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Tort Law - Damages - Imposition of Punitive Damages on Deceased's Estate

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TORT LAW—DAMAGES—IMPOSITION OF PUNITIVE DAMAGES ON DECEASED'S ESTATE—The Pennsylvania Supreme Court held that punitive damages could be recovered from the estate of the deceased tortfeasor.

G.J.D. and D.K. and J.K. v. Johnson, 713 A.2d 1127 (Pa. 1998).

Darwin T. Thebes ("Thebes") photographed Gloria Jean Diehl ("G.J.D.") while she was nude and when she was performing oral sex.¹ After discovering that G.J.D. was breaking up with him, Thebes allegedly delivered photocopies of the photographs to G.J.D.'s friends, family, and employer.² The distribution of the photocopies ceased after G.J.D. and her children ("the complainants") filed a complaint against Thebes.³

Thebes committed suicide before the case went to trial,¹ and Geraldine T. Johnson ("Johnson"), executrix of Thebes' estate, was substituted as the defendant.² Subsequently, a jury awarded both compensatory and punitive damages to the complainants.³ On

1. *G.J.D. and D.K. and J.K. v. Johnson*, 713 A.2d 1127, 1128 (Pa. 1998). According to testimony, after G.J.D. and her children moved in with Thebes, he became verbally, physically, and psychologically abusive to G.J.D. *G.J.D. and D.K. and J.K. v. Johnson*, 669 A.2d 378, 379 (Pa. Super. Ct. 1995), *aff'd*, 713 A.2d 1127 (Pa. 1998). The picture of G.J.D. nude and the picture of her performing fellatio on Thebes were taken several years before they appeared throughout the community. Brief for Appellees at 2, *G.J.D. and D.K. and J.K.* (No. 75 M.D. Appeal Docket 1996). According to G.J.D. and her children, Thebes also took Polaroid pictures of G.J.D. after physically abusing her. *G.J.D. and D.K. and J.K.*, 669 A.2d at 379. Because of the abuse, G.J.D. sent her children to live with their grandmother and, eventually, also moved out. *Id.* at 380.

2. *G.J.D. and D.K. and J.K.*, 713 A.2d at 1128. On one occasion, G.J.D.'s daughter, Julie Kell ("J.K."), discovered the photocopied pictures when she was exhibiting her goats at the Perry County Fair. *G.J.D. and D.K. and J.K.*, 669 A.2d at 380. The photographs were captioned: "Suck lollipops for money, [G.J.D.], 582-4407, New Bloomfield, PA." *Id.* The other pictures were discovered by G.J.D.'s family and friends when they were at public gatherings that were also attended by Thebes. *Id.*

3. *G.J.D. and D.K. and J.K.*, 713 A.2d at 1128. The complaint contained counts of defamation, intentional infliction of emotional distress, false light invasion of privacy, and invasion of privacy by publicity given to private life. *Id.* The complaint was filed on February 20, 1987 in the Perry County Court of Common Pleas. Brief for Appellant at 4, *G.J.D. and D.K. and J.K.* (No. 75 M.D. Appeal Docket 1996).

1. *G.J.D. and D.K. and J.K.*, 713 A.2d at 1128. Thebes committed suicide approximately fifteen months after G.J.D. filed suit; however, both he and the complainants were deposed before his death. *G.J.D. and D.K. and J.K.*, 669 A.2d at 380.

2. *G.J.D. and D.K. and J.K.*, 713 A.2d at 1128.

3. *Id.* G.J.D. testified that both of her children had developed emotional, scholastic, and behavioral problems because of the distribution of the photocopies. *G.J.D. and D.K. and*

appeal to the Pennsylvania Superior Court, Johnson raised the following two issues: (1) whether the trial court erred in allowing the jury to consider evidence as to punitive damages and in permitting the complainants to recover the damages when Thebes was dead; and (2) whether the trial court erred in ruling that the discovery conducted before Thebes died caused a waiver of the Dead Man's Rule, thereby allowing the complainants to testify as competent witnesses.⁴

The superior court found that the deterrence aspect of punitive damages was not defeated by the defendant's death because such damages were intended to deter other potential wrongdoers.⁵ Determining that the deterrence function of punitive damages was not defeated, the superior court agreed with the trial court and held that punitive damages were recoverable from Thebes' estate.⁶ In addition to its finding of viability of the deterrent effect, the court opined that the jury was aware of the value of the deceased's estate before making a determination and that the trial court may grant a remittitur⁷ if the damage award shocks the conscience of the court.⁸ Disposing of the second issue, the court held that the protection of the Dead Man's Act was waived by discovery conducted before Thebes' death.⁹

J.K., 669 A.2d at 380. *J.K.* required psychiatric care, including a three-month stay at York Hospital. *Id.* David Kell ("D.K.") eventually lost his Reserve Officer Training Corps scholarship because of his poor academic performance during his first year at Pennsylvania State University. *Id.* The jury awarded G.J.D. \$6,015.00 in compensatory damages and \$36,500.00 in punitive damages; D.K. \$5,000.00 in compensatory damages and \$20,000.00 in punitive damages; and J.K. \$10,000.00 in compensatory damages and \$20,000.00 in punitive damages. *Id.*

4. *G.J.D. and D.K. and J.K.*, 669 A.2d at 380-81.

5. *Id.* at 382. The superior court held that under Pennsylvania law, an award of punitive damages serves both to deter and to punish. *Id.* (citing *Perry v. Melton*, 299 S.E.2d 8, 12 (W.Va. 1982)). The court acknowledged that the punishment aspect of punitive damages is defeated by the tortfeasor's death; however, the court argued that the deterrence of others from engaging in similar conduct serves a public interest in addition to a private interest. *Id.*

6. *Id.*

7. Remittitur is defined as: the procedural process by which an excessive verdict of the jury is reduced. BLACK'S LAW DICTIONARY 1295 (6th ed. 1990).

8. *G.J.D. and D.K. and J.K.*, 669 A.2d at 383. Aware that the total value of the deceased's estate was \$274,017.51, the jury imposed \$76,500.00 in punitive damages based on its assessment of the need for punishment and deterrence. *Id.*

9. *Id.* at 384. The Dead Man's Act provides the following:

[I]n any civil action or proceeding, where any party to a thing or contract in action is dead . . . and his right thereto or therein has passed . . . to a party on the record who represents his interest in the subject in controversy, neither any surviving or remaining party to such thing or contract, nor any other person whose interest shall be adverse to the said right of such deceased . . . , shall be a competent witness to any matter occurring before the death of said party. . . .

On appeal to the Pennsylvania Supreme Court, Johnson argued only that the recovery of punitive damages from the decedent's estate was improper because neither of the policy objectives of punitive damages would be fulfilled when the person to be punished or deterred is deceased.¹⁰ The Pennsylvania Supreme Court granted allocatur¹¹ to resolve the following issue of first impression: whether punitive damages may be recovered from a deceased tortfeasor's estate.¹²

Writing for the majority, Justice Zappala noted that the majority of courts that have addressed this issue have held that punitive damages may not be recovered from the deceased tortfeasor's estate.¹³ When the tortfeasor is deceased, most courts reason that the primary objectives behind imposing punitive damages are not furthered.¹⁴ The court found that only five states (not including Pennsylvania) currently permit the recovery of punitive damages from the deceased tortfeasor's estate.¹⁵ Pointing to one case in particular, the court emphasized the importance of furthering certain societal interests.¹⁶ The court discussed the case of *Schwab v. Bates*, in which the strong public interest in deterring drunk driving persuaded the lower court to allow an award of punitive damages.¹⁷ The Pennsylvania Supreme Court reasoned that Thebes'

42 PA. CONS. STAT. § 5930 (1987). The court found that the Dead Man's Act was waived by the taking of a deposition of a witness concerning any occurrences involving a deceased party. *G.J.D. and D.K. and J.K.*, 669 A.2d at 384. (citing *Perlis v. Kuhns*, 195 A.2d 156, 158 (Pa. Super. Ct. 1967)).

10. *G.J.D. and D.K. and J.K.*, 713 A.2d at 1128, 1129. Johnson did not dispute the decedent's culpability or the award of compensatory damages on appeal. *Id.* at 1128.

11. *Id.* at 1129. Allocatur means the appeal is allowed, or that the court is taking the case on appeal. BLACK'S LAW DICTIONARY 75 (6th ed. 1990).

12. *G.J.D. and D.K. and J.K.*, 713 A.2d at 1129.

13. *Id.* Of the thirty-three jurisdictions to have addressed the issue, twenty-eight have decided that recovery is not allowed. *Id.* Fourteen states have enacted legislation that specifically precludes such recovery, and the states without specific legislation are split as to whether recovery is allowed. *Id.*

14. *Id.*

15. *Id.* For example, finding that the imposition of punitive damages was appropriate, the Montana Supreme Court relied on the plain language of the statute that provided in pertinent part that "a jury may award . . . punitive damages for sake of example and for the purpose of punishing the defendant." *Id.* (citing MONT. CODE ANN. § 27-1-220 (1995)). The Pennsylvania Supreme Court also discussed an Illinois decision that allowed the award of punitive damages to punish and deter the tortfeasor and others from engaging in like conduct. *Id.* at 1130. (citing *Penberthy v. Price*, 666 N.E. 2d 352 (Ill. 1996)).

16. *G.J.D. and D.K. and J.K.*, 713 A.2d at 1130. (citing *Schwab v. Bates*, 12 Pa. D. & C. 4th 162 (1991)). In *Schwab*, the court permitted the imposition of punitive damages against the estate of a decedent who injured the plaintiff as a result of driving while intoxicated. *Id.*

17. *G.J.D. and D.K. and J.K.*, 713 A.2d at 1130. (discussing *Schwab*, 12 Pa. D. & C. 4th at 162 (1991)).

outrageous behavior was analogous to drunk driving and asserted that the law should be applied so as to deter such egregious conduct.¹⁸ Holding that there was no per se prohibition against the imposition of punitive damages against an estate, Justice Zappala noted that the trier of fact should consider the nature of the acts committed and not the category of tortious conduct alleged when assessing the appropriateness of a punitive damage award.¹⁹

In support of its decision, the court first noted that the tortfeasor's death did not completely destroy the underlying purposes of punitive damages because others may be deterred from engaging in similar conduct.²⁰ The court next reasoned that the innocent beneficiaries of the estate would not be punished any more than they would have been if the tortfeasor were living when the jury awarded damages.²¹ Finally, the court determined that sufficient safeguards exist to protect an estate from the arbitrary imposition of punitive damages.²² Affirming the superior court's decision, the supreme court majority concluded that the complainants could recover punitive damages from the deceased tortfeasor's estate.²³

Chief Justice Flaherty, in dissent, began his opinion by restating the underlying objectives of punitive damages: punishment and deterrence.²⁴ The dissent argued that the majority's decision does not further either of these objectives because the general deterrent effect on others is highly speculative.²⁵ The dissent's analysis points

18. *Id.* at 1131.

19. *Id.*

20. *Id.* (citing *Kirkbride v. Lisbon Contractors Inc.*, 555 A.2d 800 (Pa. 1989)). The court further explained that the general deterrent effect was no more speculative in the instant case than it was in cases where the tortfeasor was alive. *Id.*

21. *G.J.D. and D.K. and J.K.*, 713 A.2d at 1131. The court noted that allowing the tortfeasor's estate to circumvent an award of punitive damage would be similar to the injustice of permitting a defendant to transfer his wealth to his family before a trial after discovering that punitive damages were being sought. *Id.*

22. *Id.* First, the court stated that jury instructions provide the fact finders with knowledge that the award of punitive damages would be imposed against the estate. *Id.* Second, the court stressed that the trial court may grant a remittitur if the award shocks the conscience of the court. *Id.*

23. *Id.*

24. *Id.* at 1132 (Flaherty, C.J., dissenting).

25. *Id.* Chief Justice Flaherty explained that the penal nature of punitive damages results in the availability of a quasi-criminal sanction in civil proceedings, thus, punitive damages, unlike compensatory damages, impose punishment and make an example of the wrongdoer. *Id.* Conceding that a living tortfeasor would be specifically deterred from future conduct, the dissent disagreed with the majority that other potential tortfeasors would be generally deterred by the imposition of punitive damages against a deceased tortfeasor's estate. *Id.*

out that, although the ordinary reasonable person is aware of the punishment associated with criminal behavior, the same person is most likely unaware of the consequences associated with tortious conduct.²⁶ Because of this lack of awareness, the dissent asserted that imposing punitive sanctions in the hopes of deterring potential tortfeasors does not justify the punishment of innocent beneficiaries.²⁷

The dissent argued that the beneficiaries' interests in the estate attach when the tortfeasor dies, whereas the plaintiff's interest in punitive damages does not attach until a jury hands down the award.²⁸ Relying on this argument, the dissent reasoned that any such recovery by the plaintiff would be at the expense of the already attached interests of the beneficiaries.²⁹ To further support his position, the chief justice pointed to *Feld v. Merriam*³⁰ to establish the court's acceptance of the Restatement (Second) of Torts.³¹ Although *Feld* did not address the issue of punitive damages in the context of a deceased tortfeasor, the court relied on the Restatement (Second) of Torts, which, the dissent stated, disallows the recovery of punitive damages against a deceased's estate.³² In addition, the dissent asserted that the court in *Feld* emphasized the consideration of relations between the parties.³³ Emphasizing the same consideration, the dissent asserted that it would be unjust to hold the beneficiaries responsible for Thebes'

26. *G.J.D. and D.K. and J.K.*, 713 A.2d at 1133.

27. *Id.*

28. *Id.*

29. *Id.* at 1133-34.

30. *Feld v. Merriam*, 485 A.2d 742 (Pa. 1984). The Felds, as tenants in an apartment complex, brought an action against their landlords for a breach of the duty to protect tenants from the foreseeable criminal acts of third persons. *Id.* at 744-45.

31. *G.J.D. and D.K. and J.K.*, 713 A.2d at 1134. The Restatement (Second) of Torts § 908 provides as follows:

(1) Punitive damages are damages, other than compensatory or nominal damages, awarded against a person to punish him for his outrageous conduct and to deter him and others like him from similar conduct in the future. (2) Punitive damages may be awarded for conduct that is outrageous, because of the defendant's evil motive or his reckless indifference to the rights of others. In assessing punitive damages, the trier of fact can properly consider the character of the defendant's act, the nature and extent of the harm to the plaintiff that the defendant caused or intended to cause and the wealth of the defendant.

RESTATEMENT (SECOND) OF TORTS § 908 (1979). The comments following § 908 state that "Punitive damages are not awarded against the representatives of a deceased tortfeasor nor, ordinarily, in an action under a death statute." RESTATEMENT (SECOND) OF TORTS § 908 cmt. a (1979).

32. *Feld*, 485 A.2d at 747.

33. *G.J.D. and D.K. and J.K.*, 713 A.2d at 1134 (referring to *Feld*, 485 A.2d at 748).

conduct because there was no relationship between the complainants and the estate beneficiaries.³⁴ For the preceding reasons, the chief justice would not allow a recovery of punitive damages.³⁵

Many jurisdictions have confronted the issue of whether punitive damages are recoverable from a deceased tortfeasor's estate.³⁶ Presently, six jurisdictions (including Pennsylvania) that have addressed the issue have allowed such recovery.³⁷ The majority of jurisdictions that have faced this issue have, however, denied the imposition of punitive damages against a dead tortfeasor's estate.³⁸

In 1884, in *Shiek v. Hobson*³⁹ the Iowa Supreme Court examined whether exemplary or punitive damages could be awarded against the deceased wrongdoer's personal representatives.⁴⁰ In its analysis, the court interpreted Iowa's survival statute to mean that all causes of action survive death, regardless of whether the death is that of the person wronged or the death of the wrongdoer.⁴¹ Although it agreed that the plaintiff was entitled to full compensation for her injury, the court in *Shiek* distinguished a plaintiff's right to compensation from the right to receive punitive damages.⁴² Despite its recognition that punitive damages are awarded to punish a person who has wickedly or wantonly violated the rights of another, the court reasoned that the punitive powers of the law end when the defendant dies.⁴³ Thus, the court held that allowing punitive damages to be assessed against the decedent's estate would only punish the defendant's representatives for the wrongful

34. *Id.*

35. *Id.*

36. Paul Minnich, Comment, *Punitive Damages and the Deceased Tortfeasor: Should Pennsylvania Courts allow Punitive Damages to be Recovered from a Decedent's Estate?*, 98 DICK. L. REV. 329-30 (1994).

37. *Id.* In his comment, Minnich states that only three jurisdictions allow recovery from a deceased's estate. Since 1994, however, Montana and Illinois have also permitted the recovery of punitive damages from the decedent's estate. See *Tillet v. Lippert*, 909 P.2d 1158 (Mont. 1996); *Penberthy v. Price*, 666 N.E. 2d 352 (Ill. 1996). Thus, the states that permit the recovery of punitive damages against a deceased tortfeasor's estate include the following: West Virginia, Texas, Alabama, Illinois, Montana, and Pennsylvania.

38. Minnich, *supra* note 39, at 333.

39. 19 N.W. 875 (Iowa 1884).

40. *Shiek*, 19 N.W. at 875. The defendant was sued for slander for allegedly making a statement, in the presence of the plaintiff's husband, that the defendant had enjoyed sexual intercourse with the plaintiff. *Id.* The defendant died while the suit was pending. *Id.*

41. *Id.*

42. *Id.*

43. *Id.* at 875-76.

acts of the decedent.⁴⁴

Forty-one years later, the United States Court of Appeals for the Second Circuit cited *Shiek* in *Sullivan v. Associated Billposters and Distributors of the United States and Canada*.⁴⁵ In *Sullivan*, the court relied on the general rule that there is no right to punitive or exemplary damages when the cause of action has survived the tortfeasor.⁴⁶ Adhering to this general rule, the Tenth Circuit in *Barnes v. Smith*⁴⁷ also held that punitive damages were not available from the wrongdoer's estate because the reason for their imposition would no longer be effective.⁴⁸

In 1977, the Nevada Supreme Court in *Allen v. Anderson*⁴⁹ followed this same reasoning when it addressed the issue of the imposition of punitive damages against a deceased tortfeasor's estate. In *Allen*, an automobile passenger initiated an action for compensatory and punitive damages against two drivers who were involved in an accident that resulted in the plaintiff's injuries.⁵⁰ One of the drivers was killed in the accident.⁵¹ Plaintiff alleged that both drivers were under the influence of alcohol and that such conduct warranted punitive damages.⁵²

The court determined that neither the deceased tortfeasor's estate nor the decedent's father could be held liable for punitive damages.⁵³ Relying on Nevada's punitive damages statute, the court asserted are such damages were awarded to make an example of the defendant and to punish the defendant.⁵⁴ Because punitive

44. *Id.*

45. *Sullivan v. Associated Billposters and Distrib. of the U.S. and Can.*, 6 F.2d 1000 (2d Cir. 1925).

46. *Sullivan*, 6 F.2d at 1012.

47. *Barnes v. Smith*, 305 F.2d 226 (10th Cir. 1962). A Cadillac collided with a family of eight in a pick-up truck resulting in six deaths, including those of both drivers, and three severe injuries. *Id.*

48. *Barnes*, 305 F.2d at 231. The court noted that there appeared to be no New Mexico case on point; however, of the courts that considered the issue, virtually all have held that punitive damages are not available from the deceased wrongdoer's estate. *Id.*

49. 562 P.2d 487 (Nev. 1977).

50. *Allen*, 562 P.2d at 488. Plaintiff's complaint alleged the following: (1) the drivers, while under the influence of alcohol, negligently and carelessly operated their vehicles, causing her injuries; and (2) the drivers' conduct constituted fraud, oppression, or malice, pursuant to Nevada Revised Statutes, section 42.010, thus warranting punitive damages. *Id.*

51. *Id.*

52. *Id.*

53. *Id.*

54. *Id.* The statute provides the following:

In an action for the breach of an obligation not arising from contract, where the defendant has been guilty of oppression, fraud or malice, express or implied, the plaintiff, in addition to the actual damages, may recover damages for the sake of

damages are imposed to deter future wrongdoing, a dead tortfeasor no longer remains susceptible to punishment.⁵⁵ Thus, the court reasoned that the tortfeasor's death thwarted the purpose of punitive damages.⁵⁶

Joining the majority of jurisdictions to hold that punitive damages are not recoverable from the deceased tortfeasor's estate, the Supreme Court of Florida set precedent in *Lohr v. Byrd*.⁵⁷ Lohr, who was driving while intoxicated, caused an automobile accident that resulted in his death.⁵⁸ The plaintiff, Byrd, sought compensatory and punitive damages from Lohr's estate for the injuries he sustained in the collision.⁵⁹ At trial, the jury returned a verdict for the plaintiff, which included \$25,000 in punitive damages.⁶⁰ Granting the defendant's motion for remittitur, the trial court reduced the punitive damages award to \$9,000.⁶¹ Challenging the remittitur, the plaintiff appealed, and the district court of appeals certified the question of punitive damages to the Supreme Court of Florida.⁶² *Id.* at 688.

The Supreme Court of Florida held that punitive damages may not be awarded against a deceased tortfeasor's estate.⁶³ After explaining that the purpose of punitive damages is to both punish and deter the tortfeasor, the majority rejected the plaintiff's deterrence argument that a potential tortfeasor would avoid tortious conduct if he knew that his estate could be subject to punitive damages.⁶⁴ If it were to accept this argument, the court

example and by way of punishing the defendant.

NEV. REV. STAT. 42:010 (1989).

55. *Allen*, 562 P.2d at 488. (citing *Wagner v. Gibbs*, 31 So. 434 (Miss. 1902).

56. *Id.* The court added that "[w]hen the reason for a rule ceases to exist, the rule itself is no longer of value and is extinguished by the disappearance of the reason." *Id.* at 490. (citing *Braun v. Moreno*, 466 P.2d 60, 63 (Ariz.1970)).

57. *Lohr v. Byrd*, 522 So. 2d 845 (Fla. 1988).

58. *Lohr*, 522 So. 2d at 846.

59. *Id.*

60. *Id.*

61. *Id.*

62. *Id.* The Fifth District Court of Appeal reasoned that it was bound to follow *Atlas Properties, Inc. v. Didich*, 226 So. 2d 684 (Fla. 1969) because of the following dictum:

It appears that logic and common sense indicate that this Court should now . . . allow the recovery of punitive damages under [the survival statute]. This appears to be true regardless of whether it is the tortfeasor or the injured party who dies. Certainly, this logic is more apposite when it is the injured party who dies (as we have here) rather than the actual tortfeasor.

63. *Lohr*, 522 So. 2d at 847.

64. *Id.* at 847. The plaintiff relied on *Stephens v. Rohde*, 478 So. 2d 862-63 (Fla. 1st D.C.A. 1985).

reasoned a decedent's widow and children could be placed on welfare as a result of the decedent's wrongdoing.⁶⁵ Accordingly, the court held that, in addition to defeating the purposes behind punitive damages, such an award would only punish the tortfeasor's innocent heirs and creditors.⁶⁶

In opposition, the dissent argued that the court had already addressed this issue in *Atlas Properties, Inc.*⁶⁷ The dissent stated that, although in dictum, the court in *Atlas Properties, Inc.* reasoned that the survival statute appeared to allow the recovery of punitive damages whether it was the tortfeasor or the injured party who died.⁶⁸ In addition, the dissent asserted that most jurisdictions base the decision to preclude recovery from a deceased tortfeasor's estate by either relying upon statutes that expressly prohibit the recovery of such damages or by not interpreting the particular jurisdiction's survival statute.⁶⁹

The dissent also examined the plain language of Florida's survival statute and concluded that, because no distinction was made between compensatory and punitive damages, punitive damages may be recovered from the tortfeasor's estate.⁷⁰ Furthermore, the dissent argued that the justification for punitive damages includes making an example of the wrongdoer to deter others from engaging in similar conduct.⁷¹ In concluding the argument for allowing the imposition of punitive damages against the deceased's estate, the dissent urged that, in cases involving a tortfeasor's outrageous conduct of a wilful and wanton nature, the tortfeasor's untimely death should not preclude the recovery of punitive damages.⁷²

In 1984, in *Hofer v. Lavender*,⁷³ the Supreme Court of Texas addressed the issue of whether exemplary damages may be recovered from a tortfeasor's estate when a statute specifically provided that all causes of action survived against the deceased's representatives.⁷⁴ This action arose when a drunk driver struck

65. *Lohr*, 522 So. 2d at 847.

66. *Id.*

67. *Id.* at 848 (Grimes, J., dissenting) (citing *Atlas Properties, Inc.*, 226 So. 2d at 688).

68. *Id.*

69. *Id.* (citing *Hofer v. Lavender*, 679 S.W.2d 470 (Tex.1984)).

70. *Lohr*, 522 So.2d at 848. The statute provides that "[n]o cause of action dies with the person. All causes of action survive and may be commenced, prosecuted, and defended in the name of the person prescribed by law. FLA. STAT. ch. 46.021 (1985).

71. *Id.*

72. *Id.* at 849.

73. *J.D. Hofer v. Lavender*, 679 S.W.2d 470 (Tex. 1984).

74. *Hofer*, 679 S.W. 2d at 471.

another vehicle and killed eighteen-year-old June Hofer.⁷⁵ The drunk driver died from unrelated causes before the case came to trial and Lavender was substituted as the defendant.⁷⁶ Hofer's parents, who were also passengers, sought exemplary damages for themselves and for their deceased daughter's estate.⁷⁷

On appeal to the Supreme Court of Texas, the Hofers argued that all causes of action survive under the Texas survival statute, including those against the tortfeasor's estate.⁷⁸ In response, Lavender contended that because the purpose of punitive damages was punishment, the tortfeasor's death defeated the basis for such an award.⁷⁹ In its analysis, the court agreed that a survival statute operates to ensure that an injured party's death does not abate the recovery of exemplary damages by the estate.⁸⁰ Distinguishing this case from cases in which courts did not allow punitive damages, such as *Barnes v. Smith*,⁸¹ the court noted that those cases did not involve interpretation of a survival statute.⁸²

Focusing on the purpose of punitive damages as recognized by Texas law, the court asserted, that in addition to punishment, Texas case law indicated that the public policy for punitive damages included other equally important considerations such as setting an example to others, serving as an example for the good of the public, and compensating the plaintiff for inconvenience and attorney's fees.⁸³ The court held that under the Texas Survival Statute, the plaintiff has the right to collect punitive damages from

75. *Id.*

76. *Id.* at 470.

77. *Id.* at 470, 471. The trial court awarded both sets of exemplary damages to the Hofers; the court of appeals reversed. *Id.* at 471.

78. *Id.* at 472. The statute provides in pertinent part:

All causes of action upon which suit has been . . . brought for personal injuries, or for injuries resulting in death whether such injuries be to the health or to the reputation, or to the person of the injured party, shall not abate by reason of the death of the person against whom such causes of action shall have accrued, nor by reason of the death of such injured person, but, in the case of the death of either or both, all such causes of action shall survive to and in favor of the heirs and legal representatives and estate of such injured party and against the person, or persons liable for such injuries . . . , and may be instituted and prosecuted as if such action or persons against whom same accrued were alive.

Tex. Rev. Civ. Stat. Ann. art. 5525 (*repealed and revised in TEX. CIV. PRAC. & REM. CODE ANN. §71.021 (West 1997)*).

79. *Hofer*, 679 S.W.2d at 471.

80. *Id.* at 472.

81. *Barnes v. Smith*, 305 F.2d 226 (10th Cir. 1962).

82. *Hofer*, 679 S.W.2d at 472.

83. *Id.* at 472-73.

a deceased tortfeasor's estate.⁸⁴

In one dissenting opinion, Justice Spears argued that the survival statute's language was not dispositive of the issue; therefore, the court should have investigated the purposes behind punitive damages.⁸⁵ The dissent argued that the twin aims of punitive damages, punishing the tortfeasor and providing an example to deter others, are not separable.⁸⁶ The dissent contended that a general deterrent effect, which is the only deterrent effect available after a tortfeasor dies, could not be considered in isolation.⁸⁷ The justice explained that general deterrence depends on the specific punishment imposed on the tortfeasor and that, without that punishment, the general deterrent effect diminishes significantly.⁸⁸ Thus, the dissent would have found that the plaintiff's isolated deterrence argument was insufficient to support an award of punitive damages from the deceased's estate.⁸⁹

Also rejecting the majority's reasoning, Chief Justice Pope, in his dissent, argued against additional actual damages masquerading as punitive damages.⁹⁰ Chief Justice Pope espoused that the only sound basis for awarding punitive damages is to punish the wrongdoer, not to punish the deceased's children or family.⁹¹

In 1996, the Supreme Court of Montana sided with the minority of jurisdictions to permit recovery of punitive damages from a deceased's estate in *Tillet v. Lippert*.⁹² The decedent, Kenneth Lippert, had pointed a loaded gun at the plaintiff and fired seven

84. *Id.* at 475.

85. *Id.* at 477 (Spears, J., dissenting). Pointing to the language of the statute, the dissent argued that exemplary damages against an estate are neither allowed nor disallowed.
Id.

86. *Hofer*, 679 S.W.2d at 478.

87. *Id.*

88. *Id.*

89. *Id.*

90. *Id.* at 479 (Pope, C.J., dissenting). After arguing that punitive damages should not be used to cloak additional elements of actual damage and that the courts are careful to require a measure of certainty in all other forms of compensatory damages, the chief justice posed the following questions:

Why should we allow punitive damages to stand alone without any standards or instructions necessary for recovery[?] If punitive damages serve to permit recovery for some kind of unmentioned compensation, how can we know that there is not a double recovery? If punitive damages mask phantom elements of actual damages, why is it that a plaintiff in an ordinary negligence case is denied those illusive forms of compensatory damages, but a plaintiff can recover them when he proves gross negligence?

Id. (Pope, C.J., dissenting).

91. *Hofer*, 679 S.W. 2d at 479-80.

92. *Tillet v. Lippert*, 909 P.2d 1158 (Mont. 1996).

shots at the plaintiff's tires.⁹³ Thereafter, but before trial, Kenneth Lippert died.⁹⁴ The lower court found that Lippert's conduct was "outrageous and done with actual malice;" therefore, the court allowed the plaintiff to recover punitive damages to discourage future potential tortfeasors from engaging in similar conduct.⁹⁵

The issue of whether punitive damages could be assessed against a deceased's estate was one of first impression in Montana.⁹⁶ Relying on statutory authority, the court identified the dual purposes of punitive damages as to serve as an example and to punish the defendant.⁹⁷ The court noted that punishing Lippert "[was] now beyond the jurisdiction of this temporal court," but the exemplary function would send a message to the public at large that intimidation by firing guns would not be tolerated.⁹⁸

The dissent disagreed with the majority's holding that Montana's survival act and dual purpose punitive damage statute distinguish Montana from other jurisdictions that deny an award of punitive damages.⁹⁹ Many courts, the dissent suggested, that did not permit such recovery were also in states with survival acts and had dual purposes underlying the award of punitive damages.¹⁰⁰ The dissent further contended that the plain language of the punitive damage statute provided authority to require both setting an example and punishing the defendant because of the use of the conjunctive "and."¹⁰¹ The dissent concluded that the tortfeasor's punishment was the deterrence; therefore, both purposes were required.

In the same year that the Montana Supreme Court decided *Tillet*, *Penberthy v. Price*¹⁰² gave the Appellate Court of Illinois its opportunity to consider the same issue. The plaintiffs in *Penberthy* asserted theories of negligence and wilful and wanton behavior

93. *Tillet*, 909 P.2d at 1161. The parties in this action, extended family members, lived as cotenants on approximately 240 acres known as the "home place" and were involved in a bitter family dispute. *Id.* at 1159.

94. *Id.* at 1161.

95. *Id.*

96. *Id.*

97. *Tillet*, 909 P.2d at 1162. Montana's statute provides as follows: "Except as otherwise expressly provided by statute, a judge or jury may award, in addition to compensatory damages, punitive damages for the sake of example and for the purpose of punishing a defendant." MONT. CODE ANN. § 27-1-220 (1997).

98. *Id.* at 1162.

99. *Id.* at 1163 (Erdmann, J., dissenting).

100. *Id.* (Erdmann, J., dissenting) (citing *Allen v. Anderson*, 562 P.2d 487, 489 (Nev.1977); *Byrd v. Lohr*, 488 So.2d 138, 139 (Fla. 1986)).

101. *Id.* at 1164.

102. *Penberthy v. Price*, 666 N.E.2d 352 (Ill. App.3d 1996).

after an intoxicated driver collided with their car, causing them to suffer injuries.¹⁰³ The intoxicated driver died in the accident.¹⁰⁴ After reviewing the history of survival actions, the majority relied on Illinois case law to conclude that the plaintiffs' punitive damage claim could survive against the deceased's estate.¹⁰⁵ Case law instructed the court to heed strong equitable considerations in addition to other purposes underlying the imposition of punitive damages against a deceased's estate.¹⁰⁶ The court, therefore, held that allowing punitive damages would not only deter others, but would also enhance the strong public policy against drinking and driving.¹⁰⁷

In another drunk driving case, the Pennsylvania Commonwealth Court faced the question of whether punitive damages were recoverable against the deceased driver's estate in *Schwab v. Bates*.¹⁰⁸ Narrowing its holding to apply to specific outrageous conduct, the court determined that a plaintiff could seek punitive damages from a deceased's estate when the conduct that was to be deterred in others was driving while intoxicated.¹⁰⁹

The court initially asserted that the Pennsylvania legislature had provided that all causes of action against a tortfeasor survived the tortfeasor's death.¹¹⁰ Because the statute allows a deceased

103. *Penberthy*, 666 N.E.2d at 353.

104. *Id.*

105. *Id.* at 354-57.

106. *Id.* at 355. The court cited to *Raisl v. Elwood Industries, Inc.*, 479 N.E. 2d 1106 (Ill.App.3d 1985). *Id.* The *Raisl* court found the following two exceptions to Illinois' general rule of abatement of punitive damages' claims: (1) "when a statutory basis exists for such claims or when such claims are an integral component of the regulatory scheme and of the remedy which is available under it; or (2) when strong equitable considerations favor survival." *Id.* The court also relied on *Grunloh v. Effingham Equity, Inc.*, 528 N.E.2d 1031 (Ill. App. 3d 1988). *Id.* at 356. *Grunloh* expanded on the strong equitable considerations exception in *Raisl* by listing relevant matters that should be considered, such as the following:

[w]hether the defendant's alleged conduct offends against a strong and clearly articulated public policy; whether the underlying conduct constituted intentional misconduct which is also a crime . . . ; and whether absent an award of punitive damages, a plaintiff who prevailed on the merits of his or her claim would at most be entitled to only a comparatively small recovery.

Id.

107. *Penberthy*, 666 N.E.2d at 356-57.

108. 12 Pa. D.& C.4th 162 (1991).

109. *Schwab*, 12 Pa. D.& C.4th at 168.

110. *Id.* at 163. Pennsylvania's survival statute provides that "[a]ll causes of action or proceedings, real or personal, shall survive the death of the plaintiff or of the defendant, or the death of one or more joint plaintiffs or defendants." 42 PA. CONS. STAT ANN. § 8302 (West 1982).

plaintiff's estate to recover punitive damages, the court reasoned that, if sound policy reasons exist, such recovery should also be allowed against the deceased tortfeasor's estate.¹¹¹ The court found that, in Pennsylvania, punitive damages are awarded to punish a party for certain outrageous conduct and to deter that person and others from similar conduct.¹¹² Realizing that the opportunity to punish the defendant is eliminated by death, the court stated that stronger consideration should be given to the deterrence effect on others considering the importance in deterring drunk driving.¹¹³

Recognizing the need to use a balancing test, the court opined that weighing the possible harm that could be suffered by the deceased's family against the harm that could be prevented to many innocent families by deterring drunk driving, the clear choice should be to attempt to deter the conduct.¹¹⁴

That same year, a Pennsylvania trial court in *Morfesi v. Sherman*¹¹⁵ addressed the same issue, but did not allow punitive damages to be imposed against a deceased's estate.¹¹⁶ The plaintiffs in *Morfesi* sought punitive damages for medical malpractice against the doctor's estate.¹¹⁷ Turning to Pennsylvania's twin aims of punitive damages-punishing the defendant and deterring others from similar conduct- the court found that death took away the punishment effect of such damages.¹¹⁸ The court, focusing on the deterrence element, narrowed its inquiry to whether Pennsylvania courts should permit punitive damages in this instance as a matter of public policy.¹¹⁹

The court noted that deciding whether deterrence, standing alone, was a strong enough reason to support a punitive damage claim requires a subjective answer because no objective statistics are available.¹²⁰ The court in *Morfesi* believed that the deterrence theory is weak, especially when negligence or carelessness is the conduct to be deterred, because such conduct is not intentional.¹²¹ The court, therefore, concluded that punitive damages could not be

111. *Id.*

112. *Id.* (citing *Kirkbride v. Lisbon Contractors, Inc.*, 555 A.2d 800, 803 (Pa. 1989)).

113. *Id.* at 166.

114. *Schwab*, 12 Pa. D.& C.4th at 167.

115. 13 Pa. D. & C.4th 552 (1991).

116. *Morfesi*, 13 Pa. D.& C.4th at 553.

117. *Id.*

118. *Id.* at 555.

119. *Id.*

120. *Id.* at 555-56.

121. *Morfesi*, 13 Pa. D.& C.4th at 556.

imposed against the deceased doctor's estate.¹²²

The history of the imposition of punitive damages against a decedent's estate does not support the Pennsylvania Supreme Court's decision in *G.J.D. v. Johnson*. The *G.J.D.* majority held that "there [was] no per se prohibition against imposing such punitive damages against an estate;" therefore, the court left that determination to the trier of fact.¹²³ Weighing the factors involved, the jury looked beyond the twin aims of punitive damages and focused on attempting to deter such egregious behavior in the future. By leaving the issue to the trier of fact, the court avoided an explanation of how this award of damages squares with Pennsylvania's punitive damage objectives: punishment and deterrence.

What the court fails to address is whether a general deterrent actually deters others from similar conduct. Obviously, Thebes cannot be punished or deterred; therefore, the court placed great emphasis on the hope of a general deterrent. The court could not rely heavily on other jurisdictions for authority because the majority of states do not permit such recovery. In fact, the strongest arguments *against* the imposition of punitive damages is the speculative nature of a general deterrent.

Another persuasive argument against imposing punitive damages against the deceased's estate is the injustice of hurting the innocent, surviving family members. Again disregarding the majority of the states, the court held that the family would be no worse than if the tortfeasor had lived.¹²⁴ If the tortfeasor had lived, *he* would be punished or deterred. With the tortfeasor dead, the *family* will be punished for the tortfeasor's wrong. In addition, the court found that sufficient safeguards exist to protect against an unreasonable punitive damages award.¹²⁵ Although safeguards are important to any imposition of punitive damages, the first determination must be whether such damages are even permitted.

Although it is true that G.J.D. deserves more than compensatory damages for the pain she and her family endured, the tortfeasor, Thebes, committed suicide and effectively took himself out of the scope of punitive damages because he could no longer be punished or deterred. The *G.J.D.* court failed to expand the permissible policy reasons for the imposition of punitive damages. If the court

122. *Id.*

123. *G.J.D. and D.K. and J.K. v. Johnson*, 713 A.2d 1127, 1131 (Pa. 1998).

124. *G.J.D. and D.K. and J.K.*, 713 A.2d at 1131.

125. *Id.*

wishes to expand those reasons to include attorneys' fees or additional compensation, the court should simply say so. By relying on a general deterrent effect, the court fails to ensure that punitive damages imposed against a deceased tortfeasor's estate will be effective for this speculative purpose.

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