

IN THE SUPREME COURT OF FLORIDA

CASE NO: 68,836
5th DCA No: 85-297
Florida Bar No: 184170

JAMES J. LOHR, as personal)
representative of the Estate)
of JOHN ROBERT LOHR, deceased)
and SENTRY INDEMNITY COMPANY,)
)
Petitioners,)
)
vs.)
)
HATTIE MAE BYRD,)
)
Respondent,)

REPLY BRIEF OF PETITIONERS ON THE MERITS

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

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POINTS ON APPEAL

I.

IT IS AGAINST PUBLIC POLICY TO ASSESS PUNITIVE DAMAGES AGAINST AN ESTATE AND FLORIDA SHOULD FOLLOW THE OVERWHELMING MAJORITY OF STATES WHICH HAVE HELD THAT PUNITIVE DAMAGES ARE NOT RECOVERABLE FROM AN ESTATE.

II.

STATUTORY CONSTRUCTION OF FLA. STAT. SECTION 46.021 DOES NOT PROVIDE THAT PUNITIVE DAMAGES MAY BE ASSESSED AGAINST A DECEASED TORTFEASOR'S ESTATE.

INTRODUCTION

Summary of Reply Argument

This Court should not allow punitive damages to be assessed against the estate of a deceased tortfeasor. The purpose of such an award, serving only as a deterrent, cannot be fulfilled by assessing punitive damages against the estate of a dead man. Moreover, the punishment to be served on the wrongdoer will in actuality be unfairly visited on the deceased tortfeasor's aggrieved heirs, the widow and orphans, who are completely innocent of any wrongdoing. In this case the decedent's elderly parents will be unfairly deprived of the assets of the estate, but the general situation will be that grieving widows and orphans will be deprived of the needed funds. No deterrence can be realized from such a punitive award and the tortfeasor's survivors should not be called on to suffer from the depletion of the estate when no purpose will be served by it.

Thirty-seven states out of forty-two states which have considered this question do not allow this. It is submitted that Florida should follow the overwhelming majority of states which have held that punitive damages are not recoverable from an estate.

Respondent argues that Florida has a public policy that even dead people should be punished for their wrongful acts by depletion of the estate. It is submitted that even if there is such a public policy, the much stronger public policy is to not punish the aggrieved widow and orphans.

The simple fact is that the courts of this State do not have

jurisdiction to punish the dead. Any attempt to do so misguidedly fall on the innocent widow and orphans. When the jury returns a verdict of punitive damages the decedent, lying in the graveyard shudders not, his widow and orphans do.

There simply is another jurisdiction in charge of any punishment of the dead.

I. IT IS AGAINST PUBLIC POLICY TO ASSESS PUNITIVE DAMAGES AGAINST AN ESTATE AND FLORIDA SHOULD FOLLOW THE OVERWHELMING MAJORITY OF STATES WHICH HAVE HELD THAT PUNITIVE DAMAGES ARE NOT RECOVERABLE FROM AN ESTATE.

A. Assessing Punitive Damages Against a Deceased Tortfeasors Estate Frustrates the Purpose of Such an Award

The policy of deterrence underlying punitive awards cannot be fulfilled, where the tortfeasor is dead. Such an award unfairly punishes the tortfeasor's heirs and should be rejected.

The Respondent has conceded in the very first paragraph of her argument that there is no purpose served by assessing punitive damages against a dead man.

For the precise reason that the tortfeasor is dead, no deterrent effect can be realized from assessing punitive damages against his estate, and this Court should adopt the nationally prevailing policy which denies a punitive assessment against a deceased tortfeasor's estate. (Please see overview of the majority of jurisdictions nationwide which do not allow a punitive damage claim to be assessed against a deceased tortfeasor's estate in the Petitioners Main Brief.)

The punishing effect of such damages is simply too far removed to be effective in deterring similar conduct. The deceased will never realize the punitive effect. Moreover the purpose of punitives cannot be fulfilled by charging a tortfeasor's survivors with his individual wrongful conduct. Assessing punitive damages against an estate would result only in unfairly taking rightfully inherited funds from aggrieved family members who have done nothing to warrant being so deprived.

The decisions in The Celotex Corp. v. Pickett, 11 F.L.W. 208 (Fla. 1986) and Atlas Properties, Inc. v. Didich, 226 So.2d 684 (Fla. 1969) do not stand for a public policy doctrine that allows punitive damages to be awarded against a deceased tortfeasor's estate.

The critical point of distinction between the Celotex opinion and the present case, as the Respondent points out, is that Celotex assumed the liabilities of the predecessor corporation and therefore agreed to be subject to paying the punitive award. Therefore the Celotex decision does not provide authority for this Court to go against the public policy accepted by the majority of states that disapproves of punitive damages being assessed against a deceased tortfeasor's estate. In Coletex the court found that two corporations had merged; which is to say the two became one with both continuing in existence. See Celotex at 11 F.L.W. 209. Celotex's liability derived solely from its agreement to take on all duties and liabilities of Philip Carey. Justice Overton's insightful opinion holds that liability arose, not because Celotex should be responsible for the wrongful acts of Philip Carey, but because it agreed to be liable for Philip Carey's liabilities. There was no other grounds for allowing punishment of Celotex for wrongful acts which it did not do. For as Justice McDonald's dissent goes on to point out, Celotex was not engaging in wrongful conduct at the time suit was brought and there was no deterrent effect to be realized in sanctioning Celotex. Otherwise the deterrence which may be realized from the assessment of punitive award against a viable corporate entity, is very different in effect from a punitive assessment against an

estate which is left for the aggrieved heirs of a deceased tortfeasor.

In Mercury Motors Corp. v. Smith 393 So.2d 545 (Fla. 1981) this Court quashed the decision of the District Court, holding that where an employer is not at fault, liability for punitive damages does not attach for the wrongful acts of employees, since the wrong person would be punished. Similarly, in Fisher v. City of Miami 172 So.2d 455 (Fla. 1965) this Court held that the City of Miami could not be held liable for punitive damages assessed for the wrongful conduct of its employee. Again the court discussed the purpose of a punitive award "to punish the offender and deter others from committing similar wrongs". Id. at 457. The court concluded that the purpose would not be served in that case since the people who would bear the award, tax paying citizens, would be those expected to benefit from the example of a punished wrongdoer. Similarly in the present case, the purpose of deterrence is frustrated by assessing damages literally against those innocent of any wrongdoing, since it is impossible to punish the dead tortfeasor.

B. Punitive Damages Cannot Serve as a Greater Deterrent Than Criminal Sanctions or Risking Life Itself

The Fifth District pinpointed the issue when it recognized that punitive damages inflicted on "the innocent" survivors is unjust and frustrates the purpose of such an award. Byrd v. Lohr 11 F.L. W. 1067, 1068 (Fla. 5th DCA May 8, 1986).

Insofar as the Fifth District reasoned in Byrd v. Lohr that the punitive and deterrent aspects of a punitive damage award are inseparable, it is submitted that the Fifth District was correct

in its analysis. Most certainly a punitive award is made to first serve as a deterrent to the wrongdoer and then as an example to others to avoid the wrongful conduct. There must be some logical nexus between punishing the wrongdoer and exemplifying that punishment as a deterrent, in order to fulfill the punitive purpose of exemplary damages. Substituting a deceased tortfeasor's estate means in effect, punishment will be visited only on the innocent, as the Fifth District opinion in Byrd explains.

The Respondent concedes that there is no proof that a deterrent effect will in fact result from assessing punitive damages against an estate. However the Respondent contends that it is somehow just as reasonable to expect deterrence to occur where a dead tortfeasor's estate is taxed with punitive damages as for a live tortfeasor to be deterred by the possibility of jail or fines. It is submitted that a potential wrongdoer who would not be deterred by the knowledge that he may be subject to criminal sanctions or endangering his own life, will hardly be concerned with what will happen after he is dead.

Assuming arguendo, that some slight deterrent effect, which cannot be measured, could occur from establishing a policy that allows punitive damages to be assessed against a tortfeasor's estate, such minimal deterrence cannot be of such benefit that it could justify the unfair assessment on the tortfeasor's aggrieved family, which is free of any wrongdoing. In other words making a potential wrongdoer aware that he could possibly lose his entire estate cannot justify the literal punishment that will be felt by

the aggrieved relatives, the widow and orphans, who will be deprived of the estate if such a policy is established. The Respondent can assure only that there "might" be a deterrent effect from assessing punitives against an estate. However, the Respondent overlooks the fact that a guarantee of criminal sanction or the risk of losing life itself, has not deterred the tortfeasor from wrongful conduct. In all reasonableness, a distant threat of loss to another cannot accomplish what immediate sanctions do not accomplish. It simply is not fair to assess punitive damages against the innocent heirs of a tortfeasor. At least where punitive damages are assessed against a living tortfeasor there is a realistic potential for the deterrent purpose to be fulfilled. There can be no punishment of a dead tortfeasor and Florida's public policy interests cannot be realized through depriving innocent heirs of the estate of a deceased tortfeasor. This is clearly established public policy as shown by the law of thirty seven jurisdictions which do not allow for recovery of punitive damages against a deceased tortfeasor's estate. Florida should follow the reasoning of the established majority.

C. Punitive Damages Are Not a Legal Compensatory Remedy in Florida.

Florida allows punitive damages only for punishment and as a deterrent by making an example of the wrongdoer. Such damages have no compensatory value under existing Florida law and therefore may not be awarded as a supplement to a compensatory award. There is no legal basis for broadening the otherwise narrow purpose of punitive damages and therefore punitive damages

may not be used as a method of supplementing a compensatory award.

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, 29(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.

See also, 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.

D. The Florida Supreme Court Should Adopt the Nationally Established Public Policy Which Does Not Allow Punitive Damages Against an Estate.

Point E of Respondent's Brief, as stated, erroneously presumes that punitive damages are currently assessable against an estate. This is clearly not the existing law. This issue is before this

Court as a new question in Florida jurisprudence.

It is respectfully submitted that the questions posed at page 13 of Respondent's Brief do not compel this Court to answer the issue so as to allow a punitive award. Each question is based on suit and judgment which awards punitive damages against a live defendant. In the present case the tortfeasor is dead and there is no potential for deterrence. Where suit is filed or a judgment is rendered against a live defendant, a punitive award may at least potentially fulfill its purpose. The purpose is completely frustrated here.

All of the questions raise a potential for ultimate recovery against the estate of the defendant. The distinguishing element, however, is that the defendant was alive when the suit was initiated and therefore there is some potential for the deterrent and punitive aspects of exemplary damages to be fulfilled; whereas this suit was filed against a deceased tortfeasor, and proceeded as litigation aimed solely at depleting the estate assets which rightfully belong to innocent heirs of the deceased tortfeasor. There is neither confusion nor inequity in the law at present. Punitive damages may be assessed against a live defendant tortfeasor and serve as a potential deterrent. They should not be assessed against the innocent aggrieved family of a deceased tortfeasor.

E. Punitive Damages Are a Legal Remedy Not a Cause of Action Under Florida Law, and Cannot be Recovered Against an Estate Under Fla. Stat. 46.021.

Florida Statutes Section 46.021 was inferentially construed in the dicta of Atlas Properties and Byrd v. Lohr as a possible

"cause of action" which survives the death of an injured party. However, there is no question that punitive damages are simply a means of recovery, not a cause of action which would allow recovery.

The Respondent acknowledge at Page 15 of her Brief that one who suffers damage "by the commission of a tort" may seek a punitive recovery. However every plaintiff brings suit based on the cause of action which arises from commission of a tort; a punitive recovery is one remedy for the tortuous action. There is no legal basis for filing a punitive claim independent of a cause of action.

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); Luckie v. McCall Mfg. Co., 153 So.2d 311, 314 (Fla. 1st DCA 1963) (A "cause of action" is a 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 A.m.Jur.2d, Damages; Hanna v. Martin, 49 So.2d 585, 587 (Fla. 1950). Damages are an element of a recovery in a cause of action and not by definition, or in effect, a cause of action.

A plaintiff files suit because there is a breach of duty and has a right to be compensated for the breach. The plaintiff does

not have a right to punish the tortfeasor or to punitive damages and cannot bring an "action" sounding in "punitive damages". To interpret the phrase "cause of action" in Florida Statute Section 46.021 to mean a plaintiff has an "action" for punitive damages would be contrary to the clear and plain language of law and to the established definition of cause of action and damages. The answer to the question posed by the Respondent is that punitive awards are elements of recovery, and therefore not causes of action. The Florida survival statute reasonably allows for suit to be filed by a victim's estate just as it could be filed by the victim had he lived. The survival of the right to bring a cause of action does not ensure that the recovery sought by a plaintiff will be awarded. The statute clearly does not create a right to a punitive remedy by virtue of guaranteeing a right to file a cause of action.

The Supreme Court in Atlas Properties did not find 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. As demonstrated by this Court's reliance on the Iowa case of Leahy v. Morgan, 275 F. Supp. 424 (E.D. Iowa 1967):

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.

[T]he 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.

This reasoning is unchanged even when, per chance, both a victim-plaintiff and a defendant-tortfeasor are killed. Clearly a cause of action may be filed by the estate of the plaintiff for whatever remedy is allowed by law. It is submitted that the death of either or both a potential plaintiff and defendant does not change the proper result which should occur as to the tortfeasor's estate. Should the plaintiff win a compensatory award, the estate should be assessed accordingly; but as for punitive damages, the actual assessment would punish only the innocent aggrieved family of the tortfeasor and the purpose of a punitive award would be completely frustrated.

Inherent in this reasoning is that the tortfeasor should be subject to punishment. Regardless of the degree of severity of harm he inflicts, the wrongdoer should realize the punishment. There can be no such realization by the wrongdoer when he is dead. In actuality, only the innocent heirs will know the punishment. Therefore assessing punitive damages against an estate must not be accepted as the public policy of Florida.

II. STATUTORY CONSTRUCTION OF FLA. STAT. SECTION 46.021 DOES NOT PROVIDE THAT PUNITIVE DAMAGES MAY BE ASSESSED AGAINST A DECEASED TORTFEASOR'S ESTATE.

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.

Florida Statutes Section 46.021 (1967) provides in relevant part:

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.

It has been clearly pointed out that a "cause of action" and elements of recovery are two very different and unique terms. The court in Atlas Properties determined that the estate of a deceased victim could collect a punitive award against a living tortfeasor under the survival statute. However that holding cannot reasonably be turned to resolve the issue in the present case, where the tortfeasor is dead and the purpose underlying punitive damages is frustrated. As Amicus Curiae aptly points out, the rules of statutory construction should be applied to the issue at bar. The statute does not allow punitive damages to be awarded against an estate and the court should adopt the Petitioner's view and that of thirty-seven other jurisdictions and rule accordingly.

The issue of whether to allow punitive damages to be assessed against a deceased tortfeasor's estate is clear and uncomplex. None of the scenarios raised either by the Respondent

or the Amicus Curiae changes the simple nature of the issue. The Respondent raises numerous questions which make it appear as though the timing of a defendant tortfeasor's death changes the complexion of the issue sub judice. Respectfully, that consideration is not central to the resolution of whether punitive damages can be awarded against an estate. This Court does not need to engage in drawing lines within imaginary litigation in order to resolve whether punitive damages may be assessed when the tortfeasor is, in fact, dead as in the present case. Similarly, in response to the scenario presented by the Amicus Curiae, regarding a projected effect on business relationships, such as joint ventures, it should be clearly kept in mind that such relationships are most often formed by agreement. The contractual basis for such relationships will determine the limit and scope of each party's liability, including liability for torts, and each party's interest and its division on the death of a contracting party. See Celotex (where the agreement to take on all liabilities was a critical element of the court's reasoning which held the successor corporation liable for punitive damages).

The numerous consumer protection statutes referenced by Amicus Curiae do not bind this Court on the issue presented. Clearly, in each statute listed the legislature indicated that a punitive award was available to further public policy purposes such as fair dealings in business transactions. This is not true under the language of the survival statute and this Court is not obliged to read the mind of the legislature where a clear intent

is indicated. Punitive damages were not addressed in the Fla. Stat. Section 46.021 (1967) and should not be presumptively included on a faulty notion that "cause of action" and "damages" are interchangeable terms.

It is respectfully submitted that it is unnecessary to convolute an otherwise clearly framed issue by addressing the numerous hypothetical situations posed by the Respondent and Amicus Curiae. This Court faces one decision, whether to assess punitive damages against an estate.

Based on the foregoing arguments that no deterrent effect can be realized and in truth only those innocent of any wrongdoing will be unfairly punished; This Court should not allow for recovery of punitive damages against the estate of a deceased tortfeasor.

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.

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I HEREBY CERTIFY that a true and correct copy of the foregoing was mailed this 18th day of August, 1986 to:

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