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NOTE

Torts—PUNITIVE DAMAGES—THE FLORIDA SUPREME COURT IS ASKED TO DECIDE WHETHER PUNITIVE DAMAGES MAY BE AWARDED AGAINST A DECEASED TORTFEASOR'S ESTATE—*Byrd v. Lohr*, 488 So. 2d 138 (Fla. 5th DCA 1986)

ON MAY 8, 1986, the Florida Supreme Court was asked to decide whether punitive damages may be awarded against the estate of a deceased tortfeasor. In *Byrd v. Lohr*,¹ the Fifth District Court of Appeal certified the question to the Florida Supreme Court as a matter of great public importance. The Fifth District Court's opinion focuses on the quandary faced by the court when confronted with compelling public policy arguments against assessing punitive damages against a deceased tortfeasor's estate and dicta from an earlier Florida Supreme Court case² that suggested that punitive damage claims survive regardless of the death of a tortfeasor.

The burden now rests with the Florida Supreme Court to decide whether Florida should remain one of only four states that allow plaintiffs to recover punitive damages from the estate of a wrongdoer who has died.³ Just as the Fifth District Court of Appeal struggled with the question, so too will the Florida Supreme Court have to grapple with competing precedent and public policy to decide this issue.

The purpose of this Note is to examine the types of cases in Florida and other states in which punitive damages have been awarded against deceased tortfeasor's estates. The author discusses the attendant public policy concerns that likely will be considered by the Florida Supreme Court, and considers alternatives to granting such awards.

1. 488 So. 2d 138 (Fla. 5th DCA 1986).

2. *Atlas Properties, Inc. v. Didich*, 226 So. 2d 684 (Fla. 1969).

3. Currently, only Texas, West Virginia, Illinois, and Florida allow punitive damages to be assessed against a deceased tortfeasor's estate. See **Texas**: *Hofer v. Lavender*, 679 S.W.2d 470 (Tex. 1984); **West Virginia**: *Perry v. Melton*, 299 S.E.2d 8 (W. Va. 1982); **Illinois**: *National Bank v. Norfolk & W. Ry.*, 73 Ill. 2d 160, 383 N.E.2d 919 (1978); **Florida**: *Johnson v. Rinesmith*, 238 So. 2d 659 (Fla. 2d DCA 1969), *cert. denied*, 241 So. 2d 857 (Fla. 1970).

I. BACKGROUND ON PUNITIVE DAMAGES

Punitive or exemplary damages may be awarded in a civil trial on a tort action to more than compensate a plaintiff for his injuries.⁴ The history of punitive damages may be traced back to biblical times when, according to the Bible, God instructed Moses to tell the Israelites:

If a thief is caught breaking in and is struck a blow, there is to be no blood-vengeance for him, but there shall be blood-vengeance for him if it was after dawn. Full restitution must be made if he has not the means. He must be sold to pay for what he has stolen. If the stolen animal is found alive in his possession, ox or donkey or sheep, he must pay double.⁵

Punitive damages have also been called exemplary damages or "smart money," and have been awarded by most courts to punish the defendant, to deter the defendant and others from engaging in tortious conduct, and to reimburse the plaintiff for damages such as the expense of the lawsuit and hurt feelings, which are seldom elements for which the plaintiff receives compensation.⁶

The earliest case to use the term "exemplary damages" was *Huckle v. Money*,⁷ in which an English court in 1763 first held that a jury could return a verdict exceeding the plaintiff's damages.⁸ Because English juries were composed of townspeople who were often more knowledgeable about the facts of cases than the judges, English courts were reluctant to tamper with a jury's award even if it was of punitive proportions.⁹

The first American tribunal to recognize a punitive damage award was a New Jersey court in *Coryell v. Colbaugh*.¹⁰ In that case the court stressed that the damage award should be so disproportionate as to be an example to others. In fact, the court instructed the jury not to use an equitable estimate of the plaintiff's losses as a measure of damages but to assess damages purely for the sake of example so that future offenders would be deterred.

4. W. KEETON, PROSSER AND KEETON ON TORTS § 2, at 9 (5th ed. 1984); see also Sales & Cole, *Damages: A Relic that has Outlived Its Origins*, 34 DEF. L. J. 429, 431 (1985).

5. *Exodus* 22:2-4.

6. See KEETON, *supra* note 4.

7. 95 Eng. Rep. 768 (1763) (cited in Sales & Cole, *supra* note 4, at 431).

8. See Sales & Cole, *supra* note 4, at 431.

9. *Id.* at 431-32.

10. 1 N.J.L. 77 (1791) (cited in Sales & Cole, *supra* note 4, at 435).

Because Florida adopted the common law of England as of July 4, 1776, its courts have long had the authority to assess punitive damages against tortfeasors.¹¹ Only in recent years, however, have Florida courts allowed punitive damage awards in survival actions.¹² The route taken by Florida courts to arrive at this position was long and circuitous.

In 1828, the Florida Legislature passed its first survival of actions statute which provided that "[a]ll actions for personal injuries shall die with the person, to wit: Assault and battery, slander, false imprisonment, and malicious prosecution; all other actions shall and may be maintained in the name of the representatives of the deceased."¹³ When a Florida court first interpreted this statute, it held that the act left unaltered the common law tenet that a personal injury cause of action fails to survive the death of the plaintiff.¹⁴ More than half a century later the Florida Supreme Court reconstrued the same statute to hold that survival actions for compensatory damages survive a tortfeasor's death.¹⁵

Since 1828, the legislature has twice amended the survival statute, in 1951 and 1967, so that it now provides that "[n]o 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."¹⁶ After the amendment of the statute, it was but a short step for the Florida Supreme Court to state in dicta that just as a claim for compensatory damages may survive a tortfeasor's death, so may a claim for punitive damages live on after a wrongdoer dies.¹⁷

II. BYRD v. LOHR

Although Florida courts have long allowed punitive damages to be assessed against tortfeasors,¹⁸ not until 1969 did a Florida appellate court hold that punitive damages could be assessed against

11. See FLA. STAT. § 2.01 (1983).

12. See *Johnson v. Rinesmith*, 238 So. 2d 659 (Fla. 2d DCA 1969), *cert. denied*, 241 So. 2d 857 (Fla. 1970) (holding that punitive damages may be awarded against a deceased tortfeasor's estate).

13. *Atlas Properties, Inc. v. Didich*, 226 So. 2d 684, 686 (Fla. 1969) (quoting FLA. REV. GEN. STAT. § 2571 (1828)).

14. *Jacksonville St. Ry. v. Chappel*, 22 Fla. 616, 627, 1 So. 10, 16 (1886).

15. *Waller v. First Savs. & Trust Co.*, 103 Fla. 1025, 1047, 138 So. 780, 789 (1931).

16. FLA. STAT. § 46.021 (1985).

17. *Atlas Properties, Inc. v. Didich*, 226 So. 2d 686, 688 (Fla. 1969).

18. FLA. STAT. § 2.01 (1983).

a deceased wrongdoer's estate.¹⁹ Since that time Florida district courts of appeal have twice ruled that deceased tortfeasor's estates are not safe from such assessments.²⁰

A. *The Facts*

Hattie Byrd sued the estate of John Lohr for compensatory and punitive damages for injuries she sustained in an automobile accident with an intoxicated Lohr, who died of resultant injuries.²¹ At trial, Byrd was awarded \$31,000 in compensatory damages and \$25,000 in punitive damages. The trial judge granted Lohr's motion for remittur and reduced the punitive damage award to \$9,000 to prevent destruction of the estate's assets. Byrd was given the option of a new trial in lieu of remittur but chose instead to appeal. The Fifth District Court of Appeal, finding that the trial judge did not abuse his discretion in the amount of the remittur, affirmed the lower court's decision but certified to the Florida Supreme Court the question of whether punitive damages may be awarded against the estate of a deceased tortfeasor.

B. *The Court's Rationale*

In *Byrd*, the Fifth District Court of Appeal carefully outlined the reasoning that led to its decision. What troubled the court most was that punitive damages traditionally have been awarded both to punish the tortfeasor and to deter future tortious conduct.²² Neither of these goals may be accomplished directly if the tortfeasor dies and can neither endure further punishment nor be deterred from future conduct.²³ The court noted that a majority of states reject awards of punitive damages against the assets of dead wrongdoers because the death of a tortfeasor obviates the reason for a punitive award. The court suggested that most states disallow such punitive awards because it is the heirs of the tortfeasor who are punished and not the tortfeasor himself, and because the deterrent effect of a punitive award is frustrated when the party who is not the wrongdoer is inflicted with a penalty.

19. *Johnson v. Rinesmith*, 238 So. 2d 659 (Fla. 2d DCA 1969), *cert. denied*, 241 So. 2d 857 (Fla. 1970).

20. *Byrd v. Lohr*, 488 So. 2d 138 (Fla. 5th DCA 1986); *Stephens v. Rohde*, 478 So. 2d 862 (Fla. 1st DCA 1985).

21. *Byrd*, 488 So. 2d at 138.

22. *Id.* at 139.

23. *Id.*

Despite its reluctance to uphold the trial court's punitive damage award against Lohr's estate, the court stated that it was constrained to affirm on the basis of dicta from the Florida Supreme Court's opinion in *Atlas Properties, Inc. v. Didich*,²⁴ and case law precedent from other district courts of appeal.²⁵ The court stated that "despite the compelling arguments that punitive damages should not be available against a deceased tortfeasor's estate, we are bound by the reasoning in *Atlas Properties* to reject those arguments."²⁶

III. OTHER FLORIDA CASES

In *Atlas Properties*,²⁷ a father acting as administrator of his daughter's estate sued a corporation seeking compensatory and punitive damages for the death of his daughter who drowned when her arm was caught in a pool's uncovered filter drain pipe. The Florida Supreme Court held that under Florida's survival statute²⁸ no cause of action dies with the person. The court examined the history of the survival statute and held that the father was allowed to seek any damages his daughter would have been able to recover in her own name had she lived.²⁹ The court reasoned that the language of the survival statute, "[n]o cause of action dies with the person,"³⁰ was clear and could only be interpreted as allowing recovery for punitive damages by a victim's personal representative.³¹ Although the court went further and suggested, in dictum, that punitive damages should be recoverable "regardless of whether it is the tortfeasor or the injured party who dies,"³² it contradicted that statement by adding that "this logic [supporting a punitive damage award] is more apposite when it is the injured party who dies . . . rather than the actual torfeasor."³³

Just three months after *Atlas Properties* was decided, the Second District Court of Appeal relied on that opinion to find that a

24. 226 So. 2d 684, 689 (Fla. 1969).

25. *Stephens v. Rohde*, 478 So. 2d 862, 863 (Fla. 1st DCA 1985); *Johnson v. Rinesmith*, 238 So. 2d 659, 660 (Fla. 2d DCA 1969), *cert. denied*, 241 So. 2d 857 (Fla. 1970).

26. *Byrd*, 488 So. 2d at 140.

27. 226 So. 2d 684 (Fla. 1969).

28. FLA. STAT. § 45.11 (1965) (current version at FLA. STAT. § 46.021 (1985)).

29. *Atlas Properties*, 226 So. 2d at 688-89.

30. FLA. STAT. § 45.11 (1965).

31. *Atlas Properties*, 226 So. 2d at 689.

32. *Id.* at 688.

33. *Id.*

claim for punitive damages survives the death of the tortfeasor.³⁴ In *Johnson*, the plaintiffs were injured when the car in which they were riding was in an accident. The tortfeasor did not survive the crash, and the court held that the plaintiffs could sue his estate for compensatory as well as punitive damages. The Florida Supreme Court subsequently denied certiorari.³⁵

In a more recent case, *Stephens v. Rohde*,³⁶ the First District Court of Appeal also held that a claim for punitive damages may be maintained against the estate of a deceased tortfeasor. The plaintiff in *Stephens* was hurt in an automobile accident. The defendant driver subsequently died of causes unrelated to the accident. In its opinion, the First District Court of Appeal noted that punitive awards against deceased tortfeasors' estates may have some deterrent effect if potential tortfeasors consider that their conduct may result in their estates being drained.³⁷

IV. THE CASE LAW IN OTHER STATES

Most states do not allow punitive damages to be assessed against the estate of a deceased tortfeasor.³⁸ The courts in states disallowing such awards reason that a dead tortfeasor cannot be deterred from future misconduct or be punished further.³⁹ Thus the assessment of a punitive award against a deceased tortfeasor's estate unjustly punishes only the heirs of the estate and thwarts the deterrent effect of the award by punishing the innocent.

However Florida, Texas, West Virginia, and Illinois adhere to the minority rule, allowing punitive damages to be assessed against a deceased wrongdoer's estate.⁴⁰ In deciding to follow the minority rule, the Texas and West Virginia Supreme Courts were faced with factual situations similar to that in *Byrd*.⁴¹

In *Hofer v. Lavender*,⁴² June Hofer was driving a car in which her parents were passengers. The car was struck by a vehicle driven by Robert Springate, whose blood alcohol level was 0.27%

34. *Johnson v. Rinesmith*, 238 So. 2d 659, 660 (Fla. 2d DCA 1969), *cert. denied*, 241 So. 2d 857 (Fla. 1970).

35. 241 So. 2d 857 (Fla. 1970).

36. 478 So. 2d 862 (Fla. 1st DCA 1985).

37. *Id.* at 863.

38. *Byrd v. Lohr*, 488 So. 2d 138, 139 (Fla. 5th DCA 1986).

39. *Id.*

40. See cases cited *supra* note 3.

41. See *Hofer v. Lavender*, 679 S.W.2d 470 (Tex. 1984); *Perry v. Melton*, 299 S.E.2d 8 (W. Va. 1982).

42. 679 S.W.2d at 470.

at the time of the accident. Hofer died a few hours later from injuries received in the accident. Before the case came to trial, Springate died of unrelated causes. At trial, the jury awarded the parents \$100,000 each in exemplary damages and the estate of the deceased Hofer \$200,000 in exemplary damages. The court of appeals reversed the trial court's decision in part and held that the Hofers could not recover exemplary damages for themselves or as representatives of their daughter's estate. In reversing the decision of the appellate court, the Texas Supreme Court suggested that, besides punishment, exemplary damages serve the additional purpose of setting an example to deter others.⁴³ The court emphasized that the deterrent value of a punitive damage award against a wrongdoer is not thwarted by that individual's death but remains to deter the community at large.

In the West Virginia case of *Perry v. Melton*,⁴⁴ the West Virginia Supreme Court of Appeals held that the estate of a deceased tortfeasor can be liable for punitive damages. The plaintiff was driving his car when he was struck by a car driven by the defendant, who, with a blood alcohol level of 0.19% attempted to pass a tractor trailer by driving in excess of fifty-five miles per hour in the right-hand emergency lane. The defendant's car hit a disabled tractor trailer parked in the emergency lane, flew into the air, and collided with the plaintiff's car. Both the plaintiff and the defendant were killed. The trial court refused to instruct the jury on punitive damages, believing that it was against public policy to assess punitive damages against anyone other than the tortfeasor to be punished. In its opinion reversing the trial court, the West Virginia Supreme Court of Appeals explained that, "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 tortfeasor. No sufficient justification exists for denying punitive damages simply because the tort-feasor is dead."⁴⁵ The court also noted that punitive damages serve societal functions by deterring others from engaging in similar conduct and providing additional financial assistance to those who have suffered from a defendant's conduct.

43. *Id.* at 474. The majority noted that other policy considerations are fulfilled by the award of exemplary damages, such as remuneration to the plaintiff for inconvenience, compensation to the plaintiff for losses too remote to be considered strictly compensatory, and deterrence of other potential tortfeasors.

44. 299 S.E.2d 8 (W. Va. 1982).

45. *Id.* at 13.

The highest courts of West Virginia and Texas relied primarily on public policy grounds to find that a person's claim for punitive damages is not extinguished when either his life or that of the tortfeasor is at an end. Rather than focusing on the traditional punishment aspect of punitive awards, these courts stressed that the deterrent effect of a punitive award will live on after the tortfeasor has expired.

The Illinois Supreme Court in *National Bank v. Norfolk & Western Railway*,⁴⁶ a case much like that decided by the Florida Supreme Court in *Atlas Properties*, decided that under the Illinois Survival Act⁴⁷ a cause of action for statutory punitive damages does not die with the death of an individual.⁴⁸ In *National Bank*, a motorist was struck by a train at a railroad crossing and killed. The administrator of his estate brought suit against the railroad for compensatory and punitive damages, which were awarded at trial and upheld on appeal.

By holding that a cause of action survives the death of a party, the Illinois Supreme Court created a situation in which a lower court may now rely on the higher court's reasoning to find that an action for punitive damages may survive a wrongdoer's death. Such a scenario would be similar to the reliance that the Florida Second District Court of Appeal in *Johnson v. Rinesmith*⁴⁹ placed on the decision of the Florida Supreme Court in *Atlas Properties, Inc. v. Didich*.⁵⁰

V. POLICY CONSIDERATIONS

Punishment and deterrence are the rationales employed most frequently in jurisdictions that allow recovery of punitive damages in a civil suit, though a few states also allow punitive awards as compensation for the plaintiff's hurt feelings and litigation expenses.⁵¹ In the case of a punitive award against a deceased tortfeasor's estate, because the tortfeasor himself can no longer be punished or deterred, the question becomes whether the award was given to appease the emotions of the wronged plaintiff or to deter

46. 73 Ill. 2d 160, 383 N.E.2d 919 (1978).

47. ILL. REV. STAT. ch. 110½, para. 27-6 (1977).

48. *National Bank*, 73 Ill. 2d at 174, 383 N.E.2d at 924 (the survival act itself did not authorize an award of punitive damages without an independent statutory basis for such an award).

49. 238 So. 2d 659 (Fla. 2d DCA 1969), cert. denied, 241 So. 2d 857 (Fla. 1970).

50. 226 So. 2d 684 (Fla. 1969).

51. KEETON, *supra* note 4, at 9.

the conduct of potential wrongdoers. In Florida, where punitive damages are imposed to punish the defendant and to deter others,⁵² the issue becomes whether a punitive damage award against a deceased tortfeasor's estate will deter other potential tortfeasors.

A. Deterrence as Justification

In *Stephens v. Rohde*, the First District Court of Appeal stated that punitive damage awards may deter future wrongdoing if a potential tortfeasor realizes that punitive damages may be assessed against his estate should he die as a result of his own tortious conduct.⁵³ However, in a case like *Byrd* which involves tortious behavior which is also criminally sanctioned, it is unlikely that the threat of punitive damages will do more than criminal sanctions to deter the driver's behavior. At least two commentators, working together, have asserted that people generally are more aware and mindful of criminal sanctions than of the concept of punitive damages.⁵⁴

In *Byrd v. Lohr*, the Fifth District Court of Appeal suggested that when punishment is inflicted on innocent heirs any deterrent effect is frustrated because "general deterrence logically depends upon the perception of punishment suffered by the wrongdoer."⁵⁵ In *Mercury Motors Express, Inc. v. Smith*, the Florida Supreme Court held that an employer may not be held vicariously liable for punitive damages under the doctrine of respondeat superior unless there was some fault on the part of the employer.⁵⁶ The court suggested that the public policy rationales of deterrence and punishment are not served by imposing liability for punitive damages when the employer is not at fault. The same reasoning should apply in cases in which punitive damages are sought against a deceased tortfeasor's estate because the punitive award is exacted from the innocent heirs.

Deterrence of individuals or entities other than the tortfeasor as a rationale for punitive awards is satisfied only when the tortfeasor outlives his or her misconduct. In *Campbell v. Government Employees Insurance Co.*, the Florida Supreme Court allowed a plain-

52. *Mercury Motors Express, Inc. v. Smith*, 393 So. 2d 545, 549 (Fla. 1981).

53. 478 So. 2d 862, 863 (Fla. 1st DCA 1985).

54. J. GHIARDI & J. KIRCHER, PUNITIVE DAMAGES LAW & PRACTICE § 2.09 (1984).

55. 488 So. 2d at 139.

56. 393 So. 2d 545, 549 (Fla. 1981).

tiff to recover punitive damages against an insurance company that acted in bad faith in failing to settle his claim within policy limits.⁵⁷ This award put other insurance companies on notice as to the consequences of bad faith in settling claims, and it also served as a deterrent to the insurer saddled with the punitive award. Thus the actual wrongdoer was deterred and punished.

A factor which becomes relevant in intoxicated driver cases is that the driver may be an alcoholic and unable to control himself or modify his behavior because of his disease.⁵⁸ A punitive damage award is not an effective deterrent to such individuals because it is improbable that they can be motivated by the threat of an assessment.

In the 1976 case of *Ingram v. Pettit*, the Florida Supreme Court held "that the voluntary act of driving 'while intoxicated' evinces, without more, a sufficiently reckless attitude for a jury to be asked to provide an award of punitive damages if it determines liability exists for compensatory damages."⁵⁹ By focusing on the tortfeasor's conduct without regard for his state of mind, the court imposed what was practically a strict liability rule for punitive damages in cases involving drunk drivers. Ironically, the court's description of intoxicated drivers as being reckless people against whom punitives should be assessed points out how implausible it is that these same people will be deterred from wrongdoing.

B. To Insure or Not to Insure

The question of whether to assess punitive damages brings with it the question of whether to allow potential defendants to insure against punitive awards.⁶⁰ Public policy considerations indicate that to allow punitive awards to be covered by liability insurance only thwarts the punishment rationale behind punitive damages by insulating the tortfeasor from the consequences of his act and shifting the punishment to the insurer.⁶¹

The case of *Northwestern National Casualty Co. v. McNulty*⁶² underscores the point that insurance coverage neutralizes the deterrent effect of punitive damages. In *McNulty*, the plaintiff was injured when his car was hit by a vehicle driven by the intoxicated

57. 306 So. 2d 525, 527 (Fla. 1974).

58. Geller, *Alcoholism: The Medical Viewpoint*, 56 N.Y. St. B.J. 26 (1984).

59. 340 So. 2d 922, 924 (Fla. 1976).

60. KEETON, *supra* note 4, at 13.

61. *Id.*

62. 307 F.2d 432 (5th Cir. 1962).

defendant. The plaintiff sued and obtained a verdict for \$37,500 in compensatory damages and \$20,000 in punitive damages. The United States District Court for the Southern District of Florida granted summary judgment for the plaintiff. The court of appeals reversed, finding that even if the insurance contract could be construed to provide coverage for punitive awards, to allow such coverage would contravene public policy.

The *McNulty* court also noted that when a person is able to purchase insurance coverage against a punitive damage award he is free to engage in tortious conduct which is otherwise proscribed.⁶³ The court reasoned that to hold that insurance policies may cover punitive damage awards would be tantamount to shifting the financial burden for a tortfeasor's conduct to the public in the form of higher insurance premiums. Thus, the general public and not the tortfeasor would be punished. If punitive damages are allowed in a case like *Byrd*, in which the tortfeasor did not outlive his tortious conduct, then the estate should not be protected by liability insurance as this would result in higher insurance premiums for the general public. The only parties penalized by the punitive damage award would be the innocent heirs.

VI. RECENT FLORIDA LEGISLATION

The 1986 Florida Legislature passed the Tort Reform and Insurance Act⁶⁴ to mitigate the difficulties Florida citizens face when they seek liability insurance. The legislature realized that a failure to impose limits on punitive damage awards would exacerbate the liability insurance crises in Florida, possibly resulting in citizens being unable to afford liability insurance, or injured persons being unable to recover for damages in a civil suit.⁶⁵ The Act places a number of strictures on punitive damage awards to lessen their impact on the public's purse;⁶⁶ however, the act does not prohibit punitive damages against a deceased tortfeasor's estate.

The Act limits the discovery of financial information about a defendant so that sensitive personal financial information and inflammatory information are not subject to discovery.⁶⁷ The Act also places a cap on punitive awards, requiring that they not ex-

63. *Id.* at 440.

64. Ch. 86-160, 1986 Fla. Laws 695.

65. *Id.*

66. Fort, Granger, Polston, & Wilkes, *Florida's Tort Reform: Response to a Persistent Problem*, 14 FLA. ST. U.L. REV. 505, 545 (1986).

67. *Id.* at 545-46.

ceed three times the actual damages awarded in a civil action based on negligence, strict liability, products liability, professional liability, or breach of warranty in which willful, wanton, or gross misconduct is involved.⁶⁸

Further, the Act provides that while 40% of a punitive damage award may be paid to the plaintiff, the remaining 60% must be paid into the General Revenue Fund or into the Public Medical Assistance Trust Fund in the case of a personal injury or wrongful death suit.⁶⁹ Attorneys' contingency fees are to be based on the 40% of the punitive award the plaintiff actually receives, not the entire amount of the award.⁷⁰

Florida public policy discourages liability coverage for punitive awards.⁷¹ The threat of such awards through vicarious liability is a factor in rising insurance premiums.⁷² Though the 1986 Legislature did not address the issue, the prevailing rule nationwide is that without an explicit provision denying coverage for punitive awards an insured is protected from vicarious liability but is not insured for his own misconduct.⁷³

By limiting the size of punitive damage awards and the types of cases in which they may be awarded, the Florida Legislature has attempted to contain the spreading costs of insurance premiums. Thus the Tort Insurance Reform Act of 1986 attempts to limit a plaintiff's windfall and the resulting public expense.⁷⁴

Though portions of the Tort Reform and Insurance Act have been adjudicated unconstitutional, the Florida Supreme Court has held constitutional those sections limiting the size of punitive damage awards.⁷⁵ In *Smith v. Department of Insurance*, the court approved of the trial judge's statement that the legislature has authority to limit or abolish punitive damages.⁷⁶ Thus the legislature has the authority to regulate punitive damage awards against deceased torfeasors' estates. If the Florida Supreme Court upholds the punitive damage award in *Byrd* under the rationale of deter-

68. Ch. 86-160, § 52, 1986 Fla. Laws 695, 749 (to be codified at FLA. STAT. § 768.73).

69. *Id.* (to be codified at FLA. STAT. § 768.73(2)).

70. *Id.* (to be codified at FLA. STAT. § 768.73(4)).

71. Fort, Granger, Polston, & Wilkes, *supra* note 66, at 522.

72. *See* Sales & Cole, *supra* note 4, at 463.

73. KEETON, *supra* note 4, at § 1, at 13; *see also* Mercury Motors Express, Inc. v. Smith, 393 So. 2d 545, 549 (Fla. 1981).

74. *See* Fort, Granger, Polston, & Wilkes, *supra* note 66, at 545.

75. *Smith v. Department of Insurance*, 12 Fla. L.W. 189, 193 (Fla. April 24, 1987).

76. *Id.* at 195-96 n.10.

rence or punishment, then the legislature should enact a statute prohibiting such awards.

VII. CONCLUSION

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.

Diane Wagner Carr

