fund to prevent it from happening again," he explains.

While curative arrangements may be more common outside of court, Ohio allows jurors to learn that part of a punitive damages award will go into a trust fund or public charity.

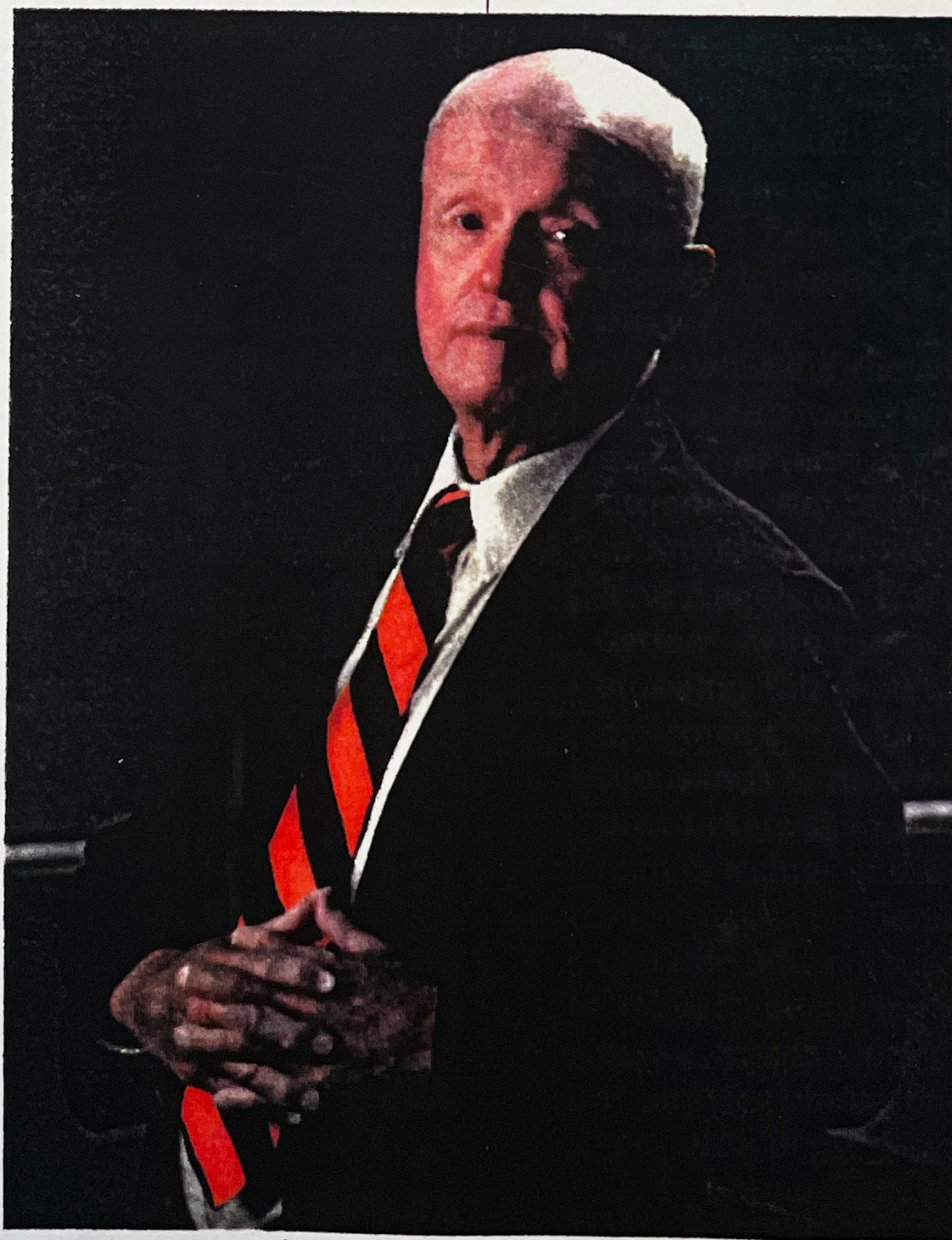
## CLEARING THE PATH FOR A NEW APPROACH

IT WAS ANOTHER FATAL TRAIN-CAR COLLISION CASE—ONE in 1989 that killed 16-year-old friends Michelle Wightman and Karrie Wieber—that first led Murray down this path. In 1996, as Murray prepared for the punitive damages phase of a protracted bifurcated trial against Conrail, he approached Wightman's mother, now Darlene M. Lowery, with the idea to create a foundation to which most of any punitive damages award, including a portion of his legal

fees, would go. The jury did not hear about the foundation, but the trial judge allowed the organization to intervene in the case so long as it did not participate.

Murray, emboldened by the Wightman experience, brought the concept to the Moores soon after. This time, the judge allowed him to tell the jury about the Angels on Track Foundation. After the jury's damage award, the railroad appealed on other grounds, and the state supreme court declined review.

Yet the Moore family's push to create a lasting legacy for their son struck a chord with one member of the court. Justice Paul E. Pfeifer wrote about the case in a March 1998 op-ed column distributed to newspapers, praising the concept of curative damages. While punitives can sometimes appear "selfish and vindictive," he wrote,



Tom Murray: Juries should know how plaintiffs would spend damages.

there was "nothing greedy or vindictive" about the Moores. "There may not always be something good that comes out of every hurtful situation," Pfeifer concluded, "but the Moores have done their best to see that the lives lost on that track were not wasted."

Then in late 2002, the Ohio Supreme Court did something truly unprecedented. In a majority opinion written by Pfeifer, the court upheld \$30 million of a \$49 million bad-faith verdict against Anthem Blue Cross and Blue Shield. In doing so, the court, on its own, directed that a portion of the award go to the creation of a memorial cancer research fund at Ohio State University. The court further ordered the fund be named for Esther Dardinger, who died from a brain tumor in 1997 after her insurance carrier stopped paying for an experimental chemotherapy treatment. *Dardinger v. Anthem*, 781 N.E.2d 121.

Citing *Wightman*, the *Dardinger* court noted that Michelle Wightman's mother directed more than half her punitive damage award to a charity. The court awarded \$10 million plus interest to Dardinger's widower, Robert Dardinger. The remaining \$20 million was to be held to pay attorney fees and court costs, with any remaining money going to the memorial foundation.

"The final net amount remaining after the prescribed payments should go to a place that will achieve a societal good, a good that can rationally offset the harm done by the defendants in this case," Pfeifer wrote. "Due to the societal stake in the punitive damages award, we find it most appropriate that it go to a state institution."

#### SHOULD COURTS CREATE CHARITIES?

WHILE A PORTION OF CHIEF JUSTICE THOMAS MOYER'S SEPARATE opinion supported the punitive award, he objected to the court creating a charity without legislative authority.

Philadelphia defense attorney Ralph G. Wellington, who handled the appeals in the *Wightman* and *Moore* cases, couldn't agree more.

"The concept of using punitive damages for social good, not just for personal wealth, is something I would applaud," says Wellington, who adds that these out-of-court arrangements may even lead to increased payouts from defendants. But the decision, he argues, should be private and not one for a jury. "It is severely prejudicial to defendants to have the avowed unbinding potential use of punitive damages before a jury," he says.

After all, Wellington says, punitive damages exist to punish the wrongdoer and deter future bad conduct. They are not there so that juries can "reallocate resources for the benefit of those not before the court." Plus, he ques-

tions how the foundations would be monitored to be sure plaintiffs spent the money the way they promised.

"It adds the dynamic in trial that can only increase damage awards," Wellington says. "Who can argue against a foundation's public use of money?"

Other jurisdictions take Wellington's point of view. In 1990, the Oregon Supreme Court ruled in *Honeywell v.*

*Sterling Furniture Co.*, 797 P.2d 1019, that jurors shouldn't be told anything about the distribution of a punitive damages award. The Oregon court especially objected to the part of a jury instruction indicating that part of any punitive award would go to the state's Criminal Injuries Compensation Account.

Similarly, in 1993, the 8th U.S. Circuit Court of Appeals at St. Louis overturned an Iowa Supreme Court decision in part because jurors were told that a portion of punitive damages could be paid into a trust managed by the court. *Burke v. Deere & Co.*, 6 F.3d 497.

Georgia then weighed in with its 1996 decision in *Ford v. Uniroyal Goodrich Tire Co.*, 476 S.E.2d 565. In that case, the Georgia Supreme Court reversed a decision that allowed jurors to know that 75 percent of a \$25 million punitive damage award would be deposited in the state treasury. The court reasoned

that, "by instructing the jury on the statutory scheme for allocating a punitive damages award, the trial court improperly shifted the jury's focus from the critical question of the defendant's conduct to the inappropriate question of the plaintiff's compensation."

But Murray says judges and jurors ought to be able to consider the information.

"It occurred to me, years ago, that this idea of punishing a defendant in a civil case could be improved upon by addressing what has historically been the most persuasive arguments against punitive damages, namely that it represents a windfall for the plaintiff who has already been compensated," Murray says.

In reality, he and many others say, it's often not about the money for those who are injured, but rather about holding defendants accountable, or about a plaintiff seeking a sense of justice.

"It wasn't about money for us, and it isn't about money for a lot of us," Vicky Moore says. "But that's the only thing you can use in the courts. That's the only option—to sue for a monetary judgment."

For the Moores and Darlene Lowery, their foundations have helped them heal. "By having a foundation and knowing that if she were still alive, she would be doing so much for other people," Lowery says, "it kind of makes you feel like you've got part of her here." ■

*Some wonder  
whether a court  
or jury should  
trust that an  
award will be  
spent as plaintiffs  
promise.*