

7-18

IN THE SUPREME COURT OF FLORIDA

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

Petitioners,)

vs.)

HATTIE MAE BYRD,)

Respondent.)

CASE NO.
5th DCA No: 85-297
Florida Bar No: 184170

68,836

FILED

JUN 20 1986

CLERK, SUPREME COURT

By _____
Deputy Clerk

BRIEF OF PETITIONERS ON THE MERITS

BRIEF OF PETITIONERS

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

(WITH APPENDIX)

Law Offices of
RICHARD A. SHERMAN, P.A.
Richard A. Sherman, Esquire
Rosemary B. Wilder, Esquire
Suite 102 N Justice Building
524 South Andrews Avenue
Fort Lauderdale, FL 33301
(305) 525-5885 - Broward
(305) 940-7557 - Dade

TABLE OF CONTENTS

	<u>Page</u>
Table of Citations.....	ii,iii
Introduction.....	1
Statement of the Facts and the Case.....	2-4
Summary of Argument.....	5
Points on Appeal.....	iv
Arguments:	
I. IT IS AGAINST PUBLIC POLICY TO ASSESS PUNITIVE DAMAGES AGAINST AN ESTATE; THIS POSITION IS SUPPORTED BY THE MAJORITY OF JURISDICTIONS THROUGHOUT THE UNITED STATES; AND THIS COURT SHOULD JOIN THE MAJORITY AND A VERDICT SHOULD BE DIRECTED FOR THE DEFENDANT.....	6-23
II. STATUTORY CONSTRUCTION DOES NOT PERMIT PUNITIVE DAMAGES TO BE RECOVERED AGAINST AN ESTATE AND A VERDICT MUST BE DIRECTED FOR THE ESTATE OF LOHR.....	24-31
Conclusion.....	32
Certificate of Service.....	33

TABLE OF CITATIONS

	<u>Page</u>
<u>Allen v. Anderson</u> , 562 P.2d 487 (Nev. 1977).....	15,16
<u>American Motorcycle Institute Inc. v. Mitchell</u> , 380 So.2d 452 (Fla. 5th DCA 1980).....	27
<u>Atlas Properties, Inc. v. Didich</u> , 226 So.2d 684 (Fla. 1969).....	4,18-20,24 25,27-30
<u>Barnes v. Smith</u> , 305 F.2d 226 (10th Cir. 1962)....	16,20
<u>Byrd v. Lohr</u> , 11 F.L.W. 1067, 1068 (Fla. 5th DCA May 8, 1986).....	7,12,20,24 29
<u>Caraway v. Revell</u> , 116 So.2d 16, 20 (Fla. 1959)...	12,13
<u>Carida v. Holy Cross Hosp., Inc.</u> , 427 So.2d 803 (Fla. 4th DCA 1983).....	27
<u>Carlile v. Game & Fresh Water Fish Commission</u> , 354 So.2d 362 (Fla. 1977).....	30
<u>Ellis v. Golconda Corp.</u> , 352 So.2d 122, (Fla. 1st DCA 1977).....	13
<u>Hanna v. Martin</u> , 49 So.2d 585, 587 (Fla. 1950)....	26
<u>Hayes v. Gill</u> , 390 S.W.2d 213 (Tenn. 1965).....	16,20
<u>Hoffman v. Jones</u> , 280 So.2d 431 (Fla. 1972).....	4,6
<u>In the matter of G.A.C. Corp.</u> , 68 F.2d 1295 (11th Cir. 1982).....	20-22
<u>Johnson v. Rinesmith</u> , 238 So.2d 659 (Fla. 2d DCA 1969).....	18-20,23
<u>Leahy v. Morgan</u> , 275 F.Supp. 424 (E.D. Iowa 1967).	28
<u>Luckie v. McCall Mfg. Co.</u> , 153 So.2d 311, 314 (Fla. 1st DCA 1963).....	26
<u>Martin v. United Sec. Services, Inc.</u> , 314 So.2d 765 (Fla. 1975).....	27

TABLE OF CITATIONS (Continued)

	<u>Page</u>
<u>Mervis v. Wolverton</u> , 2111 So.2d 847 (Miss. 1968)..	16,17
<u>Shearn v. Orlando Funeral Home</u> , 88 So.2d 591, 593 (Fla. 1956).....	26
<u>State v. Egan</u> , 287 So.2d 1 (Fla. 1973).....	30
<u>Stephens v. Rohde</u> , 478 So.2d 862 (Fla. 1st DCA 1985).....	4,20,22,23
<u>Thompson v. Estate of Petroff</u> , 319 N.W.2d, 400, 402 (Minn. 1982).....	9,13,14
<u>White Construction Co., Inc. v. Dupont</u> , 455 So.2d 1026 (Fla.1984).....	13

REFERENCES:

W. Prosser, <u>Handbook of the Law of Torts</u> , 898 (4th Ed. 1971).....	9-11
U.S. Const. Art. I Section 9 Cl.3, Section 10; Cl.1; U.S. const. Art. I. Section 10, 17; Fla. Const. Art. I Section 10.....	12
Fla. Survival Statute Section 46.021.....	18,23,27, 28
Cal. Probate Code Section 573 (West Supp. 1984)...	22
New York, N.Y. Estate Powers and Trust Law Section 11-32. (Consol. 1974).....	22
Black's Law Dictionary, p.201 (5th Ed. 1979).....	26
22 Am.Jur.2d, Damages.....	27

POINTS ON APPEAL

- I. IT IS AGAINST PUBLIC POLICY TO ASSESS PUNITIVE DAMAGES AGAINST AN ESTATE; THIS POSITION IS SUPPORTED BY THE MAJORITY OF JURISDICTIONS THROUGHOUT THE UNITED STATES; AND THIS COURT SHOULD JOIN THE MAJORITY AND A VERDICT SHOULD BE DIRECTED FOR THE DEFENDANT.

- II. STATUTORY CONSTRUCTION DOES NOT PERMIT PUNITIVE DAMAGES TO BE RECOVERED AGAINST AN ESTATE AND A VERDICT MUST BE DIRECTED FOR THE ESTATE OF LOHR.

INTRODUCTION

The Petitioners/Cross-Appellants/Appellees/Defendants, James L. Lohr as representative of the Estate of John Robert Lohr, deceased and Sentry Insurance Company will be referred to collectively as Petitioner, Defendant, or Lohr.

The Respondent/Appellant/Cross-Appellee/Plaintiff, Hattie Byrd will be referred to as Respondent, Plaintiff, or Byrd.

For the sake of simplicity and ease of reading, the supplemental authority for this Brief will be footnoted and the citations appear in the appendix. The opinion of the Fifth District Court of Appeal appears in the appendix at 1-2.

The Record reference will be designated by the letter "R". All emphasis in the Brief is that of the Respondent.

STATEMENT OF THE FACTS AND THE CASE

This appeal is to determine a question of great public importance:

May punitive damages be awarded
against a deceased tortfeasor's estate?

The Appellant respectfully suggests that this Court answer no; thus joining the overwhelming majority of jurisdictions in the United States, which do not allow the innocent widow, orphaned children, and other heirs to be punished for wrongdoing of the decedent.

What transpired was that John Lohr, the Defendant, was intoxicated and was involved in an accident with the Plaintiff, Hattie Byrd. As a result of the accident the Plaintiff was minimally injured and the Defendant was killed. The heirs to Mr. Lohr's estate are his elderly parents (R 4, 13, 29).

The Plaintiff filed suit against the decedent's estate, which was valued at \$28,000 (R 9-10). The jury awarded compensatory damages of \$31,000 and punitive damages of \$25,000 (R 34). There was no issue as to the compensatory damages and the Defendant moved for Remittitur and for entry of Judgment in Accordance with the Motion for Directed Verdict (R 32-33). The trial court held that in view of the value of the estate's being \$28,000, the \$25,000 punitive damages were too high and entered the remittitur, reducing the punitive damages to \$9,000 (R 35-36).

The Plaintiff rejected the Remittitur (R 37) and the trial court entered an Order vacating the Final Judgment and granting a new trial on damages (R 38). The Plaintiff appealed challenging the Remittitur (R 39). The Defendant cross appealed challenging the award of punitive damages against the estate of the tortfeasor (R 44).

The cross appeal presented a question of first impression in the Fifth District, namely whether punitive damages can be assessed against an estate. In its Briefs, Lohr pointed out that the overwhelming majority of states which have considered this question have refused to allow punitive damages against an estate; thirty-seven states out of forty-two states which have considered this question do not allow this.

The reason is that the purpose of punitive damages is to punish a wrongdoer. Since the decedent is dead he can not be punished any further. In the present case the Defendant was punished with his life and no further punishment is necessary or possible.

Additionally, the Defendant asked the District Court to review who is being punished when punitive damages are assessed against an estate. In truth it is the widow and orphaned children and parents who are already suffering acutely from the tragedy who are punished by the court.

It was submitted that Florida should follow the overwhelming majority of states which have held that punitive damages are not

recoverable from an estate. After the Briefs were filed in this case, the First District Court of Appeal decided Stephens v. Rohde, 478 So.2d 862 (Fla. 1st DCA 1985), which the Plaintiff relied on as supplemental authority.

The Fifth District considered the existing law in Florida and the vast body of law from other states and said that the compelling argument was that punitive damages should not be available against an estate (A 1-2). In its opinion it noted that under the restraints of Hoffman v. Jones, 280 So.2d 431 (Fla. 1972), it was bound by this Court's opinion in Atlas Properties, Inc. v. Didich, 226 So.2d 684 (Fla. 1969) (which inferred that punitive damages could be assessed against an estate). Therefore, the Fifth District had to affirm the trial court's Order Denying the Directed Verdict for the Defendant on punitive damages. However, since this Court has never expressly ruled on the issue, the Appellate Court certified the question as one of great public importance (A 2). The Appellate Court also affirmed the amount of the Remittitur (A 2).

The Petitioner now submits its Brief on the merits and respectfully asserts that Florida should follow the overwhelming majority of states which have held that punitive damages are not recoverable from an estate.

SUMMARY OF ARGUMENT

This appeal presents a question of first impression in the Florida Supreme Court, namely whether punitive damages can be assessed against an estate.

The overwhelming majority of states which have considered this question have refused to allow punitive damages against an estate; thirty-seven states out of forty-two states which have considered this question do not allow this.

The reason is that the purpose of punitive damages is to punish a wrongdoer. Since the decedent is dead he can not be punished any further. In the present case the Defendant was punished with his life and no further punishment is necessary or possible.

Additionally, this Honorable Court should review who is being punished when punitive damages are assessed against an estate. In truth, it is the widow and orphaned children and parents who are already suffering acutely from the tragedy who are punished by the court.

Therefore, it is submitted that Florida should follow the overwhelming majority of states which have held that punitive damages are not recoverable from an estate.

I. IT IS AGAINST PUBLIC POLICY TO ASSESS PUNITIVE DAMAGES AGAINST AN ESTATE; THIS POSITION IS SUPPORTED BY THE MAJORITY OF JURISDICTIONS THROUGHOUT THE UNITED STATES; AND THIS COURT SHOULD JOIN THE MAJORITY AND A VERDICT SHOULD BE DIRECTED FOR THE DEFENDANT.

The Fifth District Court correctly reasoned that allowing punitive damages against an estate served no purpose other than to punish innocent heirs: the widow, orphaned children and in this case the elderly parents of the deceased tortfeasor. While the Appellate Court agreed with the position of Defendant, that a verdict should have been directed barring punitive damages; it was bound by this Court's opinion in Hoffman v. Jones, supra, to just write an opinion setting out its reasoning, to affirm the lower court and then let this Court decide the issue. This is a case of first impression before the Supreme Court and it is respectfully submitted that this Court accept the Fifth District's reasoning and that of the vast majority of jurisdictions in the United States and bar the recovery of punitive damages against an estate.

Most of the states which have considered this problem disallow punitive damages against the estate of a dead tortfeasor. Of the four which do allow such damages, at least two -- Texas and West Virginia -- rely on public policy reasons inapplicable to Florida. In most states that have expressly considered the problem, such damages are not allowed. See, e.g., *Thorpe v. Wilson*, 58 N.C.App. 292, 293 S.E.2d 675 (1982); *Summa Corp. v. Greenspun*, 96 Nev. 247, 607 P.2d 569 (1980); *Allen v.*

Anderson, 93 Nev. 204, 563 P.2d 484 (1977); Fordon v. Nathan, 352 N.Y.S.2d 464 (N.Y.App. Div. 1974); Braun v. Moreno, 11 Ariz.App. 509, 466 P.2d 60 (1970); Mervis v. Wolverson, 211 So.2d 847 (Miss.1968); Ashcraft v. Saunders, 251 Ore. 139, 444 P.2d 924 (1968); Tietjens v. General Motors Corp., 418 S.W.2d 75 (Mo. 1967); Bancroft-Whitney Co. v. Glen, 64 Cal.2d 327, 411 P.2d 921 (1966); Hayes v. Gill, 216 Tenn. 39, 390 S.W.2d 213 (1965); Dalton v. Johnson, 240 Va. 102, 129 S.E.2d 647 (1963); Barnes v. Smith, 305 F.2d 226 (10th Cir. 1962) (applying New Mexico law); Marcante v. Hein, 51 Wyo. 389, 67 P.2d 196 (1937); Johnson v. Levy, 122 La. 118, 47 So. 422 (1908); Sheik v. Hobson, 64 Iowa 146, 19 N.W. 875 (1884). The rationale underlying these cases is that when the tortfeasor is dead, he cannot be punished and no longer needs to be deterred from future misconduct. The punishment actually is inflicted upon his heirs. Separation of the "punitive" and "exemplary" aspects of such awards is unjustified because general deterrence logically depends upon the perception of punishment suffered by the wrongdoer. When that punishment is diffused and unjustly inflicted upon the innocent, through a doctrine analogous to attainder, the deterrent effect is frustrated. It is unrealistic to suppose that such awards deter other prospective tortfeasors, especially if the criminal laws fail to do so.

Byrd v. Lohr, 11 F.L.W. 1067, 1068 (Fla. 5th DCA May 8, 1986).

Of the states which considered this question, the overwhelming majority of states have refused to allow punitive damages to be assessed against the estate of a tortfeasor, because punitive damages paid by the estate defeats their entire purpose, which is punishment and deterrence. Of these, five states have refused to allow any punitive damages, which is

consistent with the abandonment of punitive damages in England, where they originated.^{1*} Eleven statutes have enacted statutes that expressly forbid a punitive damage award against the estate of a deceased tortfeasor, among them California and New York.² Fourteen states have barred a punitive damage award against the tortfeasor's estate by case law.³ Nine states only allow a punitive damage claim to survive the death of the plaintiff.⁴ In total, thirty-seven of forty-two states to address the issue, do not permit the type of jury award given in this case. It is respectfully submitted that the trial court erred in allowing the punitive damage claim against Mr. Lohr's estate and the Motion for Entry of Judgment in accordance with Motion for Directed Verdict should have been granted.

THE DEAD HAVE BEEN PUNISHED ENOUGH

The Florida Supreme Court has not ruled on this question and therefore this is a case of first impression for this Court. It is respectfully suggested that this Honorable Court should follow the vast majority of the jurisdictions in the United States and not permit a punitive damage claim against the estate of the tortfeasor. The heirs to the estate are the only ones punished by this Judgment. The tortfeasor has already paid the ultimate price for his actions, he lost his life in the accident.

* Please see the appendix at pages A3-5 for citations footnoted in the brief.

PUNITIVE DAMAGES PAID BY ESTATE DEFEATS THE PURPOSE.

At common law all causes of action died with the actors and it appears that this was originally based on the fact that those acts now classified as torts were one time dealt with as crimes. See, W. Prosser, Handbook of the Law of Torts, 898 (4th Ed. 1971); Thompson v. Estate of Petroff, 319 N.W.2d, 400, 402 (Minn. 1982). The wrongdoer was likely to forfeit life or limb and his property was confiscated by the King. Thompson, supra 402. As early as the Thirteenth century it was recognized that punishment should not be extended beyond the offender himself and the party not at fault should not suffer punishment. By the Sixteenth century certain causes of action survived the death of the plaintiff but the courts continued to hold that if a man inflicted personal injury upon another and then died the victim had no cause of action for the tortfeasor cannot be punished when he is dead. In the Eighteenth century, English courts originated the Doctrine of Exemplary Damages as a means of justifying awards of damages exceeding the plaintiff's tangible harm.⁵ It was also recognized that the damages punished the misconduct of the defendant.⁶ As the law developed and statutes were passed allowing a cause of action to survive the death of a party, the question arose regarding the imposition of punitive damages, especially against the estate of a deceased tortfeasor.

As a general rule, punishment and the discouragement of similar offenses usually does not enter the area of tort law, with

LAW OFFICES RICHARD A. SHERMAN, P. A.

SUITE 102N JUSTICE BUILDING, 524 SOUTH ANDREWS AVE., FORT LAUDERDALE, FLA. 33301 • TEL. (305) 525-5885

SUITE 518 BISCAYNE BUILDING, 19 WEST FLAGLER STREET, MIAMI, FLA. 33130 • TEL. (305) 940-7557

one exception.

In one rather anomalous respect, however, the ideas underlying the criminal law have invaded the field of torts. ...all but a few courts have permitted the jury to award in the tort action "punitive" or "exemplary" damages, or what is sometimes called "smart money". Such damages are given to the plaintiff over and above the full compensation for his injuries, for the purpose of punishing the defendant, of teaching him not to do it again, and of deterring others from following his example.

Posser, supra at 9.

However under modern tort theory the primary reason for the existence of a cause of action is to provide compensation to the plaintiff.

[T]he general purpose of the law of torts is to secure a man indemnity against certain forms of harm to person, reputation or estate, at the hands of his neighbors, not because they are wrong, but because they are harms. O.W. Holmes, *The Common Law* 115 (M. Howe ed. 1963).

Since the focus today is on compensation the need for punitive damages has been greatly criticized.

The policy of giving punitive damages has been a subject of much controversy. They have been condemned as undue compensation of the plaintiff beyond his just deserts in the form of a criminal fine which should be paid to the state, if any-one, with the amount fixed only by the caprice of the jury and imposed

without the usual safeguards thrown about criminal procedure, such as proof of guilt beyond a reasonable doubt, the privilege against self-incrimination, and even the rule against double jeopardy-- since the defendant may still be prosecuted for the crime after he had been mulcted in the tort action.

Prosser, supra at 11.

Some states only allow punitive damages to compensate for litigation expenses that are precluded by Rules of Civil Procedure.⁷ Of course, this is easily remedied by the amendment and improvement of the Rule of Civil Procedure. Other states allowed punitive damages only to cover items previously disallowed by compensatory damages.⁸ However mental pain and suffering, hurt feelings, and wounded dignity are now included in the determination of actual damages and therefore the compensatory role of punitive damages is filled by actual damage awards.

Courts almost universally recognize that punitive damages are a windfall to the plaintiff and the only remaining viable reason for assessing punitive damages is to punish and deter. The standard applied by the courts to determine whether punitive damages can be given is that the defendant has been reckless, wanton, willful, etc. This standard serves two purposes. First, it guards against the allowance of punitive damages in cases in which there is no admonitory function and secondly, it serves to

focus attention on the person who has acted and upon the need for admonishing him.⁹

NO JURISDICTION

The quintessence of this matter is that the Florida courts do not have jurisdiction to punish the dead. Any attempt to do so is following form rather than substance. The ones punished by this unreasoned following of form are the widow and orphaned children and parents who are already suffering acutely from the tragedy, and have further punishment inflicted on them by the courts. As the Fifth District correctly observed, the assessment of punitive damages against the estate to unjustly punish the innocent heirs is a situation similar to attainder. Byrd at 1068. The United States Constitution and that of the State of Florida expressly prohibits attainder. U.S. Const. Art. I Section 9 Cl.3, Section 10; Cl.1; U.S. Const. Art. I Section 10, 17; Fla. Const. Art. I Section 10. Punishing the innocent heirs is also analogous to the feudal doctrine of corruption of blood, where the descendants are punished for the crimes of their fathers.

CASE LAW PROHIBITS ESTATE PAYING PUNITIVE DAMAGES.

Florida courts have consistently recognized that the purpose of punitive damages is to punish. The Supreme Court clearly states this purpose in Caraway v. Revell, 116 So.2d 16, 20 (Fla. 1959).

There is real affinity between the character (or kind or degree) of necessity to recover punitive damages or to sustain or warrant a conviction of manslaughter. Both have, as a basic purpose, the punishment of the offender. The offender in a manslaughter action may be deprived of his liberty or property by the State while the offender in an action for that kind of negligence justifying the imposition of punitive damages is deprived of his property-- not as compensation to the injured party but as punishment--ergo, both are punishment and partake of public wrongs, to a greater or less degree.

The dicta in Carraway was recently adopted by the Supreme Court in White Construction Co., Inc. v. Dupont, 455 So.2d 1026 (Fla. 1984). It is well established that punitive damages are an enhancement of the compensatory damages and this windfall is permitted to prevent the defendant from repeating his wrongful actions. Ellis v. Golconda Corp., 352 So.2d 122, (Fla. 1st DCA 1977). Since compensation is not a basis for punitive damages in Florida the object of punishment is not accomplished when the tortfeasor is dead.

A recent Supreme Court case in Minnesota reviewed the development of punitive damages and came to the inescapable conclusion that punitive damages are to punish the defendant and if he is dead, his estate should not suffer for his actions. Thompson v. Estate of Petroff, supra. The court was faced with the issue of assessing exemplary damages against a deceased tortfeasor under a survival statute. The plaintiff, Thompson,

was attacked by the tortfeasor Petroff and she subsequently killed him. The Supreme Court held that punitive damages against Petroff's estate were not proper and the court was not persuaded by the allegation that the punitive damages would deter others from committing the same act.

Thompson argues that if she is allowed to recover from Petroff's estate, she is also entitled to punitive damages. Although the punitive damages statute, Minn. Stat. Section 549.20 (1980), does not expressly prohibit assessing punitive damages against the estate of a deceased defendant, we conclude that such damages are not recoverable. The purpose of punitive damages is to punish the tortfeasor where the act is malicious or wilful, and to deter him from repeating the wrongful act. See, e.g., *Wilson v. City of Eagan*, 297 N.W.2d 146, 151 (Minn. 1980); *Gryc v. Dayton-Hudson Corp.*, 297 N.W.2d 727, 741 (Minn. 1980); C. McCormick *HandBook of Law of Damages* Section 77 (1935); W. Prosser, *supra*, Section 2 at 9. Obviously, if the tortfeasor is dead, no need exists for either punishment or deterrence. Thompson contends that a potential tortfeasor will be deterred from committing an intentional tort by the fear that if he dies after committing the tort, his heirs will be deprived of part of his estate as a result of the estate's liability for punitive damages. This argument is not persuasive.

We acknowledge that the decedent's act in this case was particularly brutal; nevertheless, we cannot permit punitive damages to be assessed against his estate merely because Thompson very probably could have recovered them were Petroff still alive. Petroff is dead; to punish his estate instead would be to ignore the entire purpose of punitive damages.

Thompson at 408.

LAW OFFICES RICHARD A. SHERMAN, P.A.

SUITE 102N JUSTICE BUILDING, 524 SOUTH ANDREWS AVE., FORT LAUDERDALE, FLA. 33301 • TEL. (305) 525-5885
SUITE 518 BISCAYNE BUILDING, 19 WEST FLAGLER STREET, MIAMI, FLA. 33130 • TEL. (305) 940-7557

THE DEFENDANT CAN NOT BE PUNISHED ANY FURTHER.

The Supreme Court of Nevada, in Allen v. Anderson, 562 P.2d 487 (Nev. 1977) held that neither the estate nor the father of the alleged deceased tortfeasor driver could be liable for punitive damages. The plaintiff was a passenger in a car driven by Michael Ruark. Ruark's car collided with one driven by Frederick Anderson. Both Ruark and Anderson were driving under the influence of alcohol. In the accident Ruark was killed and Anderson injured. The plaintiff sued Anderson, the estate of Ruark and Ruark's father. The court addressed a broadly worded survival statute¹⁰ and determined that punitive damages cannot be assessed against the tortfeasor's estate.

With consistent logic, by the great weight of authority, punitive damage claims do not survive the death of the tortfeasor, and cannot be sought from the deceased tortfeasor's estate. See, for example: Barnes v. Smith, 305 F.2d 226 (10th Cir. 1962); Hayes v. Gill, 216 Tenn. 39, 390 S.W.2d 213 (1965); Dalton v. Johnson, 204 Va. 102, 129 S.E.2d 647 (1963); Morris v. Barton, 200 Okl. 4, 190 P.2d 451 (1947); Marcante v. Hein, 51 Wyo. 389, 67 P.2d 196 (1937); Evans v. Gibson, 220 Cal. 476, 31 P.2d 389 (1934); Braun v. Moreno, 11 Ariz. app. 590, 466 P.2d 69 (1970); McAdams v. Blue, 3 N.C.App. 169, 164 S.E.2d 490 (1968);... In Barnes v. Smith, cited above, a case arising, as this one, from a highway disaster involving the collision of two motor vehicles, the court noted that the rule just mentioned has been almost unanimously followed by courts considering the liability of a tortfeasor's estate. One court has

LAW OFFICES RICHARD A. SHERMAN, P. A.

SUITE 102N JUSTICE BUILDING, 524 SOUTH ANDREWS AVE., FORT LAUDERDALE, FLA. 33301 • TEL. (305) 525-5885
SUITE 518 BISCAYNE BUILDING, 19 WEST FLAGLER STREET, MIAMI, FLA. 33130 • TEL. (305) 940-7557

cogently stated that fundamental rationale for such holdings as follows:
"Punitive damages are not to compensate an injured person for the loss sustained, but to punish a defendant for his conduct. [Citations omitted]. Since the deceased tortfeasor can in no way be punished by the award of punitive damages, we see no reason for allowing such damages to be assessed. When 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". Braun v. Moreno, cited above, 466 P.2d at 62, 63. Accord, Hayes v. Gill, cited above. We are persuaded by this logic.

Allen at 489-490.

The driver in Barnes v. Smith, 305 F.2d 226 (10th Cir. 1962) cited in Allen, had an alcohol content nearly three times that sufficient under accepted standards to produce drunkenness. Although there was no law in New Mexico on this subject the Tenth Circuit was persuaded by the majority rule that does not allow punitive damages from the estate of the wrongdoer, since the reason for their imposition can no longer be effective. Barnes, supra, 231. See, Hayes v. Gill, 390 S.W.2d 213 (Tenn. 1965).

The Supreme Court of Mississippi held that vindictive damages were improperly awarded against the estate of a defendant under a statute which expressly prohibits this type of award. Mervis v. Wolverton, 211 So.2d 847 (Miss. 1968) The Court was further persuaded by an early case which stated that punitive

damages should not follow the tortfeasor to the grave.

This Court in *Hewlett v. George*, 68 Miss. 702, 710, 9 So. 885, 887, 13 L.R.A. 682 (1891), has this to say in regard to punitive damages being awarded against a decedent:

The action of the court, in its instructions, in excluding from the consideration of the jury the question of punitive damages, is also assigned for error. On this point it will be sufficient to say that at common law the action would have been abated upon the death of the defendant, and no recovery could have been had against her representative. The doctrine was that for a personal wrong the offender could not have followed into the grave, and the dead be visited with punishment. Our statutes have modified the common law to the extent of permitting a recovery against the representative of the deceased wrong-doer to an amount sufficient to compensate for the actual damage sustained by the injured party; but the realm of the dead is not invaded, and punishment visited upon the dead.

Mervis, at 848.

The same rationale is still valid today. Mr. Lohr has paid for actions with his life. The punishment should not be inflicted further upon his estate and the innocent heirs, his elderly parents.

FLORIDA LAW DOES NOT REQUIRE THE IMPOSITION OF PUNITIVE DAMAGES AGAINST AN ESTATE.

One sixteen year old Florida case held that an estate may be

assessed for punitive damages and in that case there are no facts cited nor is there any discussion. Johnson v. Rinesmith, 238 So.2d 659 (Fla. 2d DCA 1969). The Second District was reviewing a Pasco County case and simply adopted the reasoning set forth in Atlas Properties, Inc., v. Didich, 213 So.2d 278 (Fla. 3d DCA 1968), which construed the Florida Survival Statute Section 46.021 to hold that a deceased plaintiff's cause of action for punitive damage survives her. In Atlas Properties a wrongful death action was brought against a corporation for the death of a 13 year old girl who drown in the defendant's swimming pool when her arm was caught in the uncovered filter drain pipe at the bottom of the pool. The jury awarded the estate \$35,000 in punitive damages. The court stated that the legislative intent of Florida's survival statute was to allow the personal representative of the decedant estate to maintain an action as the injured party would have been for the death. The court was persuaded by the following quote from an Iowa case:

"The public policy underlying exemplary damages is to punish the wrongdoer. Logic dictated that if a wrongdoer may be punished if his victim lives, then surely he should not escape retribution if his wrongful act causes a death." Leahy v. Morgan, 275 F.Supp. 424, 425 (E.D. Iowa 1967).

Atlas Properties, at 281.

Iowa like 90% of the jurisdictions in the U.S. does not allow for the recovery of punitive damages against a tortfeasor's estate.

In Atlas the court also made the statement that "...All actions including those for punitive damages should survive the death of either party to the action." Atlas Properties, supra, 280. In Johnson the court recognized that this was dicta and merely a suggestion:

That case involved the question whether a claim for punitive damages survived the death of the injured party, and it was there held that it does, and suggested that it would survive the death of the tortfeasor. We so hold.

Johnson, at 660.

The logic which compelled the result in Atlas Properties, does not apply in the instant case. Even this Court recognized this in the opinion:

Certainly this logic is more apposite when it is the injured party who dies (as we have here) rather than the actual tortfeasor.

Atlas Properties, at 688.

The Fifth District also recognized that the rationale in Atlas Properties, allowing the child's estate to recover for her death, was not suitable when applied to assess punitive damages against an estate.

The policy underlying the decision (Atlas Properties) was that a person should be punished for his malicious and reckless actions, irrespective of whether the victim lives or dies. This policy, of course, is not apposite to the converse situation, as in the instant

case, where it is the tortfeasor who is dead.

Byrd, at 1068.

The First District Court of Appeal recently held that a punitive damage claim could be brought against an estate in Stephens v. Rohde, supra. Stephens was injured in a collision with a car driven by Rohde. Rohde later died of causes unrelated to the accident and his executor was substituted as defendant. The punitive damage claim was stricken, on motion by Rohde before trial, based on the trial court's determination that punitive damages may not be recovered from a deceased tortfeasor. Relying on Atlas Properties, the Appellate Court reversed and remanded for a new trial on punitive damages.

The First District, like the Second, immediately recognized that it was only dicta in Atlas Properties that stated a punitive damage claim survives the death of the tortfeasor. Stephens at 862. The First District then looked to a one-paragraph opinion in Johnson as precedent; but did not consider case law from any other jurisdiction, other than to reject outright the Eleventh Circuit case of In the matter of G.A.C. Corp., 68 F.2d 1295 (11th Cir. 1982) as not controlling.

The Eleventh Circuit applied the rationale used in Barnes v. Smith, supra and Hayes v. Gill, supra, to prevent a punitive damage claim against the estate of the bankrupt, because to allow the claim would have the effect of punishing innocent third

parties, the creditors. The same is true in the case sub judice where the only parties to be punished are the elderly parents of Mr. Lohr who are the heirs to the estate. The Eleventh Circuit, like many other jurisdictions rejected the allegation that the punitive damages would serve to deter future wrongful conduct.

Novak, citing no supporting authority in the bankruptcy or any other context, argues that one purpose of punitive damages is to deter future wrongful conduct and that this purpose would be served by allowing his punitive damages claim. This reasoning is unsound, however, because future wrongful conduct will not be deterred when the punitive damages are paid from the wrongdoer's estate rather than from his own pocket. We agree with the bankruptcy judge that the effect of allowing a punitive damages claim would be to force innocent creditors to pay for the bankrupt's wrongdoing. Such a result would be inequitable, and the punitive damages claim was properly stricken.

This view has case support in several analogous situations. ...numerous cases have held that punitive damages cannot be recovered from the estate of a deceased tortfeasor because the purpose of punitive damages, whether it be punishment or deterrence, would not be served under such circumstances. See, e.G., Barnes v. Smith, 305 F.2d 226 (10th Cir. 1962); Sullivan v. Associates Billposters & Distributors, 6 F.2d 1000 (2d Cir. 1925); Hayes v. Gill, 216 Tenn. 39, 390 S.W.2d 213 (1965).

Matter of GAC, at 1301.

The Respondent admitted below that the only purpose served

by allowing the claim against the Lohr estate is deterrence of another from the same acts. (Brief of Appellant at 6) This is apparently the purpose which the Stephens court felt would be served by allowing the estate to be assessed punitive damages. Stephens at 863.

This proposition has been overwhelmingly rejected by at least thirty-seven jurisdictions, including the Eleventh Circuit. Matter of GAC Corp., supra. The California legislature passed a probate statute which allows all damages against an estate "except damages imposed primarily for the sake of example and by the way of punishing the defendant". Cal. Probate Code Section 573 (West Supp. 1984) See also, New York, N.Y. Estate Powers and Trust Law Section 11-32. (Consol. 1974).

The vague assertion that granting punitive damages has a deterrent effect upon the public at large is not supported by any empirical facts. Few people have any knowledge or understanding of punitive damages yet they do understand the imposition of criminal sanctions. If the public is to be deterred from driving while intoxicated the criminal system is the one to use, not the civil. The Florida legislature is the proper place to effect deterrence. The parents of Mr. Lohr can not deter the general public from wrongful acts by paying money from his estate.

It is respectfully suggested that this Honorable Court join the vast majority of jurisdictions in the United States in barring a punitive damage claim against the estate of a

tortfeasor. A single sentence in Johnson and the deterrence principle of Stephens are not persuasive nor do they serve as precedent for this court and can not stand in the face of the well-reasoned and thoughtout opinions of numerous courts and legislatures throughout the country. The trial court erred in denying the Judgment in Accordance with the Motion for Directed Verdict and the Order must be reversed and a Directed Verdict entered for the Estate of Lohr.

II. STATUTORY CONSTRUCTION DOES NOT
PERMIT PUNITIVE DAMAGES TO BE
RECOVERED AGAINST AN ESTATE AND
A VERDICT MUST BE DIRECTED FOR
THE ESTATE OF LOHR.

The Appellate Court stated that the only possible basis in Florida for assessing punitive damages against an estate would be if Florida's survival statute Section 46.021 was construed to abrogate common law so as to classify punitive damages as a "cause of action". Byrd at 1068. It is respectfully submitted that punitive damages are not a "cause of action" under Florida law and may not be recovered against an estate.

The survival statute issue arose in this case solely because of the dicta in Atlas Properties, supra. This court in Atlas Properties held that punitive damages survive the death of the injured party:

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

Atlas Properties, at 691.

In dicta however the opinion seems to treat punitive damages as a "cause of action", which would survive under the statute. The law reads:

46.021 Actions; surviving death of party

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.

The dicta discusses the fact that the 1828 statute singled out several torts that did not survive the death of the party, such as assault and battery, slander, etc. Therefore the clear intent of the legislature was that all other causes of action would survive. Atlas Properties, 688. In the 1930's the Supreme Court found that "purely" compensatory damages could be recovered, because personal injury actions survived the death of either party. Atlas Properties, 687. No appellate cases ever addressed punitive damages in this context until Atlas Properties. It has been suggested that this Court equated punitive damages with "cause of action" in examining which "torts" and "actions" survived under the statute. It is respectfully submitted that punitive damages are not a cause of action under the survival statute and that this Court in Atlas Properties allowed the recovery of punitive damages based on public policy and not merely statutory interpretation. Both statutory interpretation and public policy in the present case bar recovery of punitive damages against the tortfeasor's estate.

Punitive damages cannot be a "cause of action" because a cause of action is defined as "the fact or facts which give a person a right to judicial relief" or "the right which a party

has to institute a judicial proceeding." Black's Law Dictionary, p. 201 (5th Ed. 1979). See also, Shearn v. Orlando Funeral Home, 88 So.2d 591, 593 (Fla. 1956) (where this Court defined cause of action; and found that the plaintiff was not splitting a cause of action because she was not suing for different elements of damage of the same cause of action, but was maintaining a separate cause of action); Luckie v. McCall Mfg. Co., 153 So.2d 311, 314 (Fla. 1st DCA 1963) (A "cause of action" is particular legal right of plaintiff against defendant, together with some violation thereof which occasions loss or damage).

Damages are defined as the pecuniary consequences which law imposes for breach of some duty or the violation of some right. 22 AM. Jur.2d, Damages. In discussing damages this Court has stated that they are just compensation for injury:

The fundamental principle of the law of damages is that the person injured by breach of contract or by wrongful or negligent act or omission shall have fair and just compensation commensurate with the loss sustained in consequence of the defendant's act which give rise to the action. In other words, the damages awarded should be equal to and precisely commensurate with the injury sustained.

Hanna v. Martin, 49 So.2d 585, 587 (Fla. 1950).

It is clear that damages are simply an element of a cause of action and certainly not a cause of action in and of themselves. This is especially true in the case of punitive damages, which in Florida serves no compensatory function whatsoever. Even as an

element of a cause of action, punitive damages cannot stand alone, as they can only be recovered when an award of compensatory damages has been made. Martin v. United Sec. Services, Inc., 314 So.2d 765 (Fla. 1975); Carida v. Holy Cross Hosp., Inc., 427 So.2d 803 (Fla. 4th DCA 1983); American Motorcycle Institute Inc. v. Mitchell, 380 So.2d 452 (Fla. 5th DCA 1980).

It would be incorrect to equate the "action" for breach of contract or tort with the compensation for the breach of duty. Similarly, it would be incorrect to equate an "action" for wrongful death or personal injury with the punishment used to deter the tortfeasor. In other words, the plaintiff sues because there is a breach of duty. The plaintiff has a right to be compensated for the breach. The plaintiff has no right to punish the tortfeasor and no right to punitive damages. The plaintiff cannot bring an "action" sounding in "punitive damages". To interpret the phrase "cause of action" in Florida Statute Section 46.021 to mean the plaintiff has an "action" for punitive damages would be construing the statute contrary to the clear and plain language of law and contrary to the established definition of cause of action and damages.

It is submitted that the Supreme Court in Atlas Properties did not put an absurd construction on the law by finding that a cause of action sounding in punitive damages exists in Florida. Rather the court determined that the tort action did not die with

the plaintiff and that public policy reasons required that the tortfeasor should not benefit from the fact that the injured party died. This is clearly demonstrated by the court's reliance on the Iowa case of Leahy v. Morgan, 275 F.Supp. 424 (E.D. Iowa 1967):

This Federal District Court stated its reasoning for allowing punitive damages to survive and it was used by the 3d District Court of Appeal in the instant decision. The reasoning was stated:

"Thus, it seems apparent that Sections 611.20-.22 is a true survival act, one which is intended to preserve those causes of action which existed at the time of the injured party's death. The public policy underlying exemplary damages is to punish the wrongdoer. Logic dictates that if a wrongdoer may be punished if his victim lives, then surely he should not escape retribution if his wrongful act causes a death." Id. at 425 (Emphasis added)...

Thus, perhaps Leahy does not recite Iowa law accurately. Still, the paragraph cited above makes good sense. It puts to rest the old saying that it is better to kill your victim than to maim him.

Atlas Properties, at 687, 688.

It is important to remember that in Iowa punitive damages cannot be recovered from an estate of a tortfeasor. So the question really is not one of statutory construction. A tort cause of action survives in Florida under Section 46.021. The question is what public policy reason exists to allow the

recovery of punitive damages against the tortfeasor's estate? As previously discussed in Point I, there is no public policy served by allowing innocent heirs to be punished for the acts of a deceased wrongdoer.

Both this Court and the Fifth District noted that the logic and policy in punishing a live tortfeasor by making him pay punitive damages to the estate of the injured party is not a suitable basis for requiring innocent heirs to pay punitive damages for acts they did not commit.

It appears that logic and common sense indicated that this Court should not affirm the District Court and allow the recovery of punitive damages under Section 45.11. 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. (Emphasis added)

Atlas Properties, at 688.

* * * * *

The policy underlying the decision was that a person should be punished for his malicious and reckless actions, irrespective of whether the victim lives or dies. This policy, of course, is not apposite to the converse situation, as in the instant case, where it is the tortfeasor who is dead. (Emphasis added)

Byrd, at 1068

Punitive damages were not permitted at common law against a decedent's estate. Atlas Properties, 686; Byrd, 1068. To abrogate common law in the present case would require that an

absurd construction be placed on Florida's survival statute, that punitive damages are a "cause of action" in Florida. It is Black letter law that statutes abrogating common law must be strictly construed. Carlile v. Game & Fresh Water Fish Commission, 354 So.2d 362 (Fla. 1977). Further in interpreting legislation, the purpose of the rules relating to construction of statutes is to discover the true intention of the law. State v. Egan, 287 So.2d 1 (Fla. 1973); Carlile v. Game & Fresh Water Fish Commission, supra. The intent of the legislature was not to punish innocent heirs for the wrongs of the deceased tortfeasor. This is substantiated by the constitutional prohibitions on bills of attainder and corruption of blood.

Strict statutory construction in this case is that a tort cause of action exists against the estate of Lohr for breach of a duty of care to Mrs. Byrd, for which she received full compensatory damages. Public policy does not require any other interpretation and certainly does not require that the elderly parents of John Lohr be punished even further by having to pay punitive damages for his tortious conduct. Lohr is beyond punishment now and suffered the ultimate punishment when he was killed in the accident. It is respectfully submitted that this Court in Atlas Properties, did not establish punitive damages as a "cause of action" under the survival statute. Therefore, statutory interpretation and public policy dictates that punitive damages should not be inflicted upon innocent widows, orphaned

LAW OFFICES RICHARD A. SHERMAN, P.A.

SUITE 102N JUSTICE BUILDING, 524 SOUTH ANDREWS AVE., FORT LAUDERDALE, FLA. 33301 • TEL. (305) 525-5885

SUITE 518 BISCAYNE BUILDING, 19 WEST FLAGLER STREET, MIAMI, FLA. 33130 • TEL. (305) 940-7557

children and elderly parents and a Verdict must be directed for
the Estate of Lohr.

CONCLUSION

The lower court erred in allowing a claim for punitive damages to be brought against the estate of the tortfeasor and the Order must be reversed and a verdict directed for the Estate of Lohr.

Law Offices of
RICHARD A. SHERMAN, P.A.
Richard A. Sherman, Esquire
Rosemary B. Wilder, Esquire
Suite 102 N Justice Building
524 South Andrews Avenue
Fort Lauderdale, FL 33301
(305) 525-5885 - Broward
(305) 940-7557 - Dade

By: Richard A. Sherman
Richard A. Sherman

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing
was mailed this 23rd day of June, 1986 to:

Ray B. Dalton, Esquire
Post Office Box 606
Orlando, Florida 32802

Ned J. Julian, Jr., Esquire
Post Office Box 1330
Sanford, FL 32772-1330

Marcia K. Lippincott, Esquire
644 West Colonial Drive
Orlando, Florida 32804

Heidi M. Tauscher, Esquire
Post Office Box 3000
Orlando, Florida 32802

Law Offices of
RICHARD A. SHERMAN, P.A.
Richard A. Sherman, Esquire
Rosemary B. Wilder, Esquire
Suite 102 N Justice Building
524 South Andrews Avenue
Fort Lauderdale, FL 33301
(305) 525-5885 - Broward
(305) 940-7557 - Dade

By: Richard A. Sherman
Richard A. Sherman