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COMMENTS

PUNISHING THE DEAD: WHETHER THE ESTATES OF DEAD TORTFEASORS SHOULD BE RESPONSIBLE FOR PUNITIVE DAMAGES

Driver One, having consumed a half-dozen cocktails at a local nightclub, gets behind the wheel of his car and heads home on the interstate—traveling in the wrong direction. Driver Two, headed home from work, sees the headlights of Driver One headed straight for him, but it is too late to do anything but brace for the collision. The ensuing wreck, 100 percent the fault of the drunken Driver One, results in the death of Driver One and serious injury to Driver Two. Driver Two sues the estate of Driver One, both for compensatory damages and punitive damages. The estate of Driver One moves for partial summary judgment on the punitive damages claim solely on the basis of Driver One's death. What result?

The Arkansas Supreme Court has not addressed the issue of whether punitive damages¹ ought to be assessed against the estate of a

1. Punitive damages are also called exemplary damages, and are defined:

Exemplary damages are damages on an increased scale, awarded to the plaintiff over and above what will barely compensate him for his property loss, where the wrong done to him was aggravated by circumstances of violence, oppression, malice, fraud, or wanton and wicked conduct on the part of the defendant, and are intended to solace the plaintiff for mental anguish, laceration of his feelings, shame, degradation, or other aggravations of the original wrong, or else to punish the defendant for his evil behavior or to make an example of him, for which reason they are also called "punitive" or "punitory" damages or "vindictive" damages. Unlike compensatory or actual damages, punitive or exemplary damages are based upon an entirely different public policy consideration—that of punishing the defendant or of setting an example for similar wrongdoers, as above noted.

BLACK'S LAW DICTIONARY 352 (5th ed. 1979). The late Dean Prosser, after noting that punitive damages are rather anomalous in their being borrowed from ideas underlying the criminal law, explained the concept thusly:

Where the defendant's wrongdoing has been intentional and deliberate, and has the character of outrage frequently associated with crime, 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 the injuries, for the purpose of punishing the defendant, of teaching the defendant not to do it again, and of deterring others from following the defendant's example. Occasional decisions [footnote omitted cit-

deceased tortfeasor.² Under the common law³ of Arkansas, juries may award punitive damages *only* for the purposes of punishing defendants and deterring the defendant⁴ and others from committing the wrongful acts.⁵ In those states where punitive damages are awarded for only punishment and deterrence purposes,⁶ every state

ing Georgia, Texas, Kansas, Idaho decisions] have mentioned the additional purpose of reimbursing the plaintiff for elements of damage which are not legally compensable, such as wounded feelings or the expenses of suit.

W. PROSSER & P. KEETON, PROSSER & KEETON ON THE LAW OF TORTS § 2, at 9 (5th ed. 1984).

2. The issue discussed in this Comment, i.e., whether punitive damages should be awarded where the tortfeasor is dead, should not be confused with whether punitive damages should be allowed on a wrongful death action, i.e., where a tortfeasor committed a tort in a manner which would generally support punitive damages and as a result of the tort, the victim of the tort died. See *infra* notes 27-28, 56-57 and accompanying text.

3. A claim for punitive damages is generally governed by the common law and is to be distinguished from statutory penalties provided for successful civil plaintiffs in certain kinds of actions, e.g., the cutting of trees or quarrying of stone on the property of another, ARK. CODE ANN. § 18-60-102 (1987) (allowing treble damages), or refusing to provide a generally available news service to a newspaper seeking the service, ARK. CODE ANN. § 4-75-503 (1987) (allowing damages of \$1,000 a day to the affected newspaper).

4. The Arkansas Supreme Court has generally recognized the deterrence effect on others of a punitive damage award, but in *McClellan v. Brown*, 276 Ark. 28, 632 S.W.2d 406 (1982), the court apparently rejected the punitive damage award at issue at least partly because punitive damages would not have had a deterrent effect on the tortfeasor under the circumstances of the case. The court did not go so far as to suggest that all awards of punitive damages must be based on deterring from further wrongdoing the particular tortfeasor whose wrong was at issue.

5. The Arkansas Supreme Court has been somewhat less than consistent in its recitation of the purpose of punitive, or exemplary, damages. The general rule in Arkansas stresses the penal aspect of the award and the deterrence-to-others aspect. See, e.g., *Holmes v. Hollingsworth*, 234 Ark. 347, 353, 352 S.W.2d 96, 100 (1961), wherein the court stated: "Punitive damages are the penalty which the law inflicts on the guilty party, and are allowed as a warning or an example to others." See also *Alpha Zeta Chapter of Pi Kappa Alpha Fraternity v. Sullivan*, 293 Ark. 576, 585, 740 S.W.2d 127, 132 (1987), in which the court stated: "The two-fold intent behind punitive damages is to punish the wrongdoer and to exemplify such conduct for others to note." Justice Hays, dissenting in *National By-Products, Inc., v. Searcy House Moving Co.*, 292 Ark. 491, 498, 731 S.W.2d 194, 198 (1987) (Purtle and Hays, JJ., dissenting), stressed the deterrence purpose in suggesting it alone is reason to justify punitive damages: "The proof, I believe, was such that a jury had a right under the law to exemplify the conduct of both defendants by assessing punitive damages." The majority in *National By-Products* reversed the trial court's award of punitive damages because the evidence supported only a showing of gross negligence, not wanton conduct, nor conduct in conscious disregard for the rights and safety of others. *Id.* at 493-95, 731 S.W.2d at 195-96.

6. One scholar has suggested:

At least seven purposes for imposing punitive damages can be gleaned from judicial opinions and the writings of commentators: (1) punishing the defendant; (2) deterring the defendant from repeating the offense; (3) deterring others from committing an offense; (4) preserving the peace; (5) inducing private law enforcement; (6) compensating victims for otherwise uncompensable losses; and (7) paying the plaintiff's attorneys' fees.

which has faced the issue has rejected punitive damage claims made against the estate of a dead tortfeasor.⁷ Courts in the two states where punitive damages may be awarded against the estate of a dead tortfeasor⁸ have expressly stated that punitive damages are also compensatory in nature, a position specifically rejected by the Arkansas Supreme Court⁹ and the overwhelming majority of courts in the United States,¹⁰ including the United States Supreme Court.¹¹

Punitive damages are recoverable against the estate of a dead tortfeasor in West Virginia¹² and Texas.¹³ Some commentators and courts contend other states place liability for punitive damages on the estates of dead tortfeasors, but a careful review of the cited decisions belies this contention.¹⁴ What distinguishes Texas and West Virginia

Ellis, *Fairness and Efficiency in the Law of Punitive Damages*, 56 S. CAL. L. REV. 1, 3 (1982).

7. See *infra* notes 65-91 and accompanying text.

8. See *infra* notes 12-26, 29-40 and accompanying text.

9. *Holmes v. Hollingsworth*, 234 Ark. 347, 353, 352 S.W.2d 96, 100 (1961) ("Punitive damages are not intended to remunerate the injured parties for the damages sustained.").

10. According to the cases collected in 1 J. GHIARDI & J. KIRCHER, *PUNITIVE DAMAGES LAW AND PRACTICE* § 4.16, at Table 4-1 (1985 and cum. supp. 1988), the only U.S. jurisdictions recognizing compensation of the plaintiff as a proper purpose for awarding punitive damages are Connecticut (*Collens v. New Canaan Water Co.*, 155 Conn. 477, 234 A.2d 825 (1967)); Georgia (*Westview Cemetery, Inc. v. Blanchard*, 324 Ga. 540, 216 S.E.2d 776 (1975)); Indiana (*Hibschman Pontiac, Inc. v. Batchelor*, 266 Ind. 310, 362 N.E.2d 845 (1977)); Michigan (*Wise v. Daniel*, 221 Mich. 229, 190 N.W. 746 (1922)); and New Hampshire (*Fay v. Parker*, 53 N.H. 342 (1872) (*but see infra* note 14 and accompanying text)). Though Professors Ghiardi and Kircher list Texas and West Virginia as being states where compensation is not regarded as a purpose of punitive damage awards, the states should be listed with the minority. See *Hofer v. Lavender*, 679 S.W.2d 470, 474-75 (Tex. 1984) ("[E]xemplary damages also exist to reimburse for losses too remote to be considered as elements of strict compensation [Punitive] damages are given as compensation to the sufferer, as well as for punishment of the offender."); *Perry v. Melton*, 299 S.E.2d 8, 12 (W. Va. 1982) ("There does not seem to be any reason to fail to acknowledge that the injured party does benefit from an award of punitive damages. We find nothing in our social or public policy that precludes this consideration when we evaluate the propriety of permitting coverage for punitive damages occasioned by gross, reckless or wanton negligence.").

11. "Punitive damages are damages beyond and above the amount which a plaintiff has really suffered, and they are awarded upon the theory that they are a punishment to the defendant, and not a mere matter of compensation for injuries sustained by the plaintiff." *Washington Gas Light Co. v. Lansden*, 172 U.S. 534, 553 (1899). Obviously, the importance of the Supreme Court's view of the matter declined greatly following *Erie Railroad Co. v. Tompkins*, 304 U.S. 64 (1938) (a federal court exercising diversity jurisdiction must apply the substantive law of the relevant state). However, the view remains persuasive authority.

12. *Perry v. Melton*, 299 S.E.2d 8 (W. Va. 1982).

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

14. Some commentators list Alabama and New Hampshire as states which allow punitive damages to be assessed against the estates of deceased tortfeasors. See, e.g., 1 J. GHIARDI & J. KIRCHER, *supra* note 10, § 9.10, at 36 n.12. However, New Hampshire has no punitive damages, though it does allow "liberal compensatory damages" when the tortfeasor's conduct is especially egregious. In explaining why the liberal compensatory damages may be awarded

is their position among the minority of states that justify punitive damages partly as compensation for traditionally noncompensable injuries.¹⁵ It is this feature of the tort damages scheme in the two states that explains their uniqueness in allowing the dead to be punished through civil suits.

In *Perry v. Melton*¹⁶ the West Virginia Supreme Court stated that punitive damages serve "equally important functions . . . going beyond simple punishment of the wrongdoer,"¹⁷ and cite as examples of those purposes, "they . . . provide additional compensation to sufferers . . . encourage persons who have suffered only nominal or minimal damages, to sue . . . [and] provide a substitute for personal revenge by the wronged party."¹⁸ West Virginia also allows punitive damages

against the estate of a deceased tortfeasor, contrary to the general American rule against such awards, the New Hampshire Supreme Court wrote, "Those States, however, seek to punish the wrongdoer through punitive damages [W]e do not seek to punish the wrongdoer, but only to compensate the plaintiff if she incurs aggravated damages due to the defendant's malicious behavior." *Munson v. Raudonis*, 118 N.H. 474, 479, 387 A.2d 1174, 1177 (1978).

The Alabama Supreme Court stated in *Meighan v. Birmingham Terminal Co.*, 165 Ala. 591, 51 So. 775 (1910), that when a wrongdoer dies before the action is brought to trial, and the action survives against his personal representative, only compensatory and not punitive damages may be recovered against the estate. This clear statement was dismissed as dicta by a federal panel which allowed punitive damages in an Alabama case against a deceased tortfeasor's estate. *Ellis v. Zuck*, 546 F.2d 643 (5th Cir. 1977). The federal court, which was only predicting, not making, Alabama law, based its assumption that the Alabama Supreme Court had changed its position on *Shirley v. Shirley*, 261 Ala. 100, 73 So. 2d 77 (1954), in which a wrongful death suit was allowed to go forward against a deceased estate. In Alabama, by statute, all wrongful death damages are considered punitive. See cases collected at Note 4 under ALA. CODE § 6-5-410. Pointing up this misunderstanding by the Fifth Circuit is a 1986 federal district court case which held that amounts received under the Alabama wrongful death act were not punitive damages and were therefore not taxable. *Burford v. United States*, 642 F. Supp. 635 (N.D. Ala. 1986).

Illinois has been cited by a student author as a state authorizing punitive damages against a deceased tortfeasor, but the case upon which the student relied only held that a cause of action for wrongful death survives the deceased victim of a tortfeasor. See Note, *Torts—Punitive Damage—The Florida Supreme Court Is Asked to Decide Whether Punitive Damages May Be Awarded Against a Deceased Tortfeasor's Estate*, 15 FLA. ST. L. REV. 375, 375 n.3 (1987) (citing *National Bank v. Norfolk & W. Ry.*, 73 Ill. 2d 160, 383 N.E.2d 919 (1978)). Another apparently erroneous cite to Illinois law appears in the 1988 supplement to Annotation, *Survival of Punitive Damages*, 30 A.L.R. 4th 707 (1984 & Supp. 1988), where Illinois is listed in the section for jurisdictions which hold the view that a claim for punitive damages survives the death of the tortfeasor. The supplement at 26-27 cites *Raisl v. Elwood Indus.*, 134 Ill. App. 3d 170, 479 N.E.2d 1106 (1st Dist. 1985), which did not involve a deceased tortfeasor (the alleged tortfeasor was a corporation), but rather a deceased plaintiff.

15. E.g., attorney's fees for bringing the suit and the so-called "hedonic damages."

16. 299 S.E.2d 8 (W. Va. 1982).

17. *Id.* at 12.

18. *Id.* at 13 (citing *Mauck v. City of Martinsburg*, 167 W. Va. 332, 280 S.E.2d 216 (1981)).

even where no compensatory damages are awarded,¹⁹ a minority position.²⁰ Arkansas, for example, rejects punitive damages unless there is an appreciable amount of actual damages.²¹

The penultimate paragraph of the West Virginia Supreme Court's opinion states that the fact liability insurers may pay the punitive damages "is no reason to deny their recovery. Liability insurance protects persons who have been injured just as it protects an insured."²² The insurance argument adds little to the debate; if anything, the availability of liability insurance to pay punitive damages in a jurisdiction where such damages are viewed as compensatory in nature would tend to support the award of punitive damages against a deceased tortfeasor's estate. The more curious position seems to be allowing tortfeasors to insure against punitive damages in the majority of jurisdictions where the damages are truly viewed as punishment.²³ Such shifting of the burden from the tortfeasor, it is argued, "actually frustrate[s]" the punishment theory behind the liability for punitive damages.²⁴ The effect of insurance on punitive damage

19. *Wells v. Smith*, 297 S.E.2d 872 (W. Va. 1982).

20. "The greater number of courts have said they [punitive damages] are limited to cases in which actual compensatory damages are found by the jury." W. PROSSER & P. KEETON, *supra* note 1, § 2, at 14.

21. *Growth Properties v. Cannon*, 282 Ark. 472, 669 S.W.2d 447 (1984) (nominal damages will not support a recovery of punitive damages). In *Bell v. McManus*, 294 Ark. 275, 742 S.W.2d 559 (1988), the appellant sued the mastermind behind a burglary of Bell's home for the tort of outrage, seeking compensatory damages for mental distress and punitive damages. The trial judge granted a judgment N.O.V. for the defendant when the jury returned a verdict with no compensatory damages but \$3,700 in punitive damages. On appeal, Bell attempted the rather ingenious argument that punitive damages do not depend upon an *award* of compensatory damages, but rather only upon evidence that compensatory damages were suffered. Justice Purtle, writing for the Arkansas Supreme Court, correctly noted that "such argument attempts to draw a line too thin to follow," and held: "In the absence of an award for damages for the underlying cause of action, punitive damages are improper." *Id.* at 277, 742 S.W.2d at 560.

22. *Perry*, 299 S.E.2d at 13.

23. *See, e.g., Southern Farm Bureau Casualty Ins. v. Daniel*, 246 Ark. 849, 440 S.W.2d 582 (1969) (automobile liability insurance carrier held liable for punitive damages awarded against insured under policy whereby insurer agreed to pay on behalf of insured all sums which insured should become legally obligated to pay as damages because of bodily injury).

24. W. PROSSER & P. KEETON, *supra* note 1, § 2, at 13, discussing the following question: whether the purposes of punishment and deterrence underlying the damages themselves are not only not accomplished when the insured is allowed to shift the penalty to the shoulders of an innocent party, but are actually frustrated when the wrongdoer is thus afforded protection against what is essentially a criminal punishment imposed by the law. If punitive damages are supported by any sound policy, that policy would appear to demand that they shall not be covered by liability insurance.

Id. *See generally* R. KEETON, *INSURANCE LAW BASIC TEXT* §§ 5.3(f), 5.4(b) (1971).

claims is important,²⁵ but its effect is not substantially changed by the issue of whether punitive damages should be awarded where the tortfeasor has died.

The antepenultimate paragraph of the West Virginia Supreme Court's opinion reads:

It has long been a part of our law that a decedent's personal representative can recover punitive damages in a wrongful death action against a living tort-feasor. No sufficient justification exists for denying punitive damages simply because the tort-feasor is dead.²⁶

Logic in the paragraph is noticeably absent. The issue of whether representatives of a dead victim can recover damages against a living tortfeasor is a completely different question, with a completely different set of policies and analyses, than the issue of whether a victim or his estate can recover punitive damages against the estate of a deceased wrongdoer. Most states allow punitive damages in a wrongful death action,²⁷ including Arkansas.²⁸ The rationale behind allowing

25. The insurance industry's concern over hefty punitive damage awards, particularly in light of the increasing number of "bad faith" claims brought by insureds against insurers, is understandable. How can an insurer know whether an insured's conduct is sufficiently egregious to warrant consideration of potential punitive damages in a settlement decision? One court has written:

The process through which a fact finder finds punitive damages is somewhat contradictory. On the one hand, the court or jury must be sufficiently disturbed to conclude the defendant must be punished. On the other hand, although outraged, the fact finder cannot be vindictive. The channeling of just the correct quantum of bile to reach the correct level of punitive damages is, to put it mildly, an unscientific process complicated by personality differences.

Devlin v. Kearny Mesa AMC/Jeep/Renault, Inc., 155 Cal. App. 3d 381, 388, 202 Cal. Rptr. 204, 208 (1984). See generally Kornblum, *The Current State of Bad Faith and Punitive Damage Litigation in the U.S.*, 23 TORT & INS. L.J. 812, 832-37 (1988).

An example of how far courts will go in affirming punitive damage awards, no matter the degree of "malice" involved, appears in *Brown v. Mo-Pac. R.R. Co.*, 703 F.2d 1050 (8th Cir. 1983). The court upheld an \$80,000 compensatory award and a \$60,000 punitive award in a wrongful death action brought by a mother whose son died at a railroad crossing in Prescott, Arkansas, which was marked with a crossbuck device but no "active protection devices." Judge Arnold, writing for the 8th Circuit panel, stated that "[t]he Arkansas Supreme Court will allow punitive damages to deter a defendant from deciding that it is cheaper to be sued and pay compensatory damages than to remedy a dangerous condition." *Id.* at 1053. In *Brown* evidence showed that the State of Arkansas and the City of Prescott had declined to help fund the crossing devices despite Mo-Pac's agreement to pay its usual portion of the cost and to maintain the device. Further, the railroad "reasonably" expected that the City of Prescott would close "at least some of the four crossings within its boundaries." *Id.* However, the court noted, "[i]n view of . . . the evidence that this particular crossing was more dangerous than 90 per cent of the railroad crossings in Arkansas, we are satisfied that the evidence before the jury was sufficient to support its verdict, though perhaps not by much." *Id.* at 1053-54.

26. 299 S.E.2d at 13.

27. "It has been generally held that if the cause of action for the wrong survives, the estate or representative of the person against whom the wrong was committed may also recover

the survival of punitive damages in a wrongful death action include:

- A wrongdoer can be punished just as easily, whether his or her victim lives or dies.
- Deterrence is furthered when other potential tortfeasors learn that the death of their potential victims will not stop the imposition of punitive damages.
- It would be manifestly unjust to allow a wrongdoer to escape civil punishment by the "fortuity" of his or her victim's death, if the punishment would have been meted out should the victim have survived the tort.

As in West Virginia, courts in Texas allow what the courts term punitive damages partly on the basis of compensation to the plaintiff. In *Hofer v. Lavender*²⁹ the Texas Supreme Court noted that among the justifications for punitive damages in Texas include compensation for inconvenience and attorneys' fees³⁰ and other "losses too remote to be considered as elements of strict compensation."³¹ The court noted with approval an earlier statement by a Texas court which held that only by legal fiction does the plaintiff sue for exemplary damages on behalf of the public.³² The Texas court then overruled precedent³³ barring punitive damages against a deceased tortfeasor's estate be-

punitive damages against the person responsible for causing the wrong." 1 J. GHIARDI & J. KIRCHER, *supra* note 10, § 9.10, at 33 (1985 & Cum. Supp. 1988). See also Annotation, *Survival of Punitive Damages Claim*, 30 A.L.R. 4th 707, §§ 1, 2, 5, 6, 7 (1984 & Supp. 1988). The rule has been late in developing, however. In K. REDDEN, PUNITIVE DAMAGES 87 (1980), the author contended there was a 31-18 split in the states, with the majority rejecting the award of punitive damages in a wrongful death action.

28. Arkansas' survival statute is quite broad, providing that the personal representative may sue on any cause of action the decedent may have sued on had he or she lived. ARK. CODE ANN. § 16-62-101 (1987). Likewise, Arkansas also provides that a personal representative may bring a wrongful death action against another, even if the person responsible for the death has died. ARK. CODE ANN. § 16-62-102 (1987). In *Fields v. Huff*, 510 F. Supp. 238 (E.D. Ark. 1981), U.S. District Judge Henry Woods, whose explanation of *Arkansas Model Jury Instructions: Wrongful Death* can be found at 20 ARK. L. REV. 73 (1966), traced the history of wrongful death and punitive damages in Arkansas and held that the estate and children of a decedent may recover punitive damages in a wrongful death action brought under the statute. *Accord*, *Brown v. Mo-Pac. R.R. Co.*, 703 F.2d 1050 (8th Cir. 1983), *aff'd* 543 F. Supp. 348 (W.D. Ark. 1982). Finally, the Arkansas Supreme Court expressly held that punitive damages are recoverable in a wrongful death action in *Vickery v. Ballentine*, 293 Ark. 54, 732 S.W.2d 160 (1987). See generally Comment, *The Arkansas Wrongful Death Statute*, 35 ARK. L. REV. 295, 306-07 (1981) (concluding that punitive damages are "not repugnant to the wrongful death statute").

29. 679 S.W.2d 470 (Tex. 1984).

30. *Id.* at 474 (citing *Allison v. Simmons*, 306 S.W.2d 206 (Tex. Civ. App.—Waco 1957, writ ref'd n.r.e.)).

31. *Id.* (citing *Mayer v. Duke*, 72 Tex. 445, 10 S.W. 565 (1889)).

32. *Id.* at 474-75 (citing *Cole v. Tucker*, 6 Tex. 266 (1851) (damages are compensation to the sufferer as well as punishment of the offender)).

cause "public policy for exemplary damages includes equally important considerations other than punishment of the wrongdoer"³⁴ In so doing, the Texas Supreme Court reversed a state court of appeals³⁵ which had held that the practical effect of the recovery would be punishment of the heirs of the tortfeasor.³⁶ The court of appeals had relied on the clear, though colorful, language and logic of the 1870 Texas Supreme Court in *Wright's Administratrix v. Donnell*,³⁷ which held:

[Since Texas allows] vindictive damages . . . for the purpose of punishing the defendant, it would seem that the action thus far being of a personal character, ought not to survive the death of the offender. It is submitted that no enlightened court would do so monstrous a thing as to let fall the sword of judicial vengeance after the offender had passed from the theatre of human action, and was in the hands of his Maker.³⁸

In reversing *Wright's Administratrix*, the *Hofer* court could not resist taking a potshot at the Reconstruction-era court,³⁹ but the logic of the older decision remains solid, the modern Texas Supreme Court's *ad hominem* criticism notwithstanding.⁴⁰

Punitive damages in Arkansas, unlike in West Virginia and Texas, are not designed to compensate the victim, although earlier decisions have not always made this clear.⁴¹ Generally, the Arkansas

33. *Hofer* overruled *Wright's Adm'x. v. Donnell*, 34 Tex. 291 (1870), which held that punitive or vindictive damages could not be recovered against the representative of a deceased.

34. 679 S.W.2d at 475.

35. *Lavender v. Hofer*, 658 S.W.2d 812 (Tex. Ct. App.—Corpus Christi 1983), *rev'd*, 679 S.W.2d 470 (Tex. 1984).

36. *Id.* at 817.

37. 34 Tex. 291 (1870).

38. *Wright's Adm'x v. Donnell*, 34 Tex. 291, 298-99 (1870).

39. The *Hofer* court referred to its predecessor which handed down *Wright's Adm'x* as "[t]hat 'semi-colon' court," noting it was so called because of an opinion it issued attempting to void, on the basis of a semicolon in an election law, the election of Democrat Richard Coke as governor of Texas over incumbent Republican Richard J. Davis. *Ex parte Rodriguez*, 39 Tex. 705 (1873). Coke became governor anyway, because of President Grant's refusal to supply Union troops to intervene in behalf of Davis. 679 S.W.2d at 472 n.1.

The criticism of the Reconstruction-era court in Texas for its often political decision making has resulted in less *stare decisis* effect for the court's decisions. See Norvell, *Oran M. Roberts and the Semicolon Court*, 37 TEX. L. REV. 279, 286-89 (1959).

40. *Hofer* is discussed in Note, *Recovery of Exemplary Damages from the Estate of a Tortfeasor Is Permitted Under the Texas Survival Statute*, 16 ST. MARY'S L.J. 731 (1985), and Note, *Recovery of Exemplary Damages from the Estate of a Deceased Tortfeasor*, 28 S. TEX. L. REV. 389 (1986).

41. In a 1934 case, the Arkansas Supreme Court stated that "punitive damages are awarded in view of the supposed aggravation of the injury to the feelings of the plaintiff by the wanton or reckless act of the defendant." *Erwin v. Milligan*, 188 Ark. 658, 662, 67 S.W.2d

Supreme Court has expressly rejected the notion that punitive damages are compensatory in any fashion: "[P]unitive damages are not intended to remunerate the injured party for damages he may have sustained. . . . [Punitive damages] are the penalty the law inflicts [on the guilty party] . . . and are allowed as a warning or an example to the defendants and others.'"⁴² Recently, the Arkansas Supreme Court reiterated the purpose of punitive damages: "[T]he purpose of punitive damages is not to compensate the injured party but to impose a monetary penalty on the defendant and to discourage others from similar behavior."⁴³ In another 1987 decision, the Arkansas court referred to "the two-fold intent behind punitive damages," punishment and deterrence.⁴⁴

In 1988 the Florida Supreme Court overruled an earlier holding regarding punitive damages against deceased tortfeasors, and in so doing joined other courts which allow punitive damages only for punishment and deterrence. Florida had allowed punitive damages against the estate of a deceased tortfeasor. In *Lohr v. Byrd*⁴⁵ Florida adopted the majority rule disallowing such damages.

In *Lohr* the Florida Supreme Court was presented with this certified question: "May punitive damages be awarded against a deceased tortfeasor's estate?"⁴⁶ The court responded, "We answer the question in the negative and hold that a decedent's innocent heirs should not be punished when the wrongdoer is unavailable because of death."⁴⁷ With this decision, the court noted that Florida "join[ed] the majority

592, 594 (1934). In *Southern Farm Bureau Casualty Ins. v. Daniel*, 246 Ark. 849, 851, 440 S.W.2d 582, 583-84 (1969), Justice Byrd, writing for the five-two majority, stated that punitive "damages have been defined as damages imposed by way of punishment and as those given or awarded in view of the supposed aggravation of the injury to the feelings of the plaintiff by the wanton or reckless conduct of the defendant," citing *Erwin* as his authority. The court used this language, which apparently misstates Arkansas law as to the purpose of punitive damages, to reach the desired end in the case: making an automobile liability insurance carrier liable for the punitive damages awarded against the insured. Justice Fogleman strongly objected to the majority's statement in his dissent, writing that the majority's position "is wholly inconsistent with the theory of punitive damages in Arkansas." *Id.* at 853, 440 S.W.2d at 584 (Fogleman, J., dissenting). The majority's quote from *Southern Farm Bureau* also appeared in the case of *California Union Ins. v. Arkansas Louisiana Gas*, 264 Ark. 449, 453, 572 S.W.2d 393, 395 (1978), but only in dicta since the court was applying Oklahoma law. The statement has not otherwise been used as authority by the Arkansas Supreme Court.

42. *Holmes v. Hollingsworth*, 234 Ark. 347, 350 n.2, 352 S.W.2d 96, 98 n.2 (1961) (quoting the trial court's instructions).

43. *Vickery v. Ballentine*, 293 Ark. 54, 56-57, 732 S.W.2d 160, 162 (1987).

44. *Alpha Zeta Chapter of Pi Kappa Alpha Fraternity v. Sullivan*, 293 Ark. 576, 585, 740 S.W.2d 127, 132 (1987).

45. 522 So. 2d 845 (Fla. 1988).

46. *Id.* at 845.

47. *Id.* at 846.

of jurisdictions in this country that have considered this issue."⁴⁸ However, the Florida court pointed out that a lower court in Florida had authorized punitive damages against a deceased tortfeasor's estate for deterrence purposes, contending that "if a potential tortfeasor realizes that his estate is liable to diminishment by punitive damages awards, as is his own purse while he lives, this provides an additional incentive to avoid tortious conduct."⁴⁹ The Florida Supreme Court replied:

Accepting this argument would result in our adopting a principle that would allow a decedent's widow and children to be placed on welfare for the decedent's wrong. . . . If deterrence is justified in this instance, it would also be justified to require a decedent's family to pay a fine or be imprisoned for the decedent's criminal conduct. With the wrongdoer dead, there is no one to punish, and to punish the innocent ignores our basic philosophy of justice.

We find that logic, common sense, and justice dictate that this Court follow the majority of jurisdictions in this country and reject the imposition of punitive damages upon innocent heirs or creditors of a decedent's estate.⁵⁰

The *Lohr* court rejected⁵¹ dicta in a 1969 case, *Atlas Properties, Inc. v. Didich*,⁵² concerning punitive damages for a wrongful death. In that case, in which Florida adopted the rule that punitive damages are properly awarded in a wrongful death suit, the court stated, "[L]ogic and common sense indicate that this Court should now . . . allow the recovery of punitive damages under [the survival statute]. This ap-

48. *Id.*

49. *Stephens v. Rohde*, 478 So. 2d 862, 863 (Fla. 1st Dist. Ct. App. 1985).

50. 522 So. 2d at 847.

51. The decision quoted the conclusion from a student note encouraging the court to rule as it did:

Byrd brings before the Florida Supreme Court the critical question of whether the estate of a deceased wrongdoer may have punitive damages assessed against it. Traditionally, Florida courts have allowed punitive damages to be assessed in cases where a punitive award will deter future tortious conduct or punish a wrongdoer. Neither of these goals is furthered by a punitive award in the case of *Byrd* where the tortfeasor cannot be punished beyond his death. Nor is a punitive sanction like that in *Byrd* likely to deter others from wrong conduct if they are unaware that the sanction exists or are unable to control or modify their conduct. If the Florida Supreme Court permits a punitive damage award in *Byrd*, then the court should buttress its holding with a justification more cogent than either punishment or deterrence. Not only will these rationales not support a punitive award against a deceased tortfeasor's estate, they will only serve as a disguise for the court's real reasons for granting an award that saddles innocent heirs with an unjust penalty and the public with higher insurance premiums.

Note, *supra* note 14, at 387, quoted in part in *Lohr v. Byrd*, 522 So. 2d 845, 847 n.* (Fla. 1988).

52. 226 So. 2d 684 (Fla. 1969).

pears to be true regardless of whether it is the tortfeasor or the injured party who dies.”⁵³ The district court of appeal considering the *Lohr* case felt constricted by this erroneous dicta.⁵⁴ The court of appeal explained the problem with its holding:

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.⁵⁵

The *Atlas Properties* court erred in equating a case in which the tort victim is dead with a case in which the tortfeasor is dead. Since punitive damages are awarded for reasons relating to the tortfeasor, not the tort victim, the difference should be manifest, as courts recognizing the confusion have held.⁵⁶

The dissent in *Lohr* by Justice Grimes, joined by two other justices, was short on case citation and plausible argument. First, the dissent argued, since the Florida survival statute⁵⁷ does not preclude the recovery of punitive damages from the deceased tortfeasor’s estate, the legislature may have intended for such damages to survive. In perhaps a better argument, the dissenters then contended that the would-be tortfeasor may be deterred by the threat of having his or her estate diminished by punitive damages.

[T]he justification for punitive damages is not only to punish the wrongdoer but also to serve as an example which will deter others

53. *Id.* at 688.

54. 488 So. 2d 138, 140 (Fla. 5th Dist. Ct. App. 1986) (the court certified the question of punitive damages against a deceased tortfeasor’s estate to the Florida Supreme Court).

55. *Id.* at 139.

56. In *Wagner v. Gibbs*, 80 Miss. 53, 63, 31 So. 434, 435 (1902), the Mississippi Supreme Court explained:

Punitory damages are inflicted for the purpose of deterring a culprit in the future, and the imposition of them for such purpose is impossible in the case of a person deceased. But where the trespasser is still alive, as in the case at bar, there is no reason whatever why he should be exonerated because of the death of the one upon whom he has committed a trespass; for the punishment is imposed not to deter him from repeating his trespass as against the particular party assailed or injured, but to secure his general good behavior.

57. FLA. STAT. § 46.021 (1985), which provides: “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.”

from engaging in similar conduct. While the punishment may be less when the wrongdoer dies, it nonetheless exists because his estate is reduced as a result of his misconduct. The deterrence to others is totally unaffected by the death of the wrongdoer. In fact, the warning may be greater if one knows that even his death will not serve to insulate his estate from liability for his misconduct. Thus, "if a potential tortfeasor realizes that his estate is liable to diminishment by punitive damages awards, as is his own purse while he lives, this provides an additional incentive to avoid tortious conduct."⁵⁸

The dissent rejected the argument that the award amounts to punishing the innocent heirs of the tortfeasor "because it is based on the artificial notion that it makes a difference when the tortfeasor dies. If he dies the day after a judgment is entered against him, his heirs are surely penalized. Why should it be different if he dies the day before the judgment?"⁵⁹

The Florida dissenters are not alone in their view that the deterrence rationale can justify punitive damages against the estates of deceased tortfeasors. One commentator called the rule of nonsurvivability "bizarre," after noting a case where a plaintiff injured by a drunken driver in a car wreck was "deprived of his punitive damage claim when the drunk driver died two weeks prior to the scheduled commencement of the post remand trial."⁶⁰ The case points out, perhaps, one potential argument against the majority rule: the rule encourages delay on the part of the defendant. However, the notion that a defendant would delay a trial in the hope that he or she would die before the suit is brought seems to be a bit tenuous. Perhaps the guardian of a tortfeasor who is on his or her deathbed might seek delays in the trial, but the benefit of avoiding this relatively rare situation does not seem to be worth the cost of the minority rule.

That some deterrence might be obtained by punishing a

58. 522 So. 2d at 848 (Grimes, J., dissenting) (citations omitted).

59. *Id.* at 848-49 (Grimes, J., dissenting).

60. Schwartz, *Deterrence and Punishment in the Common Law of Punitive Damages: A Comment*, 56 S. CAL. L. REV. 133 (1982), referencing *Taylor v. Superior Court*, 24 Cal. 3d 890, 598 P.2d 854, 157 Cal. Rptr. 693 (1979). Professor Schwartz talks of depriving a plaintiff of his claim; however, since the *Taylor* case made clear that punitive damages may be awarded in the drunken driving case, the purpose of the punitive award is fulfilled anyway, i.e., putting potential drunken drivers on notice that should they be in an accident, they may be liable for punitive damages. Surely Professor Schwartz cannot logically argue that a would-be drunken driver will now choose not to get behind the wheel since there is the possibility that he or she could be killed in the crash, thus avoiding having punitive damages awarded against his estate. The argument fails, even under Professor Schwartz's liberal view toward punitive damages, e.g., supporting punitive damages which punish or which deter.

tortfeasor's estate should not end the inquiry. Persons making choices which could lead to harm against others care about their own families; given the choice of being punished personally or having the same punishment visited upon their innocent children, many actors would prefer the punishment themselves. Thus, the prospect of the innocent being punished for another's sins could have a significant deterrent effect upon the actor. Another example of punishing the dead for its possible deterrent effect upon the living is the notion of defiling the body after death, such as placing the head on a pike,⁶¹ or the body being quartered *after* being hanged, or throwing the body to the dogs.⁶²

That these forms of punishment might be effective means of deterrence is not questioned here. But a free nation generally is not willing to obtain deterrence by means such as punishing the innocent or defiling the dead.⁶³ Society is, of course, correct in these choices.⁶⁴ The issue of punitive damages presents no good occasion for departure from the rule.

The majority rule that punitive damages are not recoverable against the estate of a deceased tortfeasor has been laid down by statute or case law in most of the states: Alabama,⁶⁵ Alaska,⁶⁶ Arizona,⁶⁷ California,⁶⁸ Colorado,⁶⁹ Florida,⁷⁰ Georgia,⁷¹ Idaho,⁷² Iowa,⁷³

61. Alternately, one's head might be served on a platter. See, e.g., *Matthew* 14:8-12.

62. See, e.g., the fate of Jezebel, 2 *Kings* 9:30-37.

63. See, e.g., the eighth "sacred" right of man set forth by the National Assembly of France two centuries ago: "The Law ought to impose no other penalties but such as are absolutely and evidently necessary . . ." T. PAINE, *RIGHTS OF MAN* 92 (Easton Press ed. 1979) (Part One 1791).

64. One can also argue that, in the United States, the federal constitution mandates some of the choices against these punishments. "[C]ruel and unusual punishments [shall not be] inflicted." U.S. CONST. amend. VIII.

65. *Meighan v. Birmingham Terminal Co.*, 165 Ala. 591, 51 So. 775 (1910). But see *Ellis v. Zuck*, 546 F.2d 643 (5th Cir. 1977) (suggesting that Alabama law had changed). See *supra* note 14.

66. *Doe v. Colligan*, 753 P.2d 144, 146 (1988) ("The central purpose of punitive damages is to punish the wrongdoer and to deter him from future misconduct. The concomitant goal of general deterrence depends significantly upon the punishment function of an award of punitive damages. Since the deceased tortfeasor cannot be punished, the general deterrent effect becomes speculative at best . . .").

67. *Braun v. Moreno*, 11 Ariz. App. 509, 466 P.2d 60 (1970).

68. CAL. PROB. CODE § 573 (1979). In *Evans v. Gibson*, 220 Cal. 476, 31 P.2d 389 (1934), the death of the tortfeasor was held to have rendered meaningless the punitive aspects of damages for fraud. The court stated, "It is true that the infliction of punishment serves as a deterrent to the commission of future wrongs by others as well as by the wrongdoer, but

Louisiana,⁷⁴ Maine,⁷⁵ Massachusetts,⁷⁶ Minnesota,⁷⁷ Mississippi,⁷⁸ Missouri,⁷⁹ Nevada,⁸⁰ New Mexico,⁸¹ New York,⁸² North Carolina,⁸³

punitive damages by way of example to others should be imposed only on actual wrongdoers." *Id.* at 489-90, 31 P.2d at 395.

See also *Bancroft-Whitney Co. v. Glen*, 64 Cal. 2d 327, 411 P.2d 921, 49 Cal. Rptr. 825 (1966) (breach of fiduciary duty).

69. *Sanchez v. Marquez*, 457 F. Supp. 359 (D. Colo. 1978) (applying Colorado law in a personal injury case).

70. *Lohr v. Byrd*, 522 So. 2d 845 (Fla. 1988). See *infra* notes 55-59 and accompanying text.

71. GA. CODE ANN. § 3-505 (1975) (recodified at 9-2-41 (1982)); *Morris v. Duncan*, 126 Ga. 467, 54 S.E. 1045 (1906) (malicious use and abuse of civil process).

72. IDAHO CODE § 5-327 (1979).

73. *Rowen v. Le Mars Mut. Ins. Co.*, 282 N.W.2d 639 (Iowa 1979) (illegal transfer of control of company); *Wolder v. Rahm*, 249 N.W.2d 630 (Iowa 1977) (medical malpractice); *Sheik v. Hobson*, 64 Iowa 146, 19 N.W. 875 (1884) (award of punitive damages against deceased tortfeasor's personal representative in a slander action would amount to vicarious punishment).

74. *Johnson v. Levy*, 122 La. 118, 47 So. 422 (1908) (breach of promise to marry); *Edwards v. Ricks*, 30 La. Ann. 926 (1878) (dispossessing a family of its home).

75. *Prescott v. Knowles*, 62 Me. 277 (1874).

76. MASS. GEN. ANN. LAWS ch. 230, § 2 (West 1974); *Wilkins v. Wainwright*, 173 Mass. 212, 53 N.E. 397 (1899) (injuries caused by deceased's dogs).

77. *Thompson v. Estate of Petroff*, 319 N.W.2d 400 (Minn. 1982) (in assault case, court reasoned that the exemplary purpose of punitive damages is not well served by imposing damages on anyone other than the actual wrongdoer).

78. MISS. CODE ANN. § 91-7-235 (1973); *Mervis v. Wolverton*, 211 So. 2d 847 (Miss. 1968) (vindictive damages were improperly awarded in a default judgment below against the estate of a deceased tortfeasor, who died after the filing of the declaration); *Hewlett v. George*, 68 Miss. 702, 9 So. 885 (1891) (in false imprisonment action, court held that the offender cannot be followed into the grave for a personal wrong).

79. *Ford Motor Credit Co. v. Hill*, 245 F. Supp. 796 (W.D. Mo. 1965) (applying Missouri law in action against bank and estate of decedent, alleged joint tortfeasors).

80. *Allen v. Anderson*, 93 Nev. 204, 562 P.2d 487 (1977). The Nevada Supreme Court ruled that a survival statute which authorized an award of punitive damages "as may be fair and just" did not permit a punitive damage award against a tortfeasor's estate. This finding, according to the Alaska Supreme Court, amounted to the Nevada court having "essentially ruled, as a matter of law that it is neither fair nor just to award punitive damages against an estate." *Doe v. Colligan*, 753 P.2d 144, 145 n.5 (Alaska 1988). However, the Alaska Supreme Court may have misinterpreted the Nevada ruling. The Nevada Supreme Court noted that the statute requires only damages "proximately resulting from . . . negligence or willful misconduct" to survive. 93 Nev. at 209, 562 P.2d at 490. However, the court theorized that "[p]unitive damages do not so result. Such damages are raised, not as a proximate result of the wrongdoer's conduct, but rather, by law and are intended to punish the wrongdoer." *Id.*

Punitive damages, the *Allen* court held, are not founded upon compensation of an injured person for his damages; since the tortfeasor could not be punished, the rationale for the damages ceased to exist. *Id.* at 208-09, 562 P.2d at 489-90.

81. *State Farm Mut. Auto. Ins. v. Maidment*, 107 N.M. 568, 761 P.2d 446 (1988) (following the prediction of New Mexico law made in *Barnes v. Smith*, 305 F.2d 226 (10th Cir. 1962)). The appellant in *State Farm* argued that general deterrence should justify punitive damages against the estate. The New Mexico Court of Appeals responded: "The deterrent effect of punitive damages on others, however, is inextricably tied to the punishment of the

Oklahoma,⁸⁴ Oregon,⁸⁵ Rhode Island,⁸⁶ Tennessee,⁸⁷ Vermont,⁸⁸ Virginia,⁸⁹ Wisconsin⁹⁰ and Wyoming.⁹¹

The basic logic behind this rule is obvious: a mortal court cannot punish the deceased. The rule has been stated matter-of-factly, as in the Tennessee case of *Hayes v. Gill*:⁹²

[T]he proposition that punitive damages are, for the most part, meted out as punishment is well established by the Tennessee cases Since the deceased party 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,

tort-feasor. If the tort-feasor cannot be punished, it follows that there can be no general deterrence." *Id.* at 571, 761 P.2d at 449.

82. N.Y. EST. POWERS & TRUSTS LAW § 11-3.2 (McKinney 1979); *Gordon v. Nathan*, 43 A.D.2d 917, 352 N.Y.S.2d 464 (1st Dept. 1974) (landlord-tenant litigation); *Cullom v. Kadel*, 208 Misc. 18, 142 N.Y.S.2d 600 (1955) (libel and slander action).

In *Faulk v. Aware, Inc.*, 35 Misc. 2d 302, 231 N.Y.S.2d 270 (1962), John Henry Faulk brought a libel suit against three defendants, a corporation, and two men, alleging libel for their labeling him a communist. The court instructed the jury that punitive damages could not be recovered against the defendant who died: "Now, keep in mind that punitive damages may not be assessed, because of his death, against Johnson's estate" *Id.*, 231 N.Y.S.2d at 279. Faulk sought \$1 million each in punitive damages from the two defendants; the jury rendered its verdict for \$1.25 million in punitive damages (after obtaining the court's permission to award more than Faulk sought). In *Faulk v. Aware, Inc.*, 19 A.D.2d 464, 244 N.Y.S.2d 259 (1963), the appellate court reversed unless Faulk consented to a reduction in the punitive award to \$50,000 against *Aware, Inc.*, and \$100,000 against its president. (For a discussion of the trial, see J.H. FAULK, *FEAR ON TRIAL* (1965), and L. NIZER, *THE JURY RETURNS* 226-438 (1966)).

83. *McAdams v. Blue*, 3 N.C. App. 169, 164 S.E.2d 490 (1968) (property and personal injuries from automobile accident); *Ripley v. Miller*, 33 N.C. 247 (1850).

84. *Morris v. Barton*, 200 Okla. 4, 190 P.2d 451 (1947) (willful destruction of production from an oil and gas lease).

85. *Pearson v. Galvin*, 253 Or. 331, 454 P.2d 638 (1969) (false imprisonment); *Ashcraft v. Saunders*, 251 Or. 139, 144, 444 P.2d 924, 927 (1968) ("The reason . . . is . . . the offender is beyond punishment."); *Lane v. Schilling*, 130 Or. 119, 279 P. 267 (1929).

86. R.I. GEN. LAWS § 9-1-8 (1985); *Aldrich v. Howard*, 8 R.I. 125 (1864) (nuisance).

87. *Paul v. Milburn*, 275 F. Supp. 105 (W.D. Tenn. 1967) (applying Tennessee law); *Hayes v. Gill*, 216 Tenn. 39, 49, 390 S.W.2d 213, 217 (1965) (in action arising from automobile accident, court stated the proposition that "punitive damages are, for the most part, meted out as punishment" and rejected claim against deceased tortfeasor's estate).

88. VT. STAT. ANN. tit. 14 § 1451-4 (1974).

89. *Dalton v. Johnson*, 204 Va. 102, 107, 129 S.E.2d 647, 650-51 (1963) (holding in personal injury case arising from car wreck that punitive damages may "only be awarded against the one who has participated in the offense").

90. WIS. STAT. ANN. § 895.02 (West 1977); *McWilliams v. Bragg*, 3 Wis. 424 (1854).

91. *Marcante v. Hein*, 51 Wyo. 389, 67 P.2d 196 (1937). In an action for replevin and damages, the Wyoming Supreme Court stated, "The rule appears to be thoroughly established that executors of an estate cannot be held liable for exemplary damages in consequence of a tort committed by their testator, when the latter has died after the commencement of the action to assess damages therefore and before trial." *Id.* at 406, 67 P.2d at 202.

92. 216 Tenn. 39, 390 S.W.2d 213 (1965).

the rule itself is no longer of value and is extinguished by the disappearance of the reason.⁹³

Other courts, such as the Mississippi Supreme Court, have used more colorful language in explaining the basic logic for the rule:

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.⁹⁴

Dean Prosser stated that punitive damages are awarded "for the purpose of punishing the defendant, of teaching the defendant not to do it again, and of deterring others from following the defendant's example."⁹⁵ The Restatement (Second) of Torts asserts that punitive damages should not be collected from a deceased tortfeasor's estate, stating that under survival statutes "the death of the tortfeasor terminates liability for punitive damages."⁹⁶

In a dissent to *Hofer v. Lavender*, the Texas case which allowed recovery against a tortfeasor's estate, Justice Spears argued convincingly that "the punitive and deterrent aims of exemplary damages are not separable."⁹⁷ He continued:

The general deterrent effect of an award cannot be considered in isolation, because to a large extent general deterrence depends on punishment. Specifically, members of the public are deterred from similar misconduct because they witness the wrongdoer's punishment. When, through death, the tortfeasor is no longer subject to legal punishment, the general deterrent effect likewise is greatly diminished, if not completely frustrated. Effective deterrence cannot be achieved when punishment is impossible. For this reason, the deterrent function of exemplary damages is insufficient to support an award when the tortfeasor dies before trial.⁹⁸

Chief Justice Pope, who joined in Justice Spears' dissent, argued even further than this colleague and contended that punishment of wrongdoers is the only sound basis for the award of punitive damages:

93. *Id.* at 49, 390 S.W.2d at 217 (citations omitted).

94. *Mervis v. Wolverton*, 211 So. 2d 847, 848 (Miss. 1968) (quoting *Hewlett v. George*, 68 Miss. 702, 710, 9 So. 885, 887 (1891)).

95. W. PROSSER & P. KEETON, *supra* note 1, § 2, at 9.

96. RESTATEMENT (SECOND) OF TORTS § 926(b) (1979). RESTATEMENT (SECOND) OF TORTS § 908 comment a (1979) states that "[p]unitive damages are not awarded against representatives of a deceased tortfeasor nor, ordinarily, in an action under a death statute."

97. *Hofer v. Lavender*, 679 S.W.2d 470, 478 (Tex. 1984) (Spears, J., dissenting).

98. *Id.*

"To say that punitive damages serve as an example and deter egregious conduct is merely to state the purpose of punishment."⁹⁹

Punishment and deterrence are the reasons Arkansas and most other states allow punitive damages against a tortfeasor. The goals of neither punishment nor deterrence are furthered by a punitive award against the estate of a dead wrongdoer. Deterrence is part and parcel of punishment; that is why Arkansas courts, through the Arkansas Model Jury Instructions, tell jurors that punitive damages are to be imposed "to punish . . . and to deter," not to punish *or* to deter.¹⁰⁰ Therefore, if there is no one to punish due to the tortfeasor's death, the court should never reach the issue of whether it is possible that an award of punitive damages might deter someone else. Even if the consideration of deterrence to others is addressed, however, the question should be quickly settled: the threat of one's estate being diminished by an award of punitive damages simply does not rise to a measurable level of concern for a would-be tortfeasor. The drunken driver is still going to get behind the wheel; the snake-oil salesman is still going to defraud customers.¹⁰¹ Finally, courts should not have to address the issue of whether the injured plaintiff is being cheated out of his or her punitive damage award by the Grim Reaper's claim on the defendant. Punitive damages are not, in Arkansas and most other jurisdictions, designed to benefit the plaintiff. They may be likened to a criminal fine: the state or federal treasury benefits from the criminal wrongdoing, but the purpose behind the lawmakers' enacting the criminal statute was not to raise revenue.¹⁰²

The issue is generally settled across the country: in states which do not award punitive damages as compensation, but rather only for purposes of punishment and deterrence, there is no recovery of punitive damages against the estate of a deceased wrongdoer. To do

99. *Id.* at 479 (Pope, C.J., dissenting).

100. The Arkansas Model Jury Instruction on Punitive Damages, AMI 2217, states that punitive damages "may be imposed to punish a wrongdoer and to deter others from similar conduct." Because the purposes are stated conjunctively ("and"), instead of by use of the disjunctive "or," it would seem that when there is no wrongdoer to punish—such as where the tortfeasor has died—the precise wording of the instruction seems to bar punitive damages against a deceased tortfeasor's estate.

101. Granted, this argument may prove too much: does the threat of punitive damages ever deter a would-be tortfeasor? The answer is beyond the scope of this comment, but it is hard to imagine a situation under which a state court decision on punitive damages against a deceased tortfeasor's estate would effectively deter another would-be tortfeasor. That a court decision regarding punitive damages against a living tortfeasor might also lack deterrence effect does not argue for punitive awards against estates, but rather states a case for reconsideration of punitive awards generally.

102. See *Orkin Extermination Co. v. Traina*, 486 N.E.2d 1019, 1022 (Ind. 1986).

otherwise, as Justice Spears of the Texas Supreme Court has stated, produces a "result reminiscent of the feudal doctrine of corruption of blood."¹⁰³ Visiting punishment upon the innocent heirs of a deceased wrongdoer does not further the ends of punitive damages in Arkansas or comport with good social policy.

Charles William Burton

103. *Hofer v. Lavender*, 679 S.W.2d 470, 479 (Tex. 1984) (Spears, J., dissenting).