IN THE CIRCUIT COURT OF THE 17TH JUDICIAL CIRCUIT, IN AND FOR BROWARD COUNTY, FLORIDA

PROBATE DIVISION

CASE NO.: PR-C-95-8053 Div. 61

In re: Guardianship of Cristal Marie McBean,

Ward

MONARCHCARE, INC., as the Plenary Guardian of the Property of Cristal Marie McBean, Ward,

Petitioner,

vs.

THE NORTHERN TRUST COMPANY,

Respondent.
_____/

PETITIONER'S MOTION FOR LEAVE TO AMEND ITS PETITION FOR SURCHARGE TO ASSERT A CLAIM FOR PUNITIVE DAMAGES AGAINST NORTHERN TRUST AND MEMORANDUM AND PROFFER IN SUPPORT

Petitioner MONARCHCARE, INC. ("MonarchCare"), as the Plenary Guardian of the Property of Cristal Marie McBean, Ward, moves this Court pursuant to Fla.Stat. §768.72 and Fla.R.Civ.P. 1.190(f) for leave to amend its petition for surcharge to assert a claim for punitive damages. The basis for this motion is that discovery has demonstrated that the actions of Respondent, THE NORTHERN TRUST COMPANY, ("Northern Trust") in squandering $4,600,000 of Cristal McBean's guardianship assets go well beyond a simple one-time, negligent breach of fiduciary duty. Instead, they represent conduct that was so wanting in care that it constituted conscious disregard or indifference to the rights of the Ward – one of the bases for a claim for punitive damages under Fla.Stat. §768.72(2)(b).

SUMMARY

In February of 1996 Northern Trust was appointed guardian of the property for Cristal McBean, a severely disabled child. It was discharged in August of 2012. Over the course of those 15 years, Northern Trust paid out approximately $4,800,000 of Cristal's money to health care providers attending Cristal and for related medical services and equipment, of which approximately $4,600,000 would have been paid by Medicaid had Northern Trust set up a special needs trust for her and qualified her for Medicaid. The conscious decision by Northern Trust to pay out those vast sums without making any attempt to setup a special needs trust and qualify Cristal for Medicaid benefits devastated the guardianship's assets. At the time Northern Trust was discharged the assets in the guardianship account had dwindled to under $200,000 at a time when Cristal's monthly medical expenses averaged $37,017. Had Northern Trust not been removed as guardian the guardianship account would have run dry and Cristal's health would have been greatly jeopardized.

Fortunately, after Northern Trust was removed, Cristal's new guardian (Coral Gables Trust) petitioned the Court for approval of a special needs trust and this Court approved the same, thereby rescuing the guardianship from the financial abyss created by Northern Trust's reckless incompetence. Unfortunately, by that time, approximately $4,600,000 had been recklessly paid out by Northern Trust without any regard for the best interests of Cristal McBean. Making matters worse, the guardianship lost nearly $3,000,000 that would have been earned on Cristal's money had it stayed in the bank and been prudently invested. The total compensatory damages in this case are approximately $7,600,000.

THE FACTS

Northern Trust never should have become the guardian of Cristal's property. The trust officers at Northern Trust assigned to handle the guardianship had little or no experience managing the guardianship of a severely disabled child like Cristal. They had virtually no expertise in special needs trusts and no experience in qualifying its clients for government benefits. Northern Trust disclosed none of this to Cristal's parents before the decision was made to hire them.

Northern Trust markets itself as money managers for "the affluent." Its promotional materials include statements describing it as "the nation's largest personal trust company and a leading provider of wealth management services for affluent individuals and families." (Exhibit (1)). Cristal McBean and her parents were not affluent. They were poor and financially unsophisticated. They needed a guardian who understood their needs and the public benefits available to them. While Northern Trust may competently manage the affairs of "the affluent," it did not have a clue how to deal with the Cristal McBeans of the world.

It might have been acceptable to remain Cristal's guardian, notwithstanding its lack of experience and competence, if Northern Trust had hired a trust officer or someone competent to guide it in matters of special needs trusts and government benefits. The only unacceptable course, was to remain as guardian and **NOT** hire someone with the requisite expertise in these matters. Yet that is exactly what Northern Trust chose to do.

Attached as Exhibit (2), is the affidavit of Steven D. Brooks. Mr. Brooks is in an especially good position to advise a jury and this Court on how an institution like Northern Trust should manage a guardianship such as Cristal's. Mr. Brooks has been a Special Agent with the criminal division of the IRS, practiced law in Pennsylvania, has been a speaker at national

meetings on issues of special needs trusts and most recently, served as Senior Fiduciary Officer of BNY Mellon's Florida offices. Of special relevance to this case, Mr. Brooks was the chair of BNY Mellon's trust administration committee and drafted the policies for that institution's special needs trust administration committee.

Mr. Brooks' affidavit explains that as Cristal's guardian it was critically important that Northern Trust have the necessary expertise in the areas of special needs trusts and government benefits. Northern Trust apparently agrees. Its nationwide advertising campaign is based on the slogan "Expertise Matters". A representative example of its marketing material is attached as Exhibit (3). Against this background, Northern Trust's decision to continue, for fifteen (15) years, as Cristal's guardian with full knowledge of its utter ***lack*** of expertise in this area was reckless, grossly negligent and in wanton disregard of Cristal's best financial interest.

Joan Crain was the first trust officer Northern Trust assigned to be in charge of Cristal's guardianship. Ms. Crain admitted in her deposition that she had virtually no experience in special needs trusts or in managing the guardianships of severely handicapped people. Incredibly, she testified that she did not know whether, before becoming the trust officer for Cristal's guardianship, she had ever previously been the trust officer for a guardianship of a severely disabled person (Exhibit (4), Crain deposition at 86-88). Ms. Crain had, however, come into contact with attorney Margrit Stolz Bernstein, a special needs trust expert and the two exchanged correspondence concerning Cristal. Mrs. Bernstein explained the benefits of a special needs trust for a ward like Cristal in her letter to Northern Trust of March 21, 1997. Exhibit (5). Thus, even though Ms. Crain knew virtually nothing about special needs trusts, as of March 13, 1997, she knew from her communication with Mrs. Bernstein, that a special needs trust was in Cristal's best interests. Had Northern Trust simply followed the recommendation of the special

needs expert it had chosen to consult, Cristal's financial interest would have been protected. Yet Northern Trust totally failed to heed her common–sense, logical and easy-to-understand recommendations.

NORTHERN TRUST DID NOT UNDERSTAND THAT IT WAS RESPONSIBLE FOR SAFEGUARDING CRISTAL'S FINANCIAL INTEREST

Northern Trust, as guardian of the property, had the job of "protecting and preserving" Cristal's assets and safeguarding her financial interests. Fla.Stat. §744.361(6)(a). This is a basic tenet of guardianship law and the trust officers at Northern Trust knew or should have known that. Stunningly, trust officer Joan Crain did not know that. She testified that she did not know if anyone at Northern Trust had the responsibility to protect Cristal's financial interest:

> Q: During the time the guardianship was in place, did anybody at Northern, in your view, have the responsibility of safeguarding her financial interests, that is, the funds in the guardianship?
>
> A: I don't know.
> (Exhibit (6), Crain deposition at 20-21).

How can Northern Trust place someone in charge of Cristal's guardianship who does not know if she – or anyone at Northern Trust - should be safeguarding Cristal's financial interests when the law requires it to do so? That is the primary reason for establishing the guardianship in the first place. For Northern Trust to place a trust officer in charge of Cristal's guardianship who does not understand that it was her job to safeguard Cristal's interests is reckless in the extreme. It is also gross ignorance, and as set forth below, "gross ignorance" will support an award of punitive damages under Florida law.

In addition to Mr. Brooks, MonarchCare has retained Scott M. Solkoff, Esquire as an expert witness. Like Mr. Brooks, Mr. Solkoff is specially qualified to discuss issues concerning special needs trusts and fiduciary duties. He is board-certified in elder law and is the only such attorney to be named a Fellow of the American College of Trust and Estate Counsel. He is co-author of the leading elder law textbook in Florida. He has prepared in excess of 100 special needs trusts and has served as counsel to many guardians. Mr. Solkoff explains in his affidavit why it was imperative for Northern Trust to analyze and understand the benefits of a special needs trust for Cristal McBean and to explain those benefits to Cristal's parents and the guardianship court. Mr. Solkoff's affidavit is attached as Exhibit (7).

Before it could explain the benefits of a special needs trust, Northern Trust had to analyze and understand the benefits for itself. This is one of the most important things that the trust officer had to do for Cristal. Yet over the three years Joan Crain presided over Cristal's guardianship, we have now learned that she never once analyzed the financial savings that a special needs trust would have provided.

> Q: Did you understand, based upon your training and experience during the 1995 to 2000 time period, that a Special Needs Trust, if established, could, under certain situations, save a guardianship such as Cristal's hundreds of thousands, if not millions of dollars?
>
> A. I did not understand the dollar amounts involved. (Exhibit (8), Crain deposition at 52).

Not only did Ms. Crain have no idea of the amounts a special needs trust could have saved the guardianship, she also did not know if Cristal's parents should have been told whether a special needs trust could have saved the guardianship as much as $500,000 to $750,000 per year. (Exhibit (9), Crain deposition at 62).

Mr. Brooks and Mr. Solkoff attest to what should have been obvious to Northern Trust: Cristal's parents had the right to know of the savings that a special needs trust would have provided and there was absolutely no excuse for (1) Northern Trust's failure to analyze the benefits, (2) communicate them to Cristal's parents, and (3) for the trust officer assigned to Cristal's guardianship not to understand these basic concepts. These failures of Northern Trust during Joan Crain's three year tenure as the trust officer in charge of Cristal's guardianship represent recklessness, gross ignorance and gross negligence sufficient to support an award of punitive damages under Florida law. (Exhibits (2) and (7)).

CRISTAL MCBEAN FARES NO BETTER UNDER THE GUARDIANSHIP'S NEW MANAGEMENT

Joan Crain left Northern Trust in the year 2000 and was replaced by Charles Zalakar. Unfortunately for Cristal, under Mr. Zalakar's management, things went from bad to worse.

Mr. Zalakar, like Joan Crain, had absolutely no experience being the administrator of a guardianship of someone physically and mentally disabled. (Exhibit (10), Zalakar deposition at 53-54).

Cristal's parents did not know about Mr. Zalakar's complete lack of expertise in this area because neither he nor anyone at Northern Trust made this important disclosure. Incredibly, Mr. Zalakar testified that Cristal's parents had no right to know of his lack of experience in handling guardianships of people with disabilities – a mind-boggling attitude for a fiduciary. (Exhibit (11), Zalakar deposition at 95-96).

Mr. Zalakar, unlike his predecessor, at least understood that Northern Trust owed the highest duty of care to protect Cristal's financial interest. (Exhibit (12), Zalakar deposition at 62-63). He was so lacking in training, experience and competence, however, that he did not

know whether he, as the trust officer and lead fiduciary in charge of the guardianship, could retain counsel to set up a special needs trust (Exhibit (13), Zalakar deposition at 89).

Discovery has now confirmed what MonarchCare has suspected all along: notwithstanding the critical importance of a special needs trust to Cristal's financial well-being, from 2001-2010 Northern Trust never attempted to analyze whether a special needs trust was in Cristal's best interest (Exhibit (14), Zalakar deposition at 214). Over that time period Cristal's monthly medical expenses ranged from $21,178 to $37,017. Mr. Zalakar had no idea whether a special needs trust would have saved the guardianship 5% or 95% of those amounts (Exhibit (15), Zalakar deposition at 151-152).

Spending almost a decade as the trust officer on Cristal's guardianship and (1) not knowing the potential savings to the guardianship of a special needs trust, (2) not knowing whether he, as the trust officer, could set up a special needs trust, and (3) believing it was acceptable not to disclose his lack of expertise to Cristal's parents (or the Court) are all examples of "gross ignorance," "want of care," "recklessness," and indifference to Cristal's rights – the indicia of "gross negligence." But perhaps the most extraordinary view of Mr. Zalakar on the issue of setting up a special needs trust was articulated in his response to the question of who had the duty to decide whether a special needs trust should be set up for Cristal. His answer:

> It would be anybody other than Northern Trust....
> [Northern] would not have a role in making that determination.
> (Exhibit (16), Zalakar deposition at 205-206, emphasis added).

That statement strikes at the heart of this case and demonstrates the utter incompetence of Northern Trust in protecting the assets of a disabled child. As explained by Mssrs. Brooks and Solkoff, it is absolutely the duty of the guardian of the property to set up the special needs trust and petition the Court for approval of the trust and Fla.Stat. §744.361(6)(a) places that burden

squarely on them. Once Northern Trust was removed as guardian, the successor guardian, Coral Gables Trust, understood that and petitioned the Court for approval of the special needs trust (as it should have) and this Court granted the petition.

Standards for managing guardianships have been established by the National Guardianship Association and have been in effect for many years. Two of those National Standards have special application for this case. Standards 18(V) and 18(IX), attached as Exhibit (17), provide as follows:

> V. The guardian shall obtain all public insurance benefits for which the person is eligible.
>
> IX. The guardian shall oversee the disposition of the person's assets to qualify the person for any public benefits program.

While Northern Trust has made every effort to avoid the application of these standards in this case, Burl George, the former guardianship attorney for Northern Trust in the Cristal McBean matter from 1996 to 2000, agreed that these standards apply to guardians of the property.

> Q Let me ask you: Do you agree, the guardian of the property has a responsibility to obtain all public and insurance benefits for which a person is eligible?
>
> A. Yeah.
>
> Q And let me ask, do you believe the guardian of the property has a responsibility to oversee the disposition of a person's assets to qualify the person for any public benefit programs?
>
> A. Yes.
> (Exhibit (18), George deposition at 104-105).

In yet another example of the inexperience and incompetence of Northern Trust in this matter, trust officer Joan Crain testified that she had never even heard of the National Guardianship Association.

> Q: Do you know what the National Guardianship Association is?
>
> A: No.
> (Exhibit (19), Crain deposition at 134).

When asked whether it was Northern Trust's responsibility to qualify Cristal for those benefits her response was:

> A: I don't know.
> (Exhibit (20), Crain deposition at 133).

And this was the person hand-picked by Northern Trust to manage the guardianship for Cristal. Even the lawyer, Burl George knew that Northern Trust had the duty to qualify Cristal for Medicaid benefits yet the Northern Trust officers never got it done.

NORTHERN TRUSTS FAILURE TO SET UP A SPECIAL NEEDS TRUST FOR CRYSTAL WAS "APPALLING"

It is not just MonarchCare's experts who find Northern Trust's failure to obtain government benefits and create a special needs trust appalling. Others involved with Cristal reached the same conclusion, including attorney Maria Consuegra, who is an expert in this area and was asked by Stephen Taylor, Esquire to determine what government benefits were available to Cristal when it became apparent that the guardianship's money was running out. Northern Trust took her deposition in this case and she testified as follows:

Q: Were you surprised when you became involved that a –that government services were not already in place for this child?

A: I was appalled more than surprised because I could not believe that private funds were being used to pay for benefits that could be paid by governmental entities and that a special needs trust had not been set up.

* * *

Q: You mentioned you were appalled. Why were you appalled when you became involved that the government benefits weren't in place?

* * *

A: The reason I was appalled is because the guardian of the property was an entity, Northern Trust Bank, and I – you know, banks have a duty to preserve the monies of the individuals that entrust them with those monies and if those services could be paid by another payor rather than deplete the funds of the individual I can't use any other word than being appalled that that had not happened.
(Exhibit (21), Consuegra deposition at 78-80).

The opinions of Ms. Consuegra, Mssrs. Brooks and Solkoff are completely consistent. Northern Trust's gross inattention, gross ignorance and reckless handling of Cristal's guardianship was, indeed, appalling and sufficient to permit a jury to consider punitive damages.

NORTHERN TRUST'S DEFENSE – I.E., THE PARENTS WOULD NOT LET US SET UP A SPECIAL NEEDS TRUST – IS BOGUS

In argument before this Court and in pleadings filed in this case, Northern Trust says the reason it did not set up a special needs trust was because the parents were "violently opposed" to doing so. Now that depositions of Northern Trust's personnel have been taken, however, a

completely different picture emerges and the baselessness of Northern Trust's claims have been exposed.

Joan Crain was asked about this very topic:

> Q: You don't recall the parents ***ever*** telling you directly that they opposed the special needs trust, am I correct in that?
>
> A. You're correct.
> (Exhibit (22), Crain deposition at 56-57, emphasis added).

And in roughly 15,000 pages of documents produced by Northern Trust in this case there is not a single letter from Cristal's parents, nor any motions or memoranda filed with the Court demonstrating opposition by the parents to a special needs trust.

Mr. Zalakar's sworn testimony does not support Northern Trust's defense either:

> Q: At any point during ***the entire time*** that you were the trust officer on this guardianship did Glenford McBean or Tangenika Edwards tell you that they opposed a special needs trust being established for their daughter?
>
> A: No.
> (Exhibit (23), Zalakar deposition at 210-211, emphasis added).

Not only did Cristal's parents not voice any opposition to a special needs trust during his almost decade long term as trust officer, Mr. Zalakar never even discussed a special needs trust with them:

> Q: Did you, yourself ever talk to Mr. McBean or Miss. Edwards about a special needs trust?
>
> A: No, I did not.
> Exhibit (24), Zalakar deposition at 110).

What does Northern Trust rely upon for its "blame the parents" defense? A report written by Joan Crain in which Cristal's mother allegedly stated that she "violently opposes" the use of Medicaid. That memo is attached as Exhibit (25). Cristal's mother, Tanganika Edwards, denies the conversation ever took place. In addition, the memo is perhaps most remarkable for what it does not say. First, it does not even remotely suggest that the benefits of a special needs trust were explained to Cristal's mother. Second, no mention is made of any attempt to consult Cristal's father, who has been the primary care giver for Cristal for the last 15 years. Third, there is no reference to Cristal's mother's opposition to a special needs trust itself, nor to the savings of the millions of dollars that would have been realized had it been established.

This one memo forms the entire basis for Northern Trust's defense to this case. Both parents deny they were ever violently opposed to Medicaid. More to the point, however, Cristal's parents' attitudes about Medicaid should have had absolutely no bearing on the special needs trust issue. As explained by Mssrs. Brooks and Solkoff, a special needs trust needed to be established to preserve the funds in the guardianship and it was Northern Trust's legal duty as guardian to set it up whether Cristal's parents liked it or not. (Exhibits (2) and (7)). Without it, millions of dollars of Cristal's money would needlessly be spent on medical expenses and the guardianship account would eventually be bankrupted.

If the parents opposed a special needs trust because of feelings about Medicaid or for any other reason, it was incumbent upon Northern Trust to advocate for it and to petition the Court for approval of it despite their opposition. Opposition by the parents (even if it existed) would have resulted in a clear conflict between Cristal and her parents. As explained by Mssrs. Brooks and Solkoff, if the parents opposed the special needs trust a simple motion to establish a special needs trust should have been filed with the court.

Northern Trust never filed such a motion. The reasons are now obvious. It had not done its homework and did not understand the critical importance a special needs trust had to Cristal. Thus, it did not communicate the importance to Cristal's parents and therefore Cristal's parents never made an informed (or for that matter uninformed) decision to reject a special needs trust.

In a smoking gun memo MonarchCare discovered among the 15,000 documents produced by Northern Trust in this case, trust officer Joan Crain reported on April 24, 1997 that she was investigating special needs trusts. In that memo she stated that the only factor that will be used to decide whether to proceed with a special needs trust or not, was whether it made economic sense to do it:

> We will then proceed or not proceed, depending on the cost-benefit outlook.
> (Exhibit (26), emphasis added).

It could not be any simpler than that: "the cost-benefit outlook." That criteria could not have made the decision any more obvious. The cost would have been a few thousand dollars in legal fees to set it up. The benefit was the preservation of $4,600,000 plus expected interest on that money of another $3,000,000 for a total benefit of $7,600,000. Absolutely no one could have concluded otherwise: a special needs trust was critical to the preservation of Cristal's money and anyone who looked at the "cost benefit outlook" would have seen that.

We now know, however, based on the unequivocal and uncontradicted testimony of Northern Trust's two trust officers in charge of the guardianship, that the cost-benefit analysis was never done. As a result, the trust officers did not understand that the guardianship would save $4,600,000 over 15 years by the use of a special needs trust. It was Northern Trust's gross ignorance of the great benefits of special needs trusts, rather than the imaginary opposition of

Cristal's parents, that explains why Northern Trust dropped the ball on pursuing this important protection for Cristal.

There is no question that a cost-benefit analysis needed to be done. The memo from Joan Crain confirms that. Northern Trust had a duty to not only do the cost-benefit analysis but to thoroughly explain the cost-benefit analysis to Cristal's parents and educate them about the great benefit and critical importance of special needs trusts to a child like Cristal. There is no question that if the cost-benefit had been done and the results explained to Cristal's parents, they would have embraced a special needs trust and authorized its creation. How do we know that? Because when Glenford McBean was finally educated about the benefits of a special needs trust in January of 2011, he approved it without hesitation and this Court authorized establishment of the same.

As far back as 1997, Northern Trust knew that the guardianship funds might be exhausted during Cristal's lifetime. In her letter to Margrit Bernstein, trust officer Joan Crain acknowledged as much:

> Due to the fact that the doctor can not determine with any degree of accuracy the life expectancy of this child, we are aware of the possibility that given her high level of medical expenses, her resources could be exhausted during her lifetime. This is our motivation for exploring the Special Needs Trust.
> (Exhibit 27, emphasis added).

Knowing the guardianship funds might not be sufficient to cover Cristal's medical expenses and having been told that a special needs trust would likely avoid that catastrophe, Northern Trust's fifteen year failure to establish a special needs trust and qualify her for public benefits, was in reckless disregard for Cristal's financial and physical well-being and was a product of its gross ignorance, gross negligence and recklessness.

LAW GOVERNING PUNITIVE DAMAGES

Amendments to assert claims for punitive damages are governed by Fla.Stat. §768.72, which is attached as Exhibit (28). Procedurally, the statute requires a "reasonable showing," through proffered or record evidence, of a "reasonable basis" for recovery of such damages. An evidentiary hearing is neither contemplated nor required, see, e.g., Surrey Place of Ocala v. Goodwin, 861 So. 2d 1291 (Fla. 5th DCA 2004); Strasser v. Yalamanchi, 677 So. 2d 22, 23 (Fla. 4th DCA 1996), and the proffered or record evidence must be viewed in the light most favorable to the movant. See, e.g., Wayne Frier Home Center of Pensacola, Inc. v. Cadlerock Joint Venture, L.P., 16 So. 3d 1006, 1009 (Fla. 1st DCA 2009); Estate of Williams ex rel. Williams v. Tandem Health Care of Florida, Inc., 899 So. 2d 369, 376 (Fla. 1st DCA 2005).

The applicable basis for recovery of punitive damages here is gross negligence, defined in Fla.Stat. 768.72 (2)(b) as conduct so "reckless or wanting in care that it constituted a conscious disregard or indifference to the ... rights of persons exposed to such conduct," here, obviously, the ward. This is the same definition that is now part of the Florida Standard Jury Instruction on punitive damages. Fla. Std. Jury Instr. (Civ.) 503.1(b)(1). The required analysis is thus one of applying the statutory definition to the facts of a given case, or, as the court in Estate of Williams put it, "the trial court must decide, after submission of the evidence, whether there is a legal basis for the recovery of punitive damages shown by any interpretation of the evidence favorable to the plaintiff." 899 So. 2d at 376.

One source of the codified definition of punitive damages is the Florida Supreme Court's decision in White Constr. Co. v. Dupont, 455 So. 2d 1026 (Fla.1984), where the Court equated the level of negligence necessary to support an award of punitive damages with that necessary to sustain a conviction for manslaughter:

> There is a real affinity between the character (or kind or degree) of negligence necessary to recover punitive damages or to sustain or warrant a conviction of manslaughter... The character of negligence necessary to sustain an award of punitive damages must be of a "gross or flagrant character... which shows wantonness or recklessness". Id. at 1028-29.

One type of negligence sufficiently culpable to sustain a manslaughter conviction is "gross ignorance." The rule was first stated in Florida in Hampton v. State, 50 Fla. 55, 39 So. 421 (1905), where the Florida Supreme Court, in reviewing the manslaughter conviction of a physician, held that "criminal negligence exists where a physician or surgeon... exhibits gross lack of competency, or gross inattention, [which] this may arise from his gross ignorance of the science of medicine...." 39 So. at 424. The rule has been followed since. See, e.g., State v. Heines, 144 Fla. 272, 197 So. 787 (1940) (quashing of manslaughter information reversed because criminal negligence on part of chiropractor "might spring from lack of competency, inattention or indifference born of ignorance."); Gian-Cursio v. State, 180 So. 2d 396, 399 (Fla. 3d DCA 1965) ("criminal negligence exists where the physician or surgeon...exhibits gross lack of competency... that may arise from his gross ignorance....").

Quite apart from proceeding in the face of its own gross ignorance or incompetence, the actions of Northern Trust meet whichever test one chooses to apply to this case. The specific acts reflecting the indicia of gross negligence, i.e., want of care, recklessness, conscious disregard or indifference to Cristal's rights, include:

> (1) Assigning the guardianship of a severely disabled child to trust officers with absolutely no meaningful experience dealing with disabled persons;
>
> (2) Failing to have any policies and procedures in place to educate trust officers placed in charge of guardianships of

disabled people about the special needs trust and the availability of government benefit;

(3) Failing to disclose to Cristal's parents, the Court and the others that the trust officers assigned by Northern Trust had no meaningful experience dealing with disabled persons;

(4) Making no attempt whatsoever to qualify Cristal for government benefits in violation of National Guardianship Association Standards 18(V) and 18(IX);

(5) Making no attempt to understand or analyze the government benefits to which Cristal was entitled;

(6) Making no attempt whatsoever to understand the financial savings that could be realized by the guardianship through the establishment of a special needs trust;

(7) Failing to educate and communicate the importance and benefits of a special needs trust to Cristal's parents and the Guardianship Court;

(8) Month after month, year after year for fifteen (15) years, mindlessly and needlessly paying out a total of more than $4,600,000 related to Cristal's medical needs;

(9) Failing to recognize that the purported opposition by one parent is not a sufficient reason not to pursue a special needs trust;

(10) Failing to advise the Guardianship Court that a special needs trust was in Cristal's best interest and seeking Court approval of the same; and

(11) Having no monitoring or audit procedure in place to insure that the guardianship was being managed in a sound and prudent manner.

If these acts occurred over a fourteen week or even a fourteen month period, they might be fairly described as a simple breach of fiduciary duty. When these acts occur over a fifteen (15) year time frame, in the face of multiple professional warnings, they constitute a course of

conduct that can only be described as reckless and grossly negligent as attested to in the affidavits of Steven Brooks and Scott Solkoff. (Exhibits (2) and (7)).

Section 768.72 also requires a proffer or record evidence of either direct or vicarious liability on the part of a corporate defendant. See Schropp v. Crown Eurocars, Inc., 654 So. 2d 1158, 1159-61 (Fla. 1995). A reasonable showing of the former requires evidence that points to the corporation having actively and knowingly participated in the course of conduct at issue, or having condoned, ratified or consented to it. Fla.Stat. §768.72(3)(a)(b). A reasonable showing of vicarious liability calls for evidence pointing to additional or separate gross negligence on the part of the corporate defendant that contributed to the loss in question.

Direct liability is most often shown by evidence that the conduct was that of a manager or managing agent. See, e.g., Schropp, 654 So. 2d at 1161 (sales manager of automobile dealership); Winn-Dixie Stores, Inc. v. Robinson, 472 So. 2d 722, 724 (Fla.1985) (assistant store manager in Winn-Dixie chain); Wayne Frier Home Center, 16 So. 3d 1006 (sales manager); Martinez v. Brinks, Inc., 410 F.Supp.2d 1202, 1214 (branch managers with "the power to make the relevant decisions in the case without consulting any other Brinks management."); In re Rosenberg, 471 B.R. 307, 313 (S.D. Fla. 2012) (agents "in a decision making position.") Here, the principal actors, Joan Crain and Charles Zalakar, were trust officers in complete charge of managing the financial affairs of the guardianships for which they were responsible, including, pointedly, any decision to establish a special needs trust, and as such qualify as managing agents under the above cases.

Direct corporate liability also results when the actions of an employee, whatever his or her status, is in keeping with corporate policy or practice. See, e.g., Schropp, 654 So. 2d at 1162 (corporate policy of the corporation provides a basis for the punitive damages even though the

particular officers or agents ... are not identified") (concurring opinion of Wells, Shaw, Kogan and Anstead, JJ); Note 2 on Use of Fla. Std. Jury Instr. (Civ.) 503.2. That is also the case here. The obvious bookends are that it was Northern Trust who was the guardian and had the fiduciary duty to protect and preserve the guardianship's assets, not Joan Crain or Charles Zalakar, and that, even now, Northern Trust does not contend that Crain and Zalakar were simply employees that ran amuck, but rather that it had no obligation as the guardian of Cristal McBean's property to establish a special needs trust. In between these bookends is the fact that Northern Trust had no policy regarding special needs trusts, and Zalakar's specific testimony that it was not Northern Trust's job to do it, which is completely contrary to industry practice and the standards for managing guardianships established by the National Guardianship Association.

Northern Trust's active/knowing participation, or its separate gross negligence contributing to the loss, all confirmed by the affidavits of experienced professionals, are also demonstrated by:

(1) Soliciting or accepting the role of guardian in guardianships established for severely disabled people without the institutional competence to do so;

(2) Soliciting or accepting the role of guardian in guardianships established for severely disabled people without any policies or procedures in place to ensure they will be handled by trust officers sufficiently competent and experienced to do so;

(3) Having no policies or procedures in place to disclose the above shortcomings to interested parties;

(4) Having no policies or procedures in place regarding the need for or administration of special needs trusts;

(5) Having no policies or procedures in place with regard to obtaining available public benefits;

(6) Failing to recognize, much less have policies or procedures in place to guide and educate trust officers about, the National Guardianship Association, Standards of Practice and the need to comply with the same; and

(7) Failing to have any mechanism in place to oversee or monitor guardianships to insure that guardianship assets were not being squandered in the absence of special needs trusts every year for 15 years.

For reasons detailed above MonarchCare respectfully submits that there exists in this record substantial competent evidence sufficient for a jury to award punitive damages and that it be permitted to file the amended petition attached hereto as Exhibit 29.

Respectfully submitted,

STEWART TILGHMAN FOX BIANCHI & CAIN, P.A.
Attorneys for Petitioner
One Southeast Third Avenue
Suite 3000
Miami, Florida 33131-1764
Telephone: (305) 358-6644
Facsimile: (305) 358-4707

By: _____
GARY D. FOX
Florida Bar No. 224243

AND

Rodolfo Suarez, Jr., Esquire
SUAREZ & TAYLOR, Attorneys At Law
2950 SW 27 Avenue
Suite 300
Miami, FL 33133
Office: 305-448-4244
Fax: 305-448-4211

CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that a copy of the foregoing was furnished via electronic mail to all parties on the attached List of Counsel on this 26th day of February, 2014.

By: _____

GARY D. FOX
Florida Bar No. 224243
STEPHEN F. CAIN
Florida Bar No. 0425419

LIST OF COUNSEL

John F. O'Sullivan, Esquire
john.osullivan@hoganlovells.com
Catherine Dorvil, Esquire
catherine.dorvil@hoganlovells.com
Hogan Lovells US LLP
600 Brickell Avenue
Suite 2700
Miami, FL 33131
Attorneys for Northern Trust Bank

Douglas F. Hoffman, Esquire
dhoffman@estateandtrust.net
Rudolf & Hoffman, P.A.
615 Northeast Third Avenue
Fort Lauderdale, FL 33304
Attorneys for Northern Trust Bank

Rodolfo Suarez, Jr., Esquire
SUAREZ & TAYLOR, Attorneys At Law
2950 SW 27 Avenue
Suite 300
Miami, FL 33133
Office: 305-448-4244
Fax: 305-448-4211
Attorneys for Petitioner