

IN THE SUPREME COURT  
OF THE STATE OF FLORIDA

JUL 1980

CLERK OF THE COURT  
By \_\_\_\_\_  
Deputy Clerk

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

Petitioners,

vs.

Case No. 68,836

HATTIE MAE BYRD,

Respondent.

---

ON CERTIFIED QUESTION FROM THE  
FIFTH DISTRICT COURT OF APPEALS

---

---

RESPONDENT'S BRIEF ON THE MERITS

---

Roy B. Dalton, Jr.  
HURT, PARRISH & DALTON, P.A.  
1000 East Robinson Street  
Orlando, Florida 32801  
(305) 843-1920

Trial Counsel for  
Respondent

Marcia K. Lippincott  
MARCIA K. LIPPINCOTT, P.A.  
644 West Colonial Drive  
Orlando, Florida 32804  
(305) 425-0116

Appellate Counsel for  
Respondent

TABLE OF CONTENTS

Table of Authorities . . . . .	ii
Statement of Case . . . . .	1
Statement of Facts. . . . .	2
Summary of Argument . . . . .	3
Issue Involved . . . . .	5
Argument:	
I.    FLORIDA PUBLIC POLICY IS SERVED BY THE ASSESSMENT OF PUNITIVE DAMAGES AGAINST A TORTFEASOR'S ESTATE . . . . .	6
II.   THE FLORIDA SURVIVAL STATUTE MANDATES THE SURVIVAL OF PUNI- TIVE DAMAGES AGAINST A TORT- FEASOR'S ESTATE . . . . .	14
III.  THIS ISSUE SHOULD BE DECIDED IN LIGHT OF FLORIDA JURISPRU- DENCE AND SHOULD NOT BE MAN- DATED BY THE POSITIONS OF OTHER STATES . . . . .	16
Conclusion . . . . .	20
Certificate of Service . . . . .	21

## TABLE OF AUTHORITIES

### Cases

<u>Atlas Properties, Inc. v. Didich,</u> 226 So. 2d 684 (Fla. 1969) . . . . .	3, 14, 18
<u>Byrd v. Lohr,</u> 11 F.L.W. 1067 (Fla. 5th DCA 1986) . . . . .	1, 8
<u>Campbell v. Government Employees Ins. Co.,</u> 306 So. 2d 525 (Fla. 1974) . . . . .	9, 11
<u>Fisher v. City of Miami,</u> 172 So. 2d 455 (Fla. 1965) . . . . .	6
<u>Hofer v. Lavender,</u> 679 S.W. 2d 470 (Tex. 1984). . . . .	17
<u>Ingram v. Pettit,</u> 240 So. 2d 922 (Fla. 1976) . . . . .	7
<u>In the Matter of GAC Corp.,</u> 681 F. 2d 1295 (11th Cir. 1982) . . . . .	16
<u>Mercury Motors Exp., Inc. v. Smith,</u> 393 So. 2d 545 (Fla. 1981) . . . . .	7
<u>Perry v. Melton,</u> 299 S.E. 2d 8 (W. Va. 1982). . . . .	17
<u>Stephens v. Rohde,</u> 478 So. 2d 862 (Fla. 1st DCA 1985) . . . . .	9
<u>The Celotex Corporation v. Pickett,</u> 11 F.L.W. 208 (Fla. 1986) . . . . .	7, 18
<u>Thompson v. Estate of Petroff,</u> 319 N.W. 2d 400 (Minn. 1982) . . . . .	16
<u>Winn &amp; Lovett Grocery, Co. et al. v. Archer,</u> 171 So. 214 (Fla. 1937) . . . . .	6

### Miscellaneous

Black's Law Dictionary, p. 201 (5th Ed. 1979) . . . . .	15
W. Prosser, W. Page Keeton, <u>Prosser &amp; Keeton</u> <u>on Torts</u> , p. 12 (1984) . . . . .	11

STATEMENT OF CASE

Plaintiff, Hattie Mae Byrd, brought suit against Defendants, James J. Lohr, as Personal Representative of the Estate of John Robert Lohr, deceased and Sentry Indemnity Co., for compensatory and punitive damages caused by the negligence of the decedent, who injured Plaintiff in an automobile accident. [R. 9-10]

A jury trial resulted in a verdict for Plaintiff, \$31,000.00 compensatory damages and \$25,000.00 punitive damages. [R. 34] Defendant Lohr moved for remittitur and for entry of judgment in accordance with motion for directed verdict. [R. 32-33] The trial court granted the remittitur, reducing the punitive damages to \$9,000.00. [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 Fifth District Court of Appeal affirmed the trial court, but certified the following question to be of great public importance:

"MAY PUNITIVE DAMAGES BE AWARDED  
AGAINST A DECEASED TORTFEASOR'S  
ESTATE?"  
[Byrd v. Lohr, 11 F.L.W. 1067, 1068 (Fla. 5th DCA 1986)]

STATEMENT OF FACTS

On February 25, 1983, Plaintiff, Hattie Mae Byrd, was seriously injured when her car was struck by a car driven by John Robert Lohr. [R. 9-10, 34] As a result of this accident, the driver Lohr was killed. [R. 9-10] This accident was caused by the negligence of the driver Lohr in the operation of his car. [R. 9-10, 34] In addition, the driver Lohr acted in willful and wanton disregard or with reckless indifference to the rights of the Plaintiff by driving his car while voluntarily intoxicated to the extent that his faculties to drive were significantly impaired. [R. 9-10, 34]

The decedent driver's brother, James J. Lohr, was duly appointed as the Personal Representative of the estate of the decedent driver. [R. 5, 9] The Inventory of the Estate declared its value at \$66,380.26. [R. 13, 29] At the time of the trial of this action, the Personal Representative Lohr testified that the balance of the Estate was \$28,913.65. [R. 5] The Estate Inventory revealed that the only interested persons in the Estate were Francis E. Lohr and Mary Ann Lohr [R. 13, 29], who are the elderly parents of the decedent. [R. 4]

## SUMMARY OF ARGUMENT

A dead tortfeasor can no longer be reached by the acts of men. Punishment, as a reason for the assessment of punitive or exemplary damages<sup>1</sup>, is removed upon a tortfeasor's death. However, there remain valid reasons for the assessment of punitive damages even after the tortfeasor's death.

First, there is the Florida Survival Statute. This Court has expressly held that the Survival Statute requires the allowance of an action for punitive damages when the injured party dies. [Atlas Properties, Inc. v. Didich, 226 So. 2d 684, 688-689 (Fla. 1969)] The death of the tortfeasor can be treated no differently. What would happen if both the victim and tortfeasor die?

Secondly, deterrence of others is a valid public policy reason for the assessment of punitive damages. This reason continues regardless of the death of the tortfeasor. To hold to the contrary would ignore the plain fact that man's actions on earth involve planning for his death.

---

<sup>1</sup>In the situation at bar, the "punitive" aspect is removed since the tortfeasor is dead, and the term "exemplary" damages is the most appropriate. However, due to custom and convenience, the term "punitive" damages will be used throughout this brief.

Finally, this issue must be determined in light of Florida jurisprudence, which mandates the survival of punitive damages whether it is the victim or tortfeasor who dies.

ISSUE INVOLVED

MAY PUNITIVE DAMAGES BE AWARDED AGAINST  
A DECEASED TORTFEASOR'S ESTATE?

## ARGUMENT

### I. FLORIDA PUBLIC POLICY IS SERVED BY THE ASSESSMENT OF PUNITIVE DAMAGES AGAINST A TORTFEASOR'S ESTATE.

It would be ridiculous to contend that a dead man can be punished by the actions of men. Punishment is not the reason for the imposition of punitive damages against a dead man's estate. The sins of the father are not being visited upon the son. Rather the estate of a dead man is responsible for his earthly debts. A man, who commits an act which is so malicious that it warrants the imposition of punitive damages, incurs a debt to society, i.e. to serve as a deterrent example to others. This debt can and should be collected whether the wrongdoer is dead or alive.

#### A. Florida Public Policy Recognizes the Importance of Punitive Damages as a Method of Detering Others.

This Court has repeatedly held that the public policy which justifies the imposition of punitive damages is the punishment of the offender and the deterrence of others. [Winn & Lovett Grocery, Co. et al. v. Archer, 171 So. 214 (Fla. 1937); Fisher v. City of Miami, 172 So. 2d 455 (Fla. 1965); Ingram v.

Pettit, 240 So. 2d 922 (Fla. 1976); Mercury Motors Exp., Inc. v. Smith, 393 So. 2d 545 (Fla. 1981)]

Indeed, as recently as two months ago, this Court emphasized the importance of punitive damages as a method of deterring others. [The Celotex Corporation v. Pickett, 11 F.L.W. 208 (Fla. May 8, 1986)] This Court held that a successor corporation assumes its predecessor's liabilities, including punitive damages, when the two corporations statutorily merge. In so ruling, this Court stated as follows:

"Celotex's claim that the imposition of punitive damages here contravenes the purpose of such damages is unpersuasive. Punitive damages are imposed as a punishment of the defendant and as a deterrent to others. ... allowing punitive damages in this instance may well deter other corporations from seeking to merge with other companies which have engaged in reckless conduct detrimental to the public health and thereby have the potential for the imposition of punitive damages... Were we to hold that the potential for punitive damages disappears at merger, this may well encourage reckless conduct. Our holding here recognizes that since reckless wrongdoing by the predecessor can result in liability for punitive damages against the successor, acquisition candidates are deterred from such actions. Realization that their companies will sell for less, or not at all, if they engage in reckless behavior provides an incentive for acquisition candidates to conform their behavior to socially acceptable norms."  
[11 F.L.W. at p. 209]

B. The Assessment of Punitive Damages  
Against an Estate Serves to Deter  
Others From Wrongdoing.

In its opinion in the case at bar, the Fifth District Court of Appeal stated as follows:

"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)]

This analysis is faulty for two reasons. First, the analysis presupposes that man cares only for himself and while alive does not consider life for others after his death by planning and striving for the financial security of his dependents and heirs. This supposition is blatantly incorrect. Why do we make wills, sacrifice now to save for later, and pay millions of dollars in life insurance premiums?"

The imposition of punitive damages against a tortfeasor's estate makes a potential wrongdoer aware that reckless behavior can jeopardize the financial security of his family. This knowledge provides an incentive to

conform one's behavior to socially acceptable norms.

[Stephens v. Rohde, 478 So. 2d 862 (Fla. 1st DCA 1985)]

Secondly, the analysis presupposes that those who are not deterred by criminal laws, will not be deterred by punitive damages. This supposition is incorrect because it fails to realize two facts: 1) punitive damages can be imposed for countless acts which are not covered by criminal laws; and 2) the fear of losing a part of one's net worth or estate might deter a potential wrongdoer more than a criminal fine or short jail term.

As this Court stated in Campbell v. Government Employees Insurance Co., 306 So. 2d 525, 531 (Fla. 1974):

"Punitive damages tend to bring to punishment types of certain cases of oppressive conduct, i.e. slanders, malice, cruelties, anti-social, unethical and unfair treatment, often criminally unpunishable and which in actual life go unnoticed in the criminal law."

It can be neither proven nor disproven that the assessment of punitive damages against a tortfeasor's estate will deter others. Similarly, it can be neither proven nor disproven that the assessment of punitive damages against a live tortfeasor will deter others. However, it is reasonable to conclude that some potential tortfeasors may be deterred from reckless and

malicious behavior by the knowledge that such conduct may jeopardize their personal financial security. Similarly, it is also reasonable to conclude that some potential tortfeasors may be deterred from reckless and malicious behavior by the knowledge that such conduct may jeopardize their family's financial security. Society has a vital interest in taking all reasonable steps to deter man from engaging in socially unacceptable conduct. Therefore, a valid public policy purpose is served by the assessment of punitive damages against a tortfeasor's estate.

C. Florida Public Policy Recognizes Reasons Other Than Punishment and Deterrence for the Assessment of Punitive Damages.

Petitioner makes it appear that Prosser is critical of punitive damages by selective quotation. [Petitioner's Brief at pp. 10-11] After noting the criticism directed at punitive damages, Prosser continues as follows:

"[Punitive damages] have been defended as a salutary method of discouraging evil motives, as a partial remedy for the defect in American civil procedure which denies compensation for actual expenses of litigation, such as counsel fees, and as an incentive to bring into court and redress a long array of petty cases of outrage and oppression which in practice escape the notice of prosecuting attorneys occupied with serious crime,

and which a private individual would otherwise find not worth the trouble and expense of a lawsuit. At any rate, they are an established part of our legal system, and there is no indication of any present tendency to abandon them."

[W. Prosser, W. Page Keeton, Prosser and Keeton on Torts, 12 (1984)]

In Campbell v. Government Employees Insurance Co., 306 So. 2d 525, 531 (Fla. 1974) this Court looked favorably upon punitive damages and recognized valid reasons for such damages beyond the main reasons of punishment and deterrence. Specifically, it was stated as follows:

"Punitive damages are recoverable by an aggrieved to serve the predominant function of deterrence and punishment. In nearly all states punitive damages are recognized as recoverable. They are no longer looked upon as monstrous but are awarded to vindicate wrongs arising from antisocial behavior. The incentive to bring actions for punitive damages is favored because it has been determined to be the most satisfactory way to correct evil doing in areas not covered by the criminal law. Punitive damages have helped to maintain public tranquility by permitting the wronged plaintiff to take his revenge in the courtroom and not by self-help.

Compensatory damages do not always fully compensate in grievous situations nor do they have a general salutary effect under prevailing conditions to promote fair treatment of the public. At best, litigation, even when successful is an inconvenience, often an

ordeal. Compensatory damages do not sometimes offer reparation for mental invasion. Moreover, it is difficult to translate pain and suffering, disfiguration, loss of enjoyment of life, loss of prospects, into compensatory dollars. Punitive damages tend to bring to punishment types of certain cases of oppressive conduct, i.e. slander, malice, cruelties, antisocial, unethical and unfair treatment, often criminally unpunishable and which in actual life go unnoticed in the criminal law."

D. The Assessment of Punitive Damages Against an Estate Serves to Provide the Injured Party a Chance of Full Compensation.

In the case at bar, the jury valued the Plaintiff's injuries at \$31,000.00. [R. 34] However, due to the necessary expenses of attorney's fees, the Plaintiff will not receive full compensation for her injuries. Under the circumstances, where a deceased defendant inflicts injuries in reckless disregard of others, public policy is served by permitting the assessment of punitive damages against an estate, so that the Plaintiff has at least a chance of full compensation.

E. The Abolishment of Punitive Damages Against an Estate will Produce Confusion and Inequity.

If punitive damages can no longer be assessed against a tortfeasor's estate, what happens when:

1) Suit is brought for punitive damages against a live defendant and the defendant dies before trial?

2) Suit is brought for punitive damages against a live defendant and the defendant dies after trial but before judgment?

3) Judgment is entered against a live defendant for punitive damages, but before the time expires for a motion for new trial or rehearing, the defendant dies?

4) Judgment is entered against a live defendant for punitive damages, but before the judgment is paid the defendant dies?

5) Judgment is entered against a live defendant, appeal is taken, supersedeas bond is filed, and the defendant dies before the appeal is decided?

6) Judgment is entered against a live defendant, appeal is taken, no supersedeas bond is filed, and the defendant dies before the appeal is decided?

The questions will continue, confusion and inequity will prevail if this Honorable Court abolishes the assessment of punitive damages against a tortfeasor's estate.

II. THE FLORIDA SURVIVAL STATUTE MANDATES  
THE SURVIVAL OF PUNITIVE DAMAGES  
AGAINST A TORTFEASOR'S ESTATE.

A. This Court Has Held that the Survival Statute Requires the Allowance of Punitive Damages When the Injured Party Dies.

This Court in Atlas Properties, Inc. v. Didich, 226 So. 2d 684, 688-689 (Fla. 1969) clearly held that the Florida Survival Statute requires the allowance of an action for punitive damages when the injured party dies. Contrary to the assertion of Petitioner, this decision was not based on public policy reasons. Rather, after discussing the policy aspect, this Court continues as follows:

"... but there is a far better and simpler reason for allowing recovery. 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. If a victim could have brought the action before his death, then his personal representative should be allowed to do so after his death. Thus, punitive damages should survive." [emphasis supplied]

B. A Claim for Punitive Damages is a "Cause of Action" Within the Survival Statute.

Black's Law Dictionary defines the term "cause of action" as follows:

"The fact or facts which give a person a right to judicial relief. The legal effect of an occurrence in terms of redress to a party to the occurrence. A situation or state of facts which would entitle party to maintain action and give him right to seek a judicial remedy in his behalf... Matter for which action may be maintained... The right which a party has to institute a judicial proceeding."  
[p. 201 (5th Ed. 1979)]

If a person in the State of Florida suffers at least nominal damage by the commission of a tort in a willful, malicious manner or in reckless disregard of the rights of others, he is entitled to seek the assessment of punitive damages. If this is not a "cause of action," what is it? If punitive damages do not survive the death of either the injured party or the tortfeasor, then what does the Florida Survival Statute mean? And, if punitive damages survive the death of an injured party, but do not survive the death of a tortfeasor, what happens if the commission of the tort causes the death of both?

III. THIS ISSUE SHOULD BE DECIDED IN LIGHT OF FLORIDA JURISPRUDENCE AND SHOULD NOT BE MANDATED BY THE POSITIONS OF OTHER STATES.

A. The Position of Other States Does Not Conform with Florida Jurisprudence.

Petitioner attempts to lead this Court to believe that an overwhelming majority of other states have considered the issue at bar in the same context as the issue must be considered in Florida, and have held that punitive damages do not survive the death of the tortfeasor. Petitioner's contention is incorrect.

Some states refuse to allow punitive damages at all. [Petitioner's Brief, pp. 7-8; App. 3, fn. 1] This is not the situation in Florida. Some states have statutes which expressly prohibit an award of punitive damages against a tortfeasor's estate. [Petitioner's Brief, p. 8, App. 3, fn. 2] This is not the situation in Florida.

Case law from some courts contains one sentence conclusions that assessing punitive damages against an estate for the purpose of deterring others is unrealistic or unpersuasive. [Thompson v. Estate of Petroff, 319 N.W. 2d 400, 408 (Minn. 1982); In the Matter of GAC Corp., 681 F. 2d 1295, 1301 (11th Cir. 1982)] The conclusion of these courts suffer from the same faulty analysis discussed supra at pp. 8-10.

The issue sub judice must be considered in view of the Florida Survival Statute and the public policy pronouncements of the Florida Supreme Court regarding punitive damages. In reality, there are only two states which have considered the issue sub judice in a context similar to Florida jurisprudence. Those states are West Virginia and Texas. [Perry v. Melton, 299 S.E. 2d 8 (W. Va. 1982) and Hofer v. Lavender, 679 S.W. 2d 470 (Tex. 1984)]

Both decisions contain an extensive discussion regarding the positions of other states and an explanation that the positions of other states are not based on survival statute interpretations, or are based upon a limited view of the public policy justifications for a punitive damage award. In addition, both states held that a claim for punitive damages survives the death of a tortfeasor.

As the Supreme Court of Texas stated in Hofer, supra,

"... whatever may be the majority rule in other jurisdictions or be the expression of commentators does not necessarily mean it will be the law in Texas."  
[679 S.W. 2d at p. 473]

The same is true in Florida!

B. Florida's Jurisprudence Mandates the Survival of Punitive Damages in All Situations.

Florida recognizes that there are reasons other than punishment for the assessment of punitive damage. The deterrence of future wrongdoing is the most important. This Court has very recently confirmed the importance of deterrence. [The Celotex Corporation v. Pickett, 11 F.L.W. 208 (Fla. May 8, 1986)]

Men do plan and strive to provide for the financial security of their families in the event of death. Knowledge that a punitive damage award may diminish the financial security of loved ones provides an incentive to behave according to socially acceptable norms.

This Court has clearly and correctly announced that the Florida Survival Statute speaks plainly and mandates the survival of punitive damages when the injured party dies. [Atlas Properties, Inc. v. Didich, 226 So. 2d 684, 688-689 (Fla. 1969)] The same must be true if the tortfeasor dies.

Consider the issue in view of the following real-life situation, taken from the pages of a local newspaper: John Doe is arrested for drunk driving. While awaiting trial, John is again on Florida highways, driving while intoxicated. John drives over the median

of a four lane highway and crashes head on into a car carrying two adults and two children. The adults and one child are seriously injured. An eight year old girl dies. John dies also. Is there a cause of action for punitive damages?

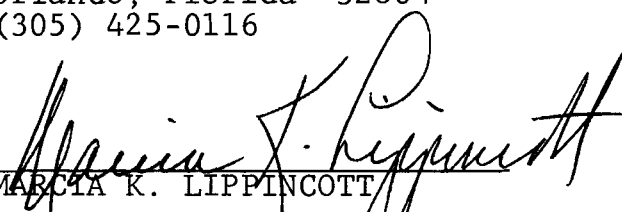
The Survival Statute and the public policy of this State mandate that this Honorable Court hold its ground, and answer, "YES!"

CONCLUSION

For the reasons stated herein, Respondent, Hattie Mae Byrd, respectfully requests this Honorable Court to answer the question certified to this Court as being of great public importance in the affirmative.

RESPECTFULLY SUBMITTED this 18th day of July,  
1986.

MARCIA K. LIPPINCOTT, P.A.  
644 West Colonial Drive  
Orlando, Florida 32804  
(305) 425-0116

  
~~MARCIA K. LIPPINCOTT~~

Appellate counsel for  
Respondent

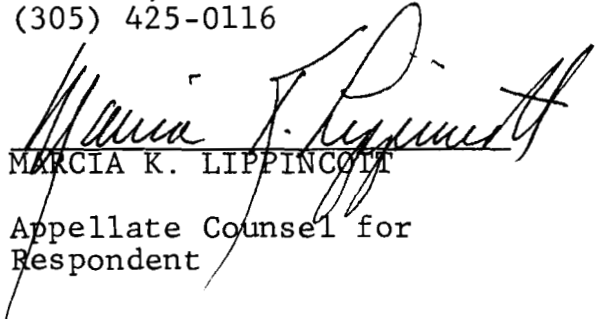
Roy B. Dalton, Jr.  
HURT, PARRISH & DALTON, P.A.  
1000 East Robinson Street  
Orlando, Florida 32801  
(305) 843-1920

Trial counsel for Respondent

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail this 18th day of July, 1986 to: NED N. JULIAN, JR., Esquire, P.O. Box 1330, Sanford, FL 32772-1330; HEIDI M. TRAUSCHER, Esquire, P.O. Box 3000, Orlando, FL 32802; RICHARD A. SHERMAN, Esquire, Suite 102 N Justice Building, 524 South Andrews Avenue, Fort Lauderdale, Florida 33301.

MARCIA K. LIPPINCOTT, P.A.  
644 West Colonial Drive  
Orlando, Florida 32804  
(305) 425-0116



MARCIA K. LIPPINCOTT

Appellate Counsel for  
Respondent