

IN THE SUPREME COURT OF FLORIDA

CASE NO: 68,836

JAMES J. LOHR, as personal
representative of the Estate
of JOHN ROBERT LOHR, deceased,
and SENTRY INDEMNITY COMPANY,

Petitioners,

v.

HATTIE MAE BYRD,

Respondent.

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BRIEF OF AMICUS CURIAE

ACADEMY OF FLORIDA TRIAL LAWYERS

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PREFACE

The Academy of Florida Trial Lawyers appears here as amicus curiae. The parties to the appeal will be referred to as they appear before this Court, that is, Petitioners and Respondent. The Academy will be referred to as such.

STATEMENT OF THE CASE AND FACTS

The Academy will rely on the Statement of Case and the Statement of Facts presented in Respondent's brief.

SUMMARY OF ARGUMENT

POINT I

The common law of England did not allow an award of punitive damages against a decedent tortfeasor's estate because it did not allow an award of any damages against a decedent tortfeasor's estate. However, the common law has been amended in this regard by the legislature in all three versions of the survival statute, the last two of which establish with unmistakable clarity the legislature's intent by the specific insertion of the words "and defended." Therefore, punitive damages, which are firmly rooted in the common law of both England and the United States, may be awarded against a deceased tortfeasor's estate. Furthermore, because punitive damages may be awarded in a variety of other causes of action created by statute, to rule otherwise regarding a deceased tortfeasor would treat tort plaintiffs as a class differently than other plaintiffs without a rational basis, since the same policy considerations apply.

POINT II

If this Court determines that punitive damages may not be awarded against a deceased tortfeasor's estate, that holding should be tailored to the specific circumstances of the instant case, where liability arises from individual, non-recurring action on the part of the deceased.

ARGUMENT

POINT I

PUNITIVE DAMAGES SURVIVES AGAINST THE ESTATE
OF A DECEASED TORTFEASOR BASED ON THE CLEAR
LEGISLATIVE INTENT EXPRESSED IN FLORIDA'S
SURVIVAL STATUTE.

In the decision under review, the Fifth District Court of Appeal stated that because the English common law (adopted in Florida as of July 4, 1776) did not allow punitive damages against a decedent's estate, the issue in this case becomes "whether that rule has been changed by statute in Florida." *BYRD v. LOHR*, 11 FLW 1067, 1068 (Fla. 5th DCA May 8, 1986). The court then held that if punitive damages can be classified as a cause of action under Florida's survival statute, §46.021, Fla. Stat. (1983), that classification applies regardless of whether it is the tortfeasor or the injured party who dies. The Academy maintains that, regardless of whether punitive damages is an independent cause of action or an element of the underlying cause of action,¹ the answer to the certified question is the same. Florida's survival statute has changed the common law rule to

1/ See generally 17 Fla.Jur.2d "Damages" §114 (1980).

allow punitive damages against a deceased tortfeasor's estate. Since Petitioners do not contest that a cause of action survives the death of the injured party, the result of their argument is a one-way cause of action contrary to the plain meaning of the survival statute.

The Academy's position on this issue is supported by the history of punitive damages in the common law and by the history of the survival statute as traced in the scholarly opinion of Justice Thornal in *ATLAS PROPERTIES, INC. v. DIDICH*, 226 So.2d 684 (Fla. 1969), where this Court held that a claim for punitive damages survives the death of the injured party. The concept of punitive damages is rooted in the common law. As this Court explained in *FLORIDA EAST COAST RY. CO. v. McROBERTS*, 111 Fla. 278, 149 So. 631, 632 (1933):

So it may be said to have been well established, both in England and the United States, as a principle of the common law, that in all actions for torts, the jury may be authorized to inflict what are called punitive or exemplary damages, having in view the enormity of the offense which has occasioned the injury, rather than the measure of compensation to be awarded to the plaintiff therefor.

English common law did not allow punitive damages against a decedent's estate for the simple reason that English common law terminated all actions with the tortfeasor's death. *ATLAS, supra*, at 686. Justice Thornal's discussion demonstrates that Florida's three survival statutes amended the common law, and the language of the last two versions of the statute established with great clarity that causes of action survive both ways, that is, with respect to the injured party and the tortfeasor.

The original statute enacted in 1928 read:

"All actions for personal injuries shall die with the person, to wit: (A) Assault and battery, slander, false imprisonment, and malicious prosecution; all other actions shall and may be maintained in the name of the representatives of the deceased" (§ 4211 of Comp. Gen. Laws; § 2571 of Rev. Gen. St.).

Id. As Justice Thornal explained, after 1931 Florida opinions interpreted the original statute to allow actions to survive either parties' death, but the judicial gloss given the statute at that time incorrectly seemed to limit that rule to compensatory damages. Id. at 686, 688. The 1951 version of the statute clarified that survival of the action applies both ways.

That statute read:

"No action for personal injuries and no other action shall die with the person, and all actions shall survive and may be instituted, maintained, prosecuted and defended in the name of the personal representative of the deceased, or in the name of such other person as may be provided by law." (Gen. Laws Ch. 26541, 1951) (Emphasis added.)

Id. at 687. (court's emphasis deleted, emphasis supplied). While the 1828 statute read that the actions to which it applied "may be maintained in the name of the representatives of the deceased," the 1951 statute read: "may be instituted, maintained, prosecuted, and defended in the name of the personal representative of the deceased...." Thus, by inserting the words "and defended," the 1951 statute made it clearer that actions could not only be instituted by a decedent's representative, but also against a decedent's representative. The amendment to the statute made clear what had developed in the case law between 1931 and 1935 as discussed by Justice Thornal. Id. at 686-687.

The current version of the statute, §46.021, Fla. Stat., was enacted in 1967, and reads:

No 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.

A clearer statute is difficult to imagine. No cause of action dies; all causes of action survive so that they can be commenced, prosecuted, and defended. Thus, to sum up, punitive damages were well established as part of the common law in England and the United States. However, punitive damages were not available against a decedent's estate under English common law because, since no action survived, no damages of any kind were available against a decedent's estate. Consistent with the common law, punitive damages are available in Florida, and by statute in derogation of the common law, Florida has maintained the availability of all types of actions (and their consequent damages) either for or against a decedent's estate.

To argue, as do the Petitioners, that a punitive damage claim survives the death of the injured party but not the death of the tortfeasor in effect creates a one-way cause of action, which is totally inconsistent with the plain language of the survival statute and its manifestly-evident legislative intent. The conclusion reached by Justice Thornal in the ATLAS case applies here as well:

The clear language of § 45.11 [now §46.021 (1967)], 'no * * * action shall die with the person * * *', indicates that any interpretation other than allowing recovery for punitive damages after the death of the injured party would be extremely difficult to justify. The statute speaks plainly on its face and really needs no interpretation.

* * * *

To conclude we find that this is a case of first impression in Florida and that the clear legislative intent on the face of Fla. Stat. § 45.11 (1965) [now §46.021 (1967), F.S.A.], indicates that punitive damages were meant to survive the death of the injured party.

Id. at 689, 691 (emphasis supplied.)

Now that the converse of the holding in ATLAS, supra, is before this Court, the Academy maintains that the language of the statute is just as clear on the issue presented here. That is, as a matter of statutory construction punitive damages are available against a decedent's estate. This Court recently summarized the applicable rules of construction, explaining that

[w]hen the language of the statute is clear and unambiguous and conveys a clear and definite meaning, there is no occasion for resorting to the rules of statutory interpretation and construction; the statute must be given its plain and obvious meaning.

A.R. Douglass, Inc. v. McRainey, 102 Fla. 1141, 1144, 137 So. 157, 159 (1931). See also Carson v. Miller, 370 So.2d 10 (Fla. 1979); Ross v. Gore, 48 So.2d 412 (Fla. 1950). It has also been accurately stated that courts of this state are

without power to construe an unambiguous statute in a way which would extend, modify, or limit, its express terms or its reasonable and obvious implications. To do so would be an abrogation of legislative power.

American Bankers Life Assurance Company of Florida v. Williams, 212 So.2d 777, 778 (Fla. 1st DCA 1968), (emphasis added). It is also true that a literal interpretation of the language of a statute need not be given when to do so would lead to an unreasonable or ridiculous conclusion. Johnson v. Presbyterian Homes Synod of Florida, Inc., 239 So.2d 256 (Fla. 1970). Such a departure from the letter of the statute, however, "is

sanctioned by the courts only when there are cogent reasons for believing that the letter [of the law] does not accurately disclose the [legislative] intent." State ex rel. Hanbury v. Tunncliffe, 98 Fla. 731, 735, 124 So. 279, 281 (1929).

HOLLY v. AULD, 450 So.2d 217, 219 (Fla. 1984) (emphasis in original).

The legislature must be assumed to know the meaning of words and to have expressed its intent by use of the words found in the statute. THAYER v. STATE, 335 So.2d 815 (Fla. 1976). When a statute is amended, it must be assumed that the legislature accorded significance to the change, had a reasonable motive for it, and that the change effected was intentional. KELLY v. RETAIL LIQUOR DEALERS ASS'N. OF DADE COUNTY, 126 So.2d 299 (Fla. 3d DCA 1961). Adopting Petitioners' argument would amount to a judicial deletion of the words "and defended" in the last two versions of the survival statute based on the policy arguments raised in their brief. However, the rules of construction establish that the legislature inserted those words for a reason, and as this Court stated in HOLLY, "it is not the court's duty or prerogative to modify or shade clearly expressed legislative intent in order to uphold a policy favored by the court." 450 So.2d at 219. In conclusion, because the legislature has seen fit to change the common law, the Academy respectfully maintains that any further alteration is within the province of the legislature, and not this Court.

Moreover, there are a variety of statutorily-created causes of action which specifically include punitive damages among the remedies available. See, e.g., §40.271(3) Fla. Stat. (1985)

(firing of juror due to jury service); §320.838 Fla. Stat. (1985) (mobile home warranties); §497.056 Fla. Stat. (1985) (cemeteries); §559.77 Fla. Stat. (1985) (consumer collection practices); §713.31(2)(c) Fla. Stat. (1985) (fraudulent mechanic's liens); §725.07(2) Fla. Stat. (1985) (racial or sexual discrimination in loans or wages); §812.035(7) Fla. Stat. (1985) (civil theft); §817.061(2) Fla. Stat. (1985) (fraudulent solicitation); §817.41(6) Fla. Stat. (1985) (fraudulent practices); §895.05(7) Fla. Stat. (1985) (RICO); §934.10(2) Fla. Stat. (1985) (illegal wiretaps); §960.18 Fla. Stat. (1985) (crime victims).

Quite obviously, the English common law argument regarding availability of punitive damages against a deceased defendant cannot be made against the entitlement to punitive damages created by these statutes. Yet, the same policy considerations which pertain to punitive damages in tort actions underlie the punitive damage provisions of these statutes. To hold that punitive damages cannot be awarded against a deceased tortfeasor's estate would treat tort plaintiffs as a class differently than plaintiffs suing pursuant to the above list of statutes, with no rational basis. In conclusion, because the legislature has amended the common law with unmistakable clarity to allow all actions (including all available damages) to be brought against a decedent's estate, and because the legislature has created new causes of action including punitive damages which survive and can be brought against a decedent's estate, the certified question should be answered in the affirmative.

POINT II

IF THIS COURT DETERMINES THAT PUNITIVE DAMAGES MAY NOT BE AWARDED AGAINST A DECEASED TORTFEASOR'S ESTATE, IT SHOULD LIMIT THAT HOLDING TO THE CIRCUMSTANCES OF THIS CASE.

If, for whatever reason, this Court determines that the certified question should be answered in the negative, and that punitive damages may not be awarded against a deceased tortfeasor's estate, the Academy respectfully maintains that any such holding should be limited to the circumstances of this case. That is, such a rule should apply only in cases where, as in the instant case which involved an automobile accident, liability arises from individual activity of the tortfeasor. It should not apply where liability is shared by others, or arises from activity which is either ongoing in its nature or susceptible to repetition or continuation by other persons in privity with the tortfeasor.

One of the principal points of contention in this case is whether punitive damages serve a punitive function in a case where the tortfeasor is dead, or whether the imposition of such damages inequitably imposes a penalty on innocent members of the tortfeasor's family. The related argument is that the deterrent aspect of such damages as to other persons is unjustified because, as the Fifth District stated, "general deterrence logically depends upon the perception of punishment suffered by the wrongdoer." 11 FLW at 1068.

The Academy maintains that these policy arguments do not apply at all in situations where, although liability attaches to

a decedent's estate, the liability arises from ongoing activity which might be carried on by others. An example is tort liability arising from the action of a joint venturer. The negligence of one joint venturer is imputed to another in an action based upon the tortious conduct of the joint venturer committed while within the scope of the joint venture. FLORIDA ROCK & SAND CO. v. COX, 344 So.2d 1296, 1298 (Fla. 3d DCA 1977). Especially where the injury inflicted results from deliberate action on behalf of the joint venture, and where that action is ongoing, both punishment and deterrence are viable bases for punitive damages even if one of the joint venturers dies.

If one of the joint venturers dies, his liability is personal, and attaches to his estate. However, responsibility for the action is shared by the other joint venturers, and the act which incurred liability may be capable of repetition by them. In that situation, the type of policy arguments raised by Petitioners would simply not apply. Cf. THE CELOTEX CORPORATION v. PICKETT, 11 FLW 208, 209 (Fla. May 8, 1986) (punitive damages against a successor corporation for the acts of its corporate predecessor fulfill both the punishment and deterrent purposes of such damages). Furthermore, inequity results if the family of a living joint venturer (who have presumably benefited from his activity in the joint venture) feel the sting of liability since his liability is personal, and yet the family of the deceased joint venturer (who also benefitted) would be absolved by the fact of his death.

In short, if the certified question is answered with an unqualified no, it could apply to a variety of situations in which the policy underlying punitive damages applies despite the death of the tortfeasor, creating inequities which may not pertain under the facts of the instant case. Thus, if this Court rules for Petitioners, the Academy contends that that ruling should be tailored to fit the circumstances of the instant case.

CONCLUSION

Based on the foregoing Argument, the Academy of Florida Trial Lawyers respectfully requests that the decision of the Fifth District Court of Appeal be approved, and that the certified question be answered in the affirmative.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been mailed to: MARCIA K. LIPPINCOTT, 644 West Colonial Drive, Orlando, FL 32804; RAY B. DALTON, P. O. Box 606, Orlando, FL 32802; NED J. JULIAN, JR., P. O. Box 1330, Sanford, FL 32772; HEIDI M. TAUSCHER, P. O. Box 3000, Orlando, FL 32802; and to RICHARD A. SHERMAN, Suite 102 N Justice Bldg., 524 So. Andrews Avenue, Ft. Lauderdale, FL 33301, this 18th day of JULY, 1986.

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