

**NOVA SCOTIA COURT OF APPEAL**  
**Citation:** *Walker v. Walker*, 2025 NSCA 16

**Date:** 20250307  
**Docket:** CA 535473  
**Registry:** Halifax

**Between:**

Deborah Walker as personal representative of the  
Estate of Frances Arlene Walker

Appellant

v.

Charles Paul Walker

Respondent

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**Judge:** The Honourable Justice Robin C.M. Gogan

**Appeal Heard:** December 12, 2024, in Halifax, Nova Scotia

**Facts:** The case involves a dispute over punitive damages for breach of fiduciary duty. The appellant, acting as the personal representative of her deceased mother's estate, accused her brother, the respondent, of misappropriating their mother's funds while acting under a power of attorney. The respondent allegedly used the funds for personal expenses, leaving the estate with debts (paras [2-3](#), [12-18](#)).

**Procedural History:** Justice Peter Rosinski awarded \$30,000 in punitive damages against the respondent for breach of fiduciary duty (para [3](#)).

**Parties Submissions:** Appellant: Argued that the punitive damages awarded were too low, not proportionate, and inconsistent with precedent. The appellant relied on the decision in *Walling v. Walling*, which awarded \$100,000 in similar

circumstances, adjusted for inflation to \$131,000 (paras [5](#), [20](#)).

Respondent: Did not appear or respond to the proceedings (para [6](#)).

**Legal Issues:**

Are the judge's reasons for the punitive damages award sufficient?

Did the judge err in the quantum of punitive damages awarded?

**Disposition:**

The appeal was dismissed.

**Reasons:**

The judge's reasons were found to be sufficient, as they were factually and legally adequate when considered in the context of the case. The judge's decision was based on the evidence and submissions, and the rationale for the award was discernible (paras [21-33](#)). The quantum of punitive damages was within the judge's discretion, as it was rationally connected to the purposes of punitive damages, considering the specific circumstances of the case (paras [35-59](#)). The appellant's failure to provide a complete briefing on the range of punitive damage awards in similar cases was noted (para [60](#)).

*This information sheet does not form part of the court's judgment. Quotes must be from the judgment, not this cover sheet. The full court judgment consists of 62 paragraphs.*

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Respondent

**Judges:** Bourgeois, Scanlan and Gogan, JJ.A.

**Appeal Heard:** December 12, 2024, in Halifax, Nova Scotia

**Held:** Appeal dismissed per reasons for judgment of Gogan, J.A.;  
Bourgeois and Scanlan, JJ.A. concurring

**Counsel:** Meaghan Kells and Blair Miller, Articled Clerk, appearing  
for Richard W. Norman, for the appellant  
Charles Paul Walker, the respondent, not appearing

## Reasons for judgment:

### Introduction

[1] This appeal considers an award of punitive damages for breach of fiduciary duty.

[2] The underlying claim arose in the context of an allegation made by Deborah Walker against her brother Charles Paul Walker. She accused him of misconduct while acting under the authority of a power of attorney granted by their mother, Frances Arlene Walker. For ease of reference in these reasons, I will refer to the parties by the names Deborah, Paul<sup>1</sup> and Frances.

[3] On June 24, 2024, Justice Peter Rosinski heard a motion brought by Deborah as personal representative of her mother's estate. The motion sought an assessment of damages and costs under Civil Procedure Rule 70.01(2) in relation to Paul's misappropriation of his mother's funds. As part of that motion, Deborah asked the court to award \$131,000 in punitive damages against Paul. The chambers judge awarded \$30,000.

[4] On the motion, Deborah relied on one authority in support of the quantum of punitive damages claimed. In *Walling v. Walling*,<sup>2</sup> the court awarded \$100,000 in punitive damages in a case where the defendant uncle breached his fiduciary duty by failing to properly administer his brother's estate for the benefit of his nephews. Deborah argued the *Walling* award was the equivalent of \$131,000 when adjusted for inflation.

[5] On appeal, Deborah argues the punitive damage award was "too low, not proportionate, and out of step with precedent established in similar cases". She submits the award is not consistent with the findings made by the chambers judge and relies only on the decision in *Walling*. However, the Court identified other relevant decisions speaking to the range of punitive damages in similar cases. These were provided to appellant's counsel prior to the hearing and must be considered in addition to *Walling*.

[6] Paul did not respond to the initial application or subsequent motion made by Deborah. He did not appear on the motion nor did he participate in this appeal.

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<sup>1</sup> The record indicates Charles Paul Walker is referred to by family members as Paul.

<sup>2</sup> *Walling v. Walling*, 2012 ONSC 6580 [*Walling*].

Later, I expand on Paul's absence from the proceedings. I pause here to note the judge was left to adjudicate only on the basis of what was provided by Deborah.

[7] For the reasons that follow, I am of the view the judge made no error in ordering punitive damages of \$30,000. I would dismiss the appeal.

### **Issues**

[8] Deborah raised only one ground of appeal, alleging the judge's award of punitive damages was too low. However, in her written submission, she argued the judge "did not provide any legal reasoning", his decision contained "no rationale" for his award, and "in the absence of any reasons" it could not be a rational and proportional figure.

[9] In my view, the lone ground of appeal advanced by Deborah conflates two issues which I would address separately as follows:

1. Are the judge's reasons sufficient?
2. Did the judge err in his award of punitive damages?

[10] Each of these issues will be addressed below.

### **Analysis**

[11] Before moving to a discussion of the issues, some additional background is necessary to explain the course of the proceeding, Paul's absence, and the motion before the judge.

[12] Frances died on May 7, 2023. She was predeceased by her husband in February of 2017. She had four children, including Deborah and Paul.

[13] On December 4, 2017, Paul became his mother's attorney under an enduring power of attorney. Frances was then living in a nursing home. Paul was living in her home and using her money to pay household expenses. He continued to act as her attorney until his appointment terminated with her death, a period of five years and five months.

[14] Deborah is the personal representative of her mother's estate and obtained a grant of probate on December 1, 2023. Both before and after the grant, Deborah had concerns about Paul's handling of their mother's financial affairs. Both parties retained lawyers. Among the concerns was Paul's efforts to sell his mother's home. Deborah and her two other siblings sought injunctive relief against Paul. He was personally served with the application at their mother's home. Paul did not respond or attend the hearings that followed. His lawyer withdrew. An injunction was granted on December 4, 2023 preventing Paul from making any further attempts to sell the home, the estate's main asset.

[15] On December 28, 2023, Deborah requested a complete accounting of Paul's transactions as their mother's attorney. This request was personally served on Paul. There was no response. Nor has there been any contact with Paul since.

[16] Deborah then brought an application seeking an accounting from Paul under the *Powers of Attorney Act*.<sup>3</sup> The original application was filed on January 31, 2024. Unsuccessful attempts were made to serve Paul with the application in February of 2024. An Order for substituted service was granted on March 28, 2024. The application was amended on April 5, 2024 to include a claim for punitive damages. A hearing proceeded on April 26, 2024. Paul did not appear or respond to the application. An Order was granted on May 3, 2024 compelling Paul to account no later than May 28, 2024 and providing for the possibility of additional relief on further notice. Paul did not provide the accounting. His phone number was disconnected and he did not respond to email messages.

[17] Deborah moved for damages and costs against Paul on June 7, 2024. He was again notified by substituted service but did not respond to the motion or attend the chambers hearing held on June 24, 2024. The hearing proceeded on the basis of Deborah's affidavit evidence. She had investigated her mother's health and financial records and concluded that Paul had drained their mother's bank and investment accounts leaving only debts.

[18] The evidence was clear and uncontested. On the day of Paul's appointment (December 4, 2017), his mother's various accounts totalled \$248,516.28. By the time of her death (May 7, 2023), there were only debts totalling \$72,701.30. These included unpaid property taxes and utility bills, almost \$15,000 owed to the nursing home facility and the amount of \$6,875.25 owing for pension payments

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<sup>3</sup> R.S.N.S. 1989, c. 352.

that continued past the date of Frances' death. The evidence established Paul used his mother's cash and credit to cover his groceries, gas, restaurant and bar charges, cash advances, auto repairs and several trips, including one to Las Vegas with a guest. Deborah calculated a total benefit to Paul of \$159,319.66 during his tenure as attorney.

[19] On her application, Deborah argued the financial benefit to Paul flowed from a breach of his fiduciary duty. She sought reimbursement to her mother's estate. She also sought interest, costs and punitive damages. The judge accepted the evidence of Paul's egregious behaviour and concluded damages were appropriate. He ordered reimbursement of the total amount calculated by Deborah, plus pre-judgment interest and solicitor-client costs.<sup>4</sup> He awarded punitive damages in the amount of \$30,000.

[20] On appeal, Deborah asserts the award of punitive damages is too low. She contends the award should be larger given the findings of the judge and the decision in *Walling*. As noted above, Deborah criticizes the judge's reasons as insufficient on this point. Therefore, it is appropriate to begin the analysis by considering the sufficiency of reasons available for review.

#### *Issue One – The Sufficiency of Reasons*

[21] Deborah argues the judge's reasons were insufficient in explaining the basis for his punitive damage award. In her view, the award was low, inconsistent with the evidence, and the judge's findings. She submits the judge "provided no rationale for the \$30,000" quantum. She refers to the decision in *Walling* and relies on the fact it "was before the chamber's judge, it was not referred to in his reasons. It was not distinguished". Similar to the issue in *Evans v. Larocque*,<sup>5</sup> the issue of sufficiency is "embedded" in Deborah's complaints about the punitive damage award.

[22] Judicial reasons are reviewed functionally and contextually and must be both factually and legally sufficient. The relevant principles were concisely reviewed in *R. v. A.P.L.*:<sup>6</sup>

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<sup>4</sup> Order dated July 11, 2024 required payments to the Estate of Frances Arlene Walker of \$159,319.66 as damages for breach of fiduciary duty, pre-judgment interest of \$30,000, solicitor-client costs of \$20,012.87 and disbursements of \$10,413.70, as well as punitive damages of \$30,000.

<sup>5</sup> 2025 NSCA 4 at para. 76.

<sup>6</sup> 2024 NSCA 48 at paras. 22-24.

## Legal principles

[22] There is no shortage of decisions from the Supreme Court of Canada articulating the principles relating to assessing the sufficiency of reasons. Those principles were summarized and re-affirmed in *R. v. G.F.*, 2021 SCC 20:

[68] The importance of trial reasons should not be understated. It is through reasoned decisions that judges are held accountable to the public, ensuring transparency in the adjudicative process and satisfying both the public and the parties that justice has been done in a particular case . . . However, this Court in *Sheppard* emphasized that, for the purposes of appellate review, **“the duty to give reasons is driven by the circumstances of the case rather than abstract notions of judicial accountability”**: para. 42. On appeal, the issue is whether there is reversible error. What is required are reasons that are sufficient in the context of the case for which they were given.

[69] **This Court has repeatedly and consistently emphasized the importance of a functional and contextual reading of a trial judge’s reasons when those reasons are alleged to be insufficient.** . . . Appellate courts must not finely parse the trial judge’s reasons in a search for error . . . **Their task is much narrower: they must assess whether the reasons, read in context and as a whole, in light of the live issues at trial, explain what the trial judge decided and why they decided that way in a manner that permits effective appellate review.** As McLachlin C.J. put it in *R.E.M.*, **“[t]he foundations of the judge’s decision must be discernable, when looked at in the context of the evidence, the submissions of counsel and the history of how the trial unfolded”**: para. 17. And as Charron J. stated in *Dinardo*, **“the inquiry into the sufficiency of the reasons should be directed at whether the reasons respond to the case’s live issues”**: para. 31.

[70] This Court has also emphasized the importance of reviewing the record when assessing the sufficiency of a trial judge’s reasons. This is because “bad reasons” are not an independent ground of appeal. **If the trial reasons do not explain the “what” and the “why”, but the answers to those questions are clear in the record, there will be no error:** *R.E.M.*, at paras. 38-40; *Sheppard*, at paras. 46 and 55.

(Emphasis added, citations omitted)

[23] As explained in *G.F.*, an appellate court must assess whether the challenged reasons are both factually and legally sufficient:

[71] The reasons must be both factually sufficient and legally sufficient. Factual sufficiency is concerned with what the trial judge decided and why: *Sheppard*, at para. 55. Factual sufficiency is ordinarily a very low bar, especially with the ability to review the record. **Even if the trial judge expresses themselves poorly, an appellate court that understands the “what” and the “why” from the record may explain the factual basis of the finding to the aggrieved party:** para. 52. It will be a very rare case where neither the aggrieved party nor the appellate court can understand the factual basis of the trial judge’s findings: paras. 50 and 52.

...

[74] Legal sufficiency requires that the aggrieved party be able to meaningfully exercise their right of appeal: *Sheppard*, at paras. 64-66. Lawyers must be able to discern the viability of an appeal and appellate courts must be able to determine whether an error has occurred: paras. 46 and 55 **Legal sufficiency is highly context specific and must be assessed in light of the live issues at trial. A trial judge is under no obligation to expound on features of criminal law that are not controversial in the case before them.** This stems from the presumption of correct application — the presumption that “the trial judge understands the basic principles of criminal law at issue in the trial”: *R.E.M.*, at para. 45. As stated in *R. v. Burns*, 1994 CanLII 127 (SCC), [1994] 1 S.C.R. 656, at p. 664, “[t]rial judges are presumed to know the law with which they work day in and day out”: see also *Sheppard*, at para. 54. A functional and contextual reading must keep this presumption in mind. Trial judges are busy. They are not required to demonstrate their knowledge of basic criminal law principles.

[75] Conversely, legal sufficiency may require more where the trial judge is called upon to settle a controversial point of law. In those cases, cursory reasons may obscure potential legal errors and not permit an appellate court to follow the trial judge’s chain of reasoning: *Sheppard*, at para. 40, citing *R. v. McMaster*, 1996 CanLII 234 (SCC), [1996] 1 S.C.R. 740, at paras. 25-27. **While trial judges do not need to provide detailed maps for well-trod paths, more is required when they are called upon to chart new territory. However, if the legal basis of the decision can nonetheless be discerned from the record, in the context of the live issues at trial, then the reasons will be legally sufficient.**

(Emphasis added)

[24] The above principles have been applied consistently by this Court, including recently in *R. v. X.J.*, 2023 NSCA 52; *R. v. Kitch*, 2023 NSCA 33; *R. v. J.M.S.*, 2020 NSCA 71, and *R. v. Preston*, 2022 NSCA 66.

[23] Although many of the governing principles emanate from criminal cases, they apply with equal force to reasons given in civil matters.<sup>7</sup>

[24] In the present case, the judge’s oral decision was not extensive. But the entire record is available and provides a fuller picture for consideration. The judge’s reasons confirm he was familiar with the history of the proceeding and Paul’s failure to participate. He concluded, as other judges had, that Paul was evading service. Paul had not contested the original application and not provided the accounting required by Order dated May 3, 2024. The notice of motion identified the outstanding issues. The written and oral submissions further refined the basis for the relief being sought. The judge accepted the evidence offered by Deborah and his findings were consistent with the evidence. The decision and Order granted clearly addressed the live issues on the motion. In my view, there is no issue with the factual sufficiency of the reasons. The judge was asked to decide whether an award of punitive damages was appropriate and, if so, determine a quantum. His decision addresses both issues and his reasons, read in conjunction with the record, provide a discernable pathway.

[25] The real issue is whether the reasons are legally sufficient – in other words, do they provide a sufficient basis for review on the issue of punitive damages.

[26] On this point, the judge referred to the motion materials being “very voluminous”. They included Deborah’s affidavit on the motion as well as previous affidavits filed in the proceedings. Counsel’s submissions invited the chambers judge to find that Paul had “preyed on their vulnerable mother”, using her money for his benefit and indulgences while leaving her care neglected, nursing home bills unpaid, and her home uninsured and in “serious disrepair”.<sup>8</sup>

[27] The judge’s reasons reveal findings in accord with the evidence and submissions. He found Paul had taken “great advantage” and exploited his mother

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<sup>7</sup> *Evans v. Larocque*, 2025 NSCA 4 at para 79; *MacIsaac Estate v. Urquhart*, 2019 NSCA 25 at para. 64; *McAleer v. Farnell*, 2009 NSCA 14 at para. 12.

<sup>8</sup> Counsel’s written submissions, Appeal Book, pp. 251-252.

at a time when she was extremely vulnerable. He accepted Deborah's evidence that Paul had taken the amount of \$159,319.66 from their mother's various accounts to fund his lifestyle while at the same time leaving bills for her care unpaid.

[28] In submissions to the judge, counsel referred to the allegations against Paul and cited the principles in *Whiten v. Pilot Insurance Co.*<sup>9</sup> as a basis to award punitive damages for conduct found to be "harsh, vindictive, reprehensible and malicious". Punitive damages were justified to effect "retribution, denunciation, and deterrence". Central to the assessment was the principle of proportionality, clearly before the judge for consideration, along with authorities supporting an award of punitive damages for breach of fiduciary duty.

[29] The decision in *Walling* was relied on by Deborah for the quantum of damages sought in the amount of \$131,000. In oral submissions on this point, counsel reiterated:

The second part is punitive damages, which Deborah is asking for a hundred and thirty-one thousand dollars (\$131,000) in punitive damages, and there is a case to support a figure in that amount for breach of fiduciary duty, which in these circumstances were aggravated severely by the incapacity and vulnerability of Frances Walker when she was alive and the effect that the theft had on her. And one serious example would be her nursing home fees were set up by automatic payment and returned for insufficient funds because of the money that had been taken from her account by Paul.

[30] Justice Rosinski recognized Deborah was in attendance on the motion and inquired whether she wished to add anything to counsel's submission. She responded:

... I think its important for the Court to understand that my mother was very vulnerable, had serious mental health issues, my brother was certainly very much aware of it. He was very well education [*sic*] with the law, and he knowingly took advantage of the situation and as a result my mother did not receive the care and comfort she deserved in her last years. She was in a very terrible place that she wanted – didn't want to be there but believed that she couldn't afford anything and that she had nothing, because my brother was spending it. She had very little financial knowledge and it was very difficult to see her in such a terrible state.

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<sup>9</sup> 2002 SCC 18 [*Whiten*].

[31] Following immediately after the evidence and submissions, the judge’s reasons struck a cautious note, appropriate in Paul’s absence. He found Paul had “exploited his mother”, and “not only did he actually exploit her financially but also he neglected her ... although the degree to which is very difficult to ascertain without, you know, more precise evidence”.

[32] The judge went on to award punitive damages and determine the amount:

... I think this is, **according to the case law that’s cited by Mr. Norman in his brief** – each situation is unique, of course, nothing can really erase for Deborah Walker and her siblings the egregious conduct and breach of fiduciary duty by Mr. Paul Walker here. However, it is appropriate, or it would be, to order some level of punitive damages as this is an extremely gross and repugnant breach of fiduciary duty. Sometimes these take place in the nature of corporations and so on, but this is of a much more personal nature to a very vulnerable person. Somehow Mr. Paul Walker, his psychological makeup or what you have permitted him to somehow overlook and give no regard to his mother, it would appear, and his siblings collaterally. So, I do agree that an amount of punitive damages is appropriate here. I believe it should not be as high an amount as – and again these are just numbers, it doesn’t remedy the real harm done here and the hurt, but I do believe that thirty thousand dollars (\$30,000) punitive damages is appropriate here, and I will order that. ...<sup>10</sup>

(Emphasis added)

[33] The judge’s reasons display his understanding of the evidence and Deborah’s position in seeking punitive damages. His findings reflect the analysis called for in *Whiten*<sup>11</sup> and reveal a basis for his decision not to award the amount of punitive damages sought. Key to the assessment of sufficiency is recognition that quantifying damages is a discretionary exercise guided by the evidence, the relevant principles, and the objectives of the award. It would have been helpful for the judge to have expanded his reasons for distinguishing this case from *Walling*. Nevertheless, I find the rationale for the award discernible when considered functionally and contextually, and I conclude the reasons are legally sufficient.

[34] I turn now to consider whether the judge erred in the quantum of the punitive damage award.

### *Issue Two – The Quantum of Punitive Damages*

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<sup>10</sup> Hearing transcript, Appeal Book at p. 282.

<sup>11</sup> 2002 SCC 18 at paras. 111-125.

[35] The main issue on this appeal is the quantum of punitive damages. On this point, the position of the appellant walks a fine line. She does not question the factual findings of the judge, nor his decision to award punitive damages. Her sole complaint is the quantum of the award is not “rationally connected to the purposes for which the damages are awarded”. Relying on the punitive damage award in *Walling*, she contends a much higher award is appropriate.

[36] An award of punitive damages may be reviewed for error in law or in the exercise of discretion. On this point, Deborah relies on the majority reasons in *Whiten* which delineated an “interventionist” and “supervisory” standard of review:

In *Hill, supra*, Cory J., while emphasizing the overriding obligation of rationality, also recognized that the jury must be given some leeway to do its job. The issue of punitive damages, after all, is a matter that has been confided in the first instance to their discretion. Thus, to be reversed, their award of punitive damages must be “so inordinately large as obviously to exceed the maximum limit of a reasonable range within which the jury may properly operate” (para. 159). Putting these two notions together, the test is whether a reasonable jury, properly instructed, could have concluded that an award in that amount, and no less, was rationally required to punish the defendant’s misconduct.

This test provides an appellate court with supervisory powers over punitive damages that are more interventionist than in the case of other jury awards of general damages ... In the case of punitive damages, the emphasis is on the court’s obligation to ensure that the award is the product of reason and rationality. The focus is on whether the court’s sense of reason is offended rather than on whether its conscience is shocked.<sup>12</sup>

(Emphasis added)

[37] *Whiten* was decided in the context of a \$1,000,000 punitive damage award. It responded to a concern about awards exceeding “the outer boundaries of a rational and measured response to the facts of the case”<sup>13</sup> and not being the product of reason and rationality.<sup>14</sup> The animating principle was that the quantum of the award be a rationally proportionate means to an end.<sup>15</sup> To assist in assessing proportionality, *Whiten* directed consideration of:

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<sup>12</sup> *Whiten* at paras. 107-108.

<sup>13</sup> *Whiten* at para. 76.

<sup>14</sup> *Whiten* at para. 108.

<sup>15</sup> *Whiten* at para. 111.

1. The blameworthiness of the defendant's conduct;
2. The vulnerability of the plaintiff;
3. The harm directed specifically at the plaintiff;
4. The need for deterrence;
5. Other penalties, both civil and criminal, which have been or are likely to be imposed on the defendant for the same misconduct; and
6. The advantage wrongfully gained by the defendant from the misconduct.<sup>16</sup>

[38] As noted in Deborah's factum, the *Whiten* standard of review was applied by this Court in *Kings Mutual Insurance Company v. Ackermann*.<sup>17</sup> However, that case involved an appeal from the decision to award punitive damages, not the quantum.

[39] Post-*Whiten*, the standard of review of punitive damage awards has been increasingly deferential. In *Richard v. Time Inc.*, the Supreme Court of Canada described it as follows:

188 This appeal highlights the problems trial judges face in calculating punitive damages. Although they have a discretion in this regard, they must exercise it judicially and must also, to the extent possible, comply with the practice established by the courts and consider all the specific circumstances of each case, bearing in mind the principles of deterrence, punishment and denunciation that underlie punitive damages.  
[...]

190 It should also be borne in mind that a trial court has latitude in determining the quantum of punitive damages, provided that the amount it awards remains within rational limits in light of the specific circumstances of the case before it (*Quebec (Public Curator) v. Syndicat national des employés de l'Hôpital St-Ferdinand*, at para 125; *Whiten v. Pilot Insurance Co.*, at para. 100). Appellate intervention will be warranted only where there has been an error of law or a

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<sup>16</sup> *Whiten* at paras. 111-26; *Luft v. Taylor, Zinkhofer v. Conway*, 2017 ABCA 228 at para. 58.

<sup>17</sup> 2010 NSCA 39, at para. 34. The quantum of the award of punitive damages was \$55,000.

wholly erroneous assessment of the quantum. An assessment will be wholly erroneous if it is established that the trial court clearly erred in exercising its discretion, that is, if the amount awarded was not rationally connected to the purposes being pursued in awarding punitive damages in the case before the court (*St-Ferdinand*, at para. 129; *Provigo Distribution inc. v. Supermarché A.R.G. inc.*, [1998] R.J.Q. 47 (C.A.)).<sup>18</sup>

(Empasis added)

[40] More recently, in *Bank of Montreal v. Marcotte*, the Supreme Court further refined the basis for intervention:

98 In *Cinar Corporation v. Robinson*, 2013 SCC 73, [2013] 3 S.C.R. 1168, this Court confirmed that there are only two grounds for an appellate court to interfere with a trial court’s assessment of punitive damages;

(1) if there is an error of law; or (2) if the amount is not rationally connected to the purposes for which the damages are awarded, namely prevention, deterrence (both specific and general), and denunciation ...<sup>19</sup>

[41] Deborah relied on the decision of this Court in *Industrial Alliance Insurance and Financial Services Inc. v. Brine*<sup>20</sup> a case where an award of punitive damages in the amount of \$500,000 was reduced on appeal as one that “exceeds the amount needed to rationally serve the purposes of prevention, deterrence and denunciation”.<sup>21</sup> On the issue of quantum, the Court began by providing guidance on the framework of the analysis:<sup>22</sup>

[217] The quantification of punitive damages is not a linear exercise. It is a contextual balance of the criteria that were discussed in *Whiten*. The quantum should stem from a principled analysis. The questions are: How would the award promote the objectives of punitive damages? What is the lowest award that would serve those objectives, because any higher award would be irrational? (paras. 70-71).

[218] The “governing rule for quantum is proportionality” (*Whiten*, para. 74) ...

<sup>18</sup> *Richard v. Time Inc.*, 2012 SCC 8 at paras. 188, 190 [*Richard*].

<sup>19</sup> 2014 SCC 55 at para. 98.

<sup>20</sup> 2015 NSCA 104 [*Industrial Alliance*].

<sup>21</sup> *Industrial Alliance* at para. 216.

<sup>22</sup> *Industrial Alliance* at paras. 217-18.

[42] Following a survey of existing punitive damage awards, the Court emphasized the primacy of relating the facts of the particular case to the objectives of the award:

[210] In *Whiten*, Justice Binnie said that a court should relate the facts of the particular case to the purposes of punitive damages, namely retribution or punishment, deterrence of the wrongdoer and others, and denunciation. He added (para. 71) that the court should “ask itself how, *in particular*, an award would further one or other of the objectives of the law, and what is the lowest award that would serve the purpose, i.e., because any higher award would be irrational.”<sup>23</sup>

(Emphasis in original quotation in *Whiten*)

[43] With this guidance, I return to the present case where Deborah complains the judge erred in the exercise of discretion in his award of punitive damages. When reviewing this allegation, I must be persuaded a clear error exists in the quantum of the award such that there is no rational connection between the amount and the purpose for which it is awarded.<sup>24</sup> This is a high bar for the appellant to clear.

[44] The appellant’s argument on this issue has two elements: (1) consideration of the *Whiten* factors; and (2) reliance on other punitive damage awards.

[45] On the first element, Deborah lists the considerations prescribed by *Whiten* and refers to the evidence and the findings made by the judge. She notes the judge’s findings that Paul’s misconduct was deliberate, over an extended period of time, knowing it was wrong to benefit in the circumstances, all of which drove the conclusion that his blameworthiness was high. Paul took great advantage of the situation and exploited his vulnerable mother while he derived considerable benefit. There were no other known penalties for Paul’s misconduct. At no point in this aspect of the argument did Deborah contend the judge misunderstood the evidence or applied the wrong principles. To the contrary, she relied on the uncontested evidence and the judge’s findings in support of her argument that “each factor weighs heavily in favour of a significant award of punitive damages”. In other words, although the judge’s discretion was based on the evidence, and considered relevant principles, the outcome of the exercise remains contentious.

[46] The rationale underlying Deborah’s dissatisfaction brings me to the second element of her argument. On this point, she submits a court “may consider

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<sup>23</sup> *Industrial Alliance* at para. 210.

<sup>24</sup> *Richard* at para. 190.

previous awards when assessing the quantum of punitive damages in a particular case”. She relies on this Court’s review of such awards in *Industrial Alliance*<sup>25</sup> and the subsequent decision of the Federal Court of Appeal in *Airbus Helicopters S.A.S. v. Bell Helicopter Textron Canada Limitée*.<sup>26</sup> While noting none of the cited cases involve breach of a fiduciary duty, Deborah nonetheless contends Paul’s conduct reflects a “much higher level of moral blameworthiness”. She concludes this part of her argument by citing *Walling*, the lone authority put before the judge, once again relying on it in support of her assertion on quantum.

[47] There are a number of issues with this aspect of Deborah’s argument. The first involves the clear guidance in the authorities that the focus remain on the particular circumstances of each case and whether the award of punitive damages rationally achieves its purpose. It is internal proportionality that governs the exercise of discretion. The award must reflect the specific defendant’s conduct and blameworthiness rather than any external benchmark.<sup>27</sup> Ultimately, “each case revolves around its own facts” and it is for the trial judge to “assess the evidence and determine its weight and effect”.<sup>28</sup> Other awards of punitive damages merely serve as “guideposts” in determining an appropriate award.<sup>29</sup>

[48] In the present case, there is no allegation the judge failed to consider the evidence or the submissions made by Deborah and her counsel. As noted, the judge’s brief decision referenced the evidence and record, and he made relevant findings:

- The level of exploitation by Paul of his mother “is clearly demonstrated by the affidavit” evidence.
- He “readily” concluded that the monies taken were not for the benefit of Paul’s mother.
- Paul’s mother had dementia and “she was extremely vulnerable”.
- Paul was living in his mother’s home “all expenses paid” with the knowledge of his siblings “in order that somebody of the four of them would be in Halifax to look after their mother”.

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<sup>25</sup> *Industrial Alliance* at paras. 201-09.

<sup>26</sup> 2019 FCA 29 at paras. 37-38.

<sup>27</sup> *Whiten* at para. 74.

<sup>28</sup> *Fidler v. Sun Life Assurance Co. of Canada*, 2006 SCC 30, at para. 72; *Industrial Alliance* at paras. 188-90.

<sup>29</sup> *Airbus* at para. 37.

- Paul took “great advantage of the situation and exploited his mother ... financially but also he neglected her”.
- It was difficult to assess how Paul treated his mother on a continuous basis.
- Paul took a total of \$159,319.66 from his mother over five and a half years and the amount taken with interest was awarded to her estate as compensatory damages for breach of his fiduciary duty. There was also an award of solicitor client costs and disbursements.
- Although each situation is unique, this case involved “egregious conduct” and “is an extremely gross and repugnant breach of fiduciary duty ... of a much more personal nature to a very vulnerable person”.
- An award of punitive damages was appropriate in the circumstances and “although it doesn’t remedy the real harm done here”, the amount of \$30,000 “is appropriate here”.
- The harm in this case was distinguished from the kind involving corporations.
- It was in the interests of justice that any unpaid judgment amount be deducted from any gift to Paul from his mother’s estate.

[49] Although the judge did not reference any particular decision in his reasons, his findings reflect appreciation of the governing principles. Having considered the evidence and made his findings, he was satisfied the amount of \$30,000 in punitive damages was an appropriate award. Although he did not distinguish *Walling*, his view was clear. He did not agree the punitive damage award should be as high as the amount sought.

[50] The overwhelming frailty with Deborah’s position on this point is the failure to fully brief the judge, or this Court, on the range of awards for punitive damages in similar cases. In both her written and oral submission on the motion, she relied only on *Walling*. On appeal, she argued the judge erred in not awarding punitive damages consistent with *Walling*. When one considers Paul’s lack of participation in the proceeding, there is a clear obligation on Deborah to fully canvas the range of punitive damage awards in like cases. Unfortunately, this was not done and it

fell to this Court to identify the relevant authorities. Having done so, it is abundantly clear Deborah’s position on this appeal is unsupportable.

[51] A review of punitive damage awards for breach of fiduciary duty reveals a broad range of outcomes driven by a similarly broad range of circumstances. The decision in *Walling* is the highest award at \$100,000. In that case, the judge found the trustee had been derelict in his duty to the estate and his nephews by squandering their entire inheritance, funds designated to pay for their post-secondary education. The defendant’s conduct was characterized as “outrageous” with the judge concluding “it is hard to think of a more egregious example of breach of fiduciary duty”.<sup>30</sup> Punitive damages were necessary to deter the defendant and others from similar conduct and underscore the need to respect court orders and the rule of law.<sup>31</sup>

[52] In the more recent decision of *Queripel v. Shaddock*, an estate trustee breached her fiduciary duty by failing to account or communicate with beneficiaries over a twenty year period resulting in an award of \$50,000 in punitive damages.<sup>32</sup> In particular, the executor lived rent free in a condominium owned by the estate while failing to pay the fees, assessments and taxes resulting in legal action. The beneficiaries were vulnerable minors and the failure of the trustee to abide by her duties and responsibilities was aggravated by a lack of disclosure or accounting. The court found the conduct “egregious, abhorrent, and dismissive of court authority”.<sup>33</sup> The beneficiaries cited *Walling* and sought \$100,000 in punitive damages. The court distinguished *Walling* by noting that the primary asset of the estate still existed and the sale proceeds were still available for distribution to the beneficiaries. The quantum of the award was driven by the need for specific and general deterrence.<sup>34</sup>

[53] In *Kolic v. Kolic*, a decision with much similarity to the present case, the court awarded the amount of \$10,000 in punitive damages.<sup>35</sup> In that case, over a nine year period, the defendant failed to act properly under the authority of her mother’s power of attorney. She lived in her mother’s home and misappropriated her mother’s money without the knowledge of her siblings. After her mother’s

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<sup>30</sup> *Walling* at para. 28.

<sup>31</sup> *Walling* at paras. 39-40.

<sup>32</sup> *Queripel v. Shaddock*, 2023 ONSC 3114 [*Queripel*].

<sup>33</sup> *Queripel* at para. 44.

<sup>34</sup> *Queripel* at para. 41.

<sup>35</sup> *Kolic v. Kolic*, 2019 BCSC 1463 at paras. 124-25 [*Kolic*].

death, she sought to conceal her conduct from her siblings and court orders were required to obtain the relevant records. The defendant frustrated the court process with her efforts to avoid trial.<sup>36</sup> In awarding punitive damages, the court cited *Whiten and Zielinski v. Brennan*.<sup>37</sup>

[54] In *Zielinski*, the court found a breach of trust when the defendant placed his interests in the estate ahead of the remaining beneficiaries who were his siblings. The defendant failed to adhere to the wishes of the testator and instead conveyed property to himself and encumbered it with debt that the estate did not owe. The defendant was ordered to pay \$15,000 in punitive damages.<sup>38</sup>

[55] No punitive damages were awarded in *Spisak v. Spisak*.<sup>39</sup> In that case, the daughter of the deceased was the sole executor and trustee of her father's estate which was to be divided equally with her brother. Over a period of fifteen months, the defendant withdrew all the funds in the estate for her own benefit, ultimately advising her brother what she had done. The court awarded damages for breach of fiduciary duty but declined to award punitive damages, citing the defendant's mental health and addiction issues. Both *Queripel* and *Walling* were distinguished given: (1) the defendant's addiction issues; (2) the relatively brief time period of the misconduct; and (3) the absence of any particular vulnerability on the brother's part.

[56] This review of existing authority underscores the discretionary nature of any award of punitive damages. In quantifying punitive damages, the exercise must reflect a rational and proportionate means to achieve the objectives of punishment, deterrence and denunciation. In this context, other punitive damage awards serve as no more than guidance against which the rationality of any award can be assessed. The overriding consideration is whether the award is a proportional response to the circumstances of the case.

[57] I am not persuaded the judge's failure to award punitive damages consistent with the award in *Walling* demonstrates error. With the full spectrum of authority available to review, the award in *Walling* falls at the top end of punitive damage awards for breach of fiduciary duty. While some similarities exist, there are also differences apparent in the record that support a more restrained award.

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<sup>36</sup> *Kolic*, at para. 123.

<sup>37</sup> *Zielinski v. Brennan*, [2002] O.J. No. 2884, 4 E.T.R. (2d) 310 (ONSC) [*Zielinski*].

<sup>38</sup> *Zielinski* at para. 28.

<sup>39</sup> *Spisak v. Spisak*, 2023 ONSC 4726.

[58] By way of example, the duration of misconduct in the present case is much shorter than in *Walling* and the main asset of the estate remains available for distribution to the beneficiaries. The judge quantified the amount taken and awarded compensatory damages, interest and costs for Paul's breach of fiduciary duty. He further provided for any outstanding judgment to be paid out of Paul's share of his mother's estate. This provides the possibility that Paul will receive little or nothing from his mother's estate and his siblings will recover what was taken. These considerations diminish the objective of punishment relative to those existing in *Walling*. However, the nature of the misconduct, including the considerable enrichment to Paul to the detriment of his mother's care in her final years, called out for an award that would deter Paul and others, as well as denounce his highly repugnant behaviour.

[59] The judge awarded the amount of \$30,000 in punitive damages in addition to the other relief granted. In my view, the amount of the award, when considered in the context of the judge's findings and the governing principles, does not signal a clear error or wholly erroneous assessment. It was an award rationally connected to the purpose of punitive damages and properly within the exercise of judge's discretion.

[60] Before concluding my reasons, I observe that the appellant's submissions before the judge and this Court did not discharge an important requirement, especially in circumstances where there is no meaningful adversary. There must be a complete, accurate, and balanced briefing presented to the Court – anything less will be contrary to the interests of justice and may well run afoul of other important duties and obligations.

### **Disposition**

[61] I would dismiss the appeal.

[62] On the matter of costs, I would decline any award. Although Deborah was unsuccessful and there were failures in the conduct of the appeal, in my view it is inappropriate for Paul to receive any award of costs in the circumstances of this case.

Gogan, J.A.

Concurred in:

Bourgeois, J.A.

Scanlan, J.A.