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EXEMPLARY DAMAGES—SURVIVAL STATUTE—Recovery of Exemplary Damages From the Estate of a Tortfeasor is Permitted Under the Texas Survival Statute

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

June Hofer was driving a vehicle occupied by her parents, J.D. and Joan Hofer, when it was struck by a vehicle driven by Robert W. Springate.¹ At the time of the accident, tests indicated that Springate had a blood alcohol content of .27%.² June Hofer died a few hours after the accident, and Robert Springate died of unrelated causes after Hofer's parents had filed suit, but before the case came to trial.³ This suit instituted by the Hofers, pursuant to the Texas Survival Statute⁴ and the Texas Wrongful Death Act,⁵ sought, among other things, exemplary damages for themselves and the estate of their daughter.⁶ Upon Springate's death, his personal representative, Sharon

1. See *Hofer v. Lavender*, 679 S.W.2d 470, 471 (Tex. 1984).

2. See *id.* at 471. The jury verdict of the 117th District Court, Nueces County, found Springate guilty of gross negligence and various acts of negligence, which were determined to be the proximate cause of June Hofer's death. See *Lavender v. Hofer*, 658 S.W.2d 812, 813 (Tex. App.—Corpus Christi 1983), *rev'd*, 679 S.W.2d 470 (Tex. 1984).

3. See *Hofer v. Lavender*, 679 S.W.2d 470, 471 (Tex. 1984).

4. TEX. REV. CIV. STAT. ANN. art. 5525 (Vernon 1958). The Texas Survival Statute provides in pertinent part:

All causes of action upon which suit has been or may hereafter be brought for personal injuries, or for injuries resulting in death, . . . shall not abate by reason of the death of the person against whom such cause of action shall have accrued, nor by reason of the death of such injured person, but, in the case of the death of either or both, all such causes of action shall survive to and in favor of the heirs and legal representatives and estate of such injured party and against the person, or persons liable for such injuries and his or their legal representatives, and may be instituted and prosecuted as if such person or persons against whom same accrued were alive.

Id.

5. TEX. REV. CIV. STAT. ANN. art. 4675 (Vernon 1958). The pertinent part of the Texas Wrongful Death Act provides that "[w]hen an injury causing the death of any person, occurring either within or without this state, is caused by the wrongful act, neglect, carelessness, unskillfulness, or default of another person, . . . such persons . . . shall be liable in damages for the injuries causing such death." *Id.*

6. See *Hofer v. Lavender*, 679 S.W.2d 470, 471 (Tex. 1984). The majority states that "[q]uite plainly, the Hofers have no cause of action for exemplary damages under the Wrongful Death Act because TEX. REV. CIV. STAT. ANN. art. 4675 cannot enlarge upon TEX. CONST. art. XVI, § 26." See *id.* at 475. The majority's rationale for precluding the award of exemplary damages under the Texas Wrongful Death Act is based on the interpretive commentary to TEX. CONST. art. XVI, § 26. See *id.* at 475. Article 16, section 26, of the Texas

Lavender, was substituted as defendant.⁷ The jury awarded J.D. and Joan Hofer each \$100,000 and the estate of their daughter \$200,000 in exemplary damages.⁸ The Corpus Christi court of appeals reversed and rendered judgment that the Hofers could not recover exemplary damages for themselves individually, nor as the representatives of the estate of their daughter against Springate's estate.⁹ The Texas Supreme Court granted the Hofer's writ of error.¹⁰ Held—*Reversed*. Exemplary damages can be assessed against the estate of a tortfeasor under the Texas Survival Statute.¹¹

Exemplary damages, synonymous with "punitive," "vindictive," "smart money," and "presumptive damages,"¹² are awarded to a plaintiff beyond the amount necessary to compensate him for injury or loss sustained as a

Constitution provides that "[e]very person . . . that may commit a homicide through willful act, or omission, or gross neglect shall be responsible, in exemplary damages, to the surviving husband, widow, heirs of his or her body or such of them as there may be. . . ." See TEX. CONST. art. XVI, § 26. The interpretive commentary states:

If the [1860] act created a new cause of action, distinct from any that the deceased might have had, had he survived, then exemplary damages would die with the deceased. On the other hand, if the cause of action was a mere continuation of the deceased's cause of action, exemplary damages would still be the part of the judgment that the deceased's family could collect.

See *id.* interp. commentary (Vernon 1955).

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

8. See *Hofer v. Lavender*, 679 S.W.2d 470, 471 (Tex. 1984). The jury for the 117th District, Nueces County, assessed actual damages against Lavender in the amount of \$109,837.25 and, in addition, awarded the Hofers \$10,000 in actual damages for the loss of society and companionship of their daughter. See *Lavender v. Hofer*, 658 S.W.2d 812, 813 (Tex. App.—Corpus Christi 1983), *rev'd*, 679 S.W.2d 470 (Tex. 1984). Exemplary damages are defined as that award beyond the amount necessary to make the plaintiff whole. See *Gostkowski v. Roman Catholic Church*, 168 N.E. 798, 800 (N.Y. 1933). The trial court in *Hofer* defined exemplary damages for the jury as "an amount which you may award in your discretion and as an example for the good of the public, in the interest of society at large in deterring the commission of similar wrongs." See *Hofer v. Lavender*, 679 S.W.2d 470, 471 (Tex. 1984).

9. See *Lavender v. Hofer*, 658 S.W.2d 812, 817 (Tex. App.—Corpus Christi 1983), *rev'd*, 679 S.W.2d 470 (Tex. 1984). The reversal of the award of exemplary damages was based solely on the proposition that a decedent tortfeasor's estate could not be liable in an assessment of punitive damages. See *id.* at 812, 817.

10. See *Hofer v. Lavender*, 27 Tex. Sup. Ct. J. 504 (July 11, 1984). The writ of error was granted on February 8, 1984. See *id.* at 504.

11. See *Lavender v. Hofer*, 679 S.W.2d 470, 475 (Tex. 1984). The court in *Hofer* distinguished the effect of the Texas Wrongful Death Act because J.D. and Joan Hofer are not in that class of persons who can recover exemplary damages in a wrongful death action. See *id.* at 475.

12. See *McAdams v. Blue*, 164 S.E.2d 490, 494 (N.C. Ct. App. 1968) ("vindictive" damages proper); *South Tex. Coaches v. Eastland*, 101 S.W.2d 878, 883 (Tex. Civ. App.—Dallas 1937, writ *dism'd*) (exemplary damages not allowed as compensation, but as "smart money"); D. DOBBS, *HANDBOOK ON THE LAW OF REMEDIES* § 3.09, at 204 (1973) (indicating various names and synonyms used in place of "punitive" damages).

result of a tortfeasor's misconduct.¹³ The origin of the doctrine of punitive damages is firmly embedded in the English case law of the eighteenth century.¹⁴ In 1763, an English court fully articulated and applied the concept of exemplary damages with approval in response to a brazen public attack made upon the liberty of an English subject.¹⁵ Although the majority of American jurisdictions presently allow exemplary damages,¹⁶ Louisiana, Massachusetts, Nebraska, and Washington are the sole members of a jurisdictional minority which continue to reject the award of punitive or exemplary damages.¹⁷ Even though these states are in the minority, arguments exist in support of such a view, based on the theory that the underlying

13. See *Kirschbaum v. Lowrey*, 206 N.W. 171, 173 (Minn. 1925) (punitive damages can be awarded in addition to damages received as compensation to plaintiff); *Gostkowski v. Roman Catholic Church*, 168 N.E. 798, 800 (N.Y. 1933) (juries allowed to award damages which express indignation at defendant's malfeasance in addition to damages which set dollar amount on plaintiff's loss); see also J. DUFFY, PUNITIVE DAMAGES: A DOCTRINE WHICH SHOULD BE ABOLISHED, THE CASE AGAINST PUNITIVE DAMAGES 4, 6 (Defense Research Inst. Monograph No. 15, 1969) (calling for reversal of judicial trend in extending award of punitive damages).

14. See J. GHIARDI & J. KRICHNER, PUNITIVE DAMAGES LAW AND PRACTICE § 101, at 1-3 (1981) (historical perspectives which gave rise to concept of punitive damages in eighteenth century England); K. REDDEN, PUNITIVE DAMAGES § 2.2, at 26-28 (1980) (delineation of English eighteenth century case law giving rise to idea of punitive damages).

15. See *Huckle v. Money*, 95 Eng. Rep. 768, 769 (1763). The plaintiff sought damages against the secretary of state, who had issued a general warrant which led to plaintiff's arrest and detainment for six hours. Lord Chief Justice Pratt found the detainment more odious than the Spanish Inquisition. The court refused to find the 300*l* damage award outrageous or excessive and, instead, found that the jury had "done right in giving exemplary damages." See *id.* at 769. Recently, commentators have postulated theories regarding the basis of the origin of punitive damages. See, e.g., J. GHIARDI & J. KRICHNER, PUNITIVE DAMAGES LAW AND PRACTICE § 1.02, at 3-5 (1981) (explanations as to why punitive damages were first allowed and purposes to be met by their award); K. REDDEN, PUNITIVE DAMAGES § 2.2, at 24-31 (1980) (theory that punitive damages may have arisen from the Code of Hammurabi, the Hittite Law, the Hindu Code of Manu, and other ancient law codes); Sales, *The Emergence of Punitive Damages in Product Liability Action: A Further Assault on the Citadel*, 14 ST. MARY'S L.J. 351, 353 (1983) (theories and postulates proposed to explain origin of exemplary damages).

16. See, e.g., *Alaska Polar Co. v. Lee*, 553 P.2d 54, 61 (Alaska 1976) (recognizing validity of punitive damages but confining their award to narrow limits); *Beebee v. Pierce*, 521 P.2d 1263, 1264 (Colo. 1974) (recognizing purposes to be met by award of exemplary damages); *FBC Stores, Inc. v. Duncan*, 198 S.E.2d 595, 599 (Va. 1973) (validating punitive damages as means to punish defendant and deter public from committing similar wrongs).

17. See *McCoy v. Arkansas Nat'l Gas Co.*, 143 So. 383, 386 (La.) (rejecting *in toto* awards of exemplary damages), *cert. denied*, 287 U.S. 661 (1932); *City of Lowell v. Massachusetts Bonding & Ins. Co.*, 47 N.E.2d 265, 272 (Mass. 1943) (only time exemplary damages awardable is when statutory authorization exists); *Miller v. Kingsley*, 230 N.W.2d 472, 474 (Neb. 1975) (rejecting idea of punitive damages in civil cases); *Standard v. Bolin*, 565 P.2d 94, 98 (Wash. 1977) (doctrine of award of punitive damages discussed).

rationale of punitive damages is not met by their award.¹⁸

Traditionally, the purposes for exemplary damages have fallen into either the deterrence or punishment category.¹⁹ Recently, however, various purposes beyond the limited categories of deterrence and punishment of the tortfeasor have been offered with increasing regularity.²⁰ Preserving the peace, inducing private law enforcement, compensating victims for otherwise uncompensable loss, revenge, paying the plaintiff's attorney's fees, and deterring others from committing an offense have all been offered as additional purposes for the award of exemplary damages.²¹ Even so, some states strictly adhere to the position that punitive damages are only intended to punish the defendant and to prevent him from repeating actions which are willful, wanton, or grossly negligent.²² Other states view exemplary dam-

18. See J. DUFFY, PUNITIVE DAMAGES: A DOCTRINE WHICH SHOULD BE ABOLISHED, THE CASE AGAINST PUNITIVE DAMAGES 4, 6 (Defense Research Inst. Monograph No. 15, 1969). The author sees punitive damages as serving no valid function in American jurisprudence and views their award as a "confiscation of private property in derogation of constitutional safeguards," when one considers compensation and restoring an individual to the status quo as the primary goals of tort law. See *id.* at 6.

19. See, e.g., *Trahan v. Cook*, 265 So. 2d 125, 130 (Ala. 1972) (exemplary damages, under appropriate circumstances, can be awarded to punish defendant and discourage others from similar wrongful conduct); *Campbell v. Government Employees Ins. Co.*, 306 So. 2d 525, 527 (Fla. 1975) (predominate function of punitive damages is to deter and punish); *Wedeman v. City Chevrolet Co.*, 366 A.2d 7, 12 (Md. 1976) (punitive damages to punish wrongdoer and deter from similar wrong in future); see also Comment, *The Admonitory Function of Punitive Damages and its Impact on the Law of Fraud and Deceit*, 26 ALA. L. REV. 288, 291 (1962) (well settled in most jurisdictions that punitive damages punish defendant and deter other potential wrongdoers).

20. See *Kewin v. Massachusetts Mut. Life Ins. Co.*, 295 N.W.2d 50, 55 (Mich. 1980) (punitive damages awarded to compensate plaintiff for "humiliation, sense of outrage, and indignity"); *Perry v. Melton*, 299 S.E.2d 8, 12-13 (W. Va. 1982) (exemplary damages support public policy interests beyond simple punishment and deterrence); Note, *Exemplary Damages in the Law of Torts*, 70 HARV. L. REV. 517, 520-22 (1957) (compensation to plaintiff and revenge considered to be purposes to be met by award of exemplary damages).

21. See *Scott v. Plante*, 641 F.2d 117, 135 (3d Cir. 1981) (punitive damages discourage private retribution on part of individual wronged), *vacated and remanded on other grounds*, 458 U.S. 1101, 1101 (1982); *Heyes-Albion v. Kuberski*, 311 N.W.2d 122, 129 (Mich. Ct. App. 1981) (purpose of punitive damages *not* to punish defendant but to make plaintiff whole); *Planet Plows, Inc. v. Evans*, 600 S.W.2d 874, 877 (Tex. Civ. App.—Amarillo 1980, no writ) (award of punitive damages fulfills purpose of reimbursing plaintiff for attorney's fees); Ellis, *Fairness and Efficiency in the Law of Punitive Damages*, 56 S. CAL. L. REV. 1, 3-11 (1983) (purposes gleaned from wide range of judicial opinions and writings of various scholars commenting and expanding on those opinions); see also Ellis, *Punitive Damages in Iowa Law: A Critical Assessment*, 66 IOWA L. REV. 1005, 1006-13 (1981) (viewing purposes as type of criminal sanction). *But see* LOGAN, PUNITIVE DAMAGES: A DOCTRINE WHICH SHOULD BE ABOLISHED, THE CASE AGAINST PUNITIVE DAMAGES 23 (Defense Research Inst. Monograph No. 15, 1969) (asserting punitive damages serve no purpose but are, in essence, criminal penalty without required constitutional protection).

22. See *Braun v. Moreno*, 466 P.2d 60, 63 (Ariz. Ct. App. 1970) (when reason for punish-

ages as exerting a deterrent effect on members of the public as well as on the defendant.²³ A third group of states perceive the award of punitive damages as compensation to the victim for injuries or losses sustained.²⁴

In Texas, the stated purpose for exemplary damages is most often found within the rubric of deterrence and punishment of the tortfeasor.²⁵ The award of exemplary damages has also been cited in Texas judicial decisions as a method by which to deter members of the public from committing wrong similar to that of a defendant who has been held to an assessment of punitive damages.²⁶ Additionally, compensation for inconvenience to the plaintiff and awarding money damages for losses too remote to be within the category of actual damages have both been found by Texas courts as sufficient reason for the award of exemplary damages.²⁷ The award of reasonable attorney's fees has also been cited as a valid purpose to be considered.²⁸

ment ceases to exist because of death of tortfeasor, need for punitive damages also ceases); *Thompson v. Estate of Petroff*, 319 N.W.2d 400, 408 (Minn. 1982) (when defendant can no longer be punished or deterred, punitive damages cannot be awarded); *cf. Allen v. Anderson*, 562 P.2d 487, 489-90 (Nev. 1977) (exemplary damages cannot punish tortfeasor who has died).

23. *See, e.g., Ray Dodge, Inc. v. Moore*, 479 S.W.2d 518, 523 (Ark. 1982) (exemplary damages must be sufficient to deter others besides tortfeasor at bar); *Pringle Tax Serv. v. Knoblauch*, 282 N.W. 2d 151, 154 (Iowa 1979) (exemplary damages awarded as punishment and as deterrent to wrongdoer and others); *Standard Life Ins. Co. v. Veal*, 354 So. 2d 239, 247 (Miss. 1979) (punitive damages assessed as example and warning to others).

24. *See, e.g., Dorosota v. Lovin*, 150 A. 692, 693 (Conn. 1930) (punitive damages are to compensate plaintiff for injuries, not to punish defendant); *Wise v. Daniel*, 190 N.W. 745, 747 (Mich. 1922) (compensation of plaintiff, not punishment of tortfeasor, purpose of exemplary damages); *Faye v. Parker*, 53 N.H. 342, 382 (1872) (exemplary damages are subcategory of compensatory damages).

25. *See, e.g., Bernal v. Seitt*, 158 Tex. 521, 527, 313 S.W.2d 520, 523-24 (1958) (when defendant grossly negligent, award of exemplary damages serves to punish wrongdoer); *Bennett v. Howard*, 141 Tex. 101, 109, 170 S.W.2d 709, 713 (1943) (purpose of exemplary damages to punish, not compensate, plaintiff with excess award); *Bank of N. Am. v. Bell*, 493 S.W.2d 633, 636-37 (Tex. Civ. App.—Houston [14th Dist.] 1973, no writ) (punitive damages serve to discourage defendant from future wrongdoing).

26. *See, e.g., Pace v. State*, 650 S.W.2d 64, 65 (Tex. 1983) (one purpose of exemplary damages is to deter members of public from committing wrongs similar to those of defendant); *Chandler State Bank v. Dorset*, 618 S.W.2d 113, 115-16 (Tex. Civ. App.—Tyler 1981, no writ) (exemplary damages serve as example to public-at-large); *Burlington-Rock Island R.R. v. Newrone*, 239 S.W.2d 734, 737 (Tex. Civ. App.—Waco 1951, no writ) (discouraging others from undertaking wrong similar to that of tortfeasor is valid purpose for award of exemplary damages).

27. *See Pan Am. Petroleum Corp. v. Hardy*, 370 S.W.2d 904, 908 (Tex. Civ. App.—Waco 1963, writ ref'd n.r.e.) (inconvenience to plaintiff one purpose to be met by award of punitive damages); *Allison v. Simmons*, 306 S.W.2d 206, 211 (Tex. Civ. App.—Waco 1957, writ ref'd n.r.e.) (losses beyond scope of actual damages and inconvenience to plaintiff valid purposes to be met by award of punitive damages).

28. *See Planet Plows, Inc. v. Evans*, 600 S.W.2d 874, 877 (Tex. Civ. App.—Amarillo 1980, no writ) (attorney's fees one element to be considered in award of exemplary damages);

One possible reason for the award of exemplary damages, which all Texas courts exclude, is that of compensating the plaintiff for losses and injuries suffered as a result of the defendant's conduct.²⁹ By judicial fiat, the purposes underlying the award of exemplary damages have provided a means of analysis by which courts can determine if their award is authorized under a survival statute when the tortfeasor is dead.³⁰

Jurisdictions in the United States adhere to one of three possible positions when the award of punitive damages against a decedent tortfeasor pursuant to a survival statute is at issue.³¹ The first group of jurisdictions has statutory law which directly addresses, and usually proscribes, the award of punitive damages against a deceased tortfeasor.³² Some jurisdictions do not address the effect that a survival statute has when the plaintiff or the plain-

Allison v. Simmons, 306 S.W.2d 206, 211 (Tex. Civ. App.—Waco 1957, writ ref'd n.r.e.) (attorney's fees within scope of consideration when awarding exemplary damages). *Allison* is often cited by courts as evidence for the proposition that exemplary damages are not confined to the rubric of a deterrence/punishment function. *See id.* at 211; *see also McDonald v. Bennet*, 674 F.2d 1080, 1093 n.10 (5th Cir. 1982) (indicative of requisite considerations in determining amount of exemplary damages to be awarded).

29. *See, e.g., Sheffield Div., Armco Steel Corp. v. Jones*, 376 S.W.2d 825, 831 (Tex. 1964) (exemplary damages cannot be awarded as additional compensatory damages); *Perdernalles Elec. Co-op. v. Schultz*, 583 S.W.2d 882, 884-85 (Tex. Civ. App.—Waco 1979, writ ref'd n.r.e.) (exemplary damages awarded as punishment of wrongdoer, not compensation to plaintiff); *Courtesy Pontiac, Inc. v. Ragsdale*, 532 S.W.2d 118, 122 (Tex. Civ. App.—Tyler 1975, writ ref'd n.r.e.) (award of exemplary damages punishes defendant, not meant to compensate plaintiff). This position directly contradicts those jurisdictions which view punitive damages as compensation to the victim. *See Johnson v. Morris*, 123 S.E. 707, 708 (Ga. 1924) (award of exemplary damages to compensate plaintiff for wounded feelings); *Faye v. Parker*, 53 N.H. 342, 382 (1872) (exemplary damages within scope of compensation to plaintiff).

30. *See Thompson v. Estate of Petroff*, 319 N.W.2d 400, 408 (Minn. 1982) (purpose of punitive damages determinative when deciding if award of exemplary damages against decedent's estate valid); *Perry v. Melton*, 299 S.E.2d 8, 12 (W. Va. 1982) (in broad survey on whether punitive damages are awardable when defendant is dead, court finds functions to be met by such award determinative).

31. *See Braun v. Moreno*, 466 P.2d 60, 61-62 (Ariz. 1970) (actions pursuant to survival statute involving death of tortfeasor distinct from other statutory actions when tortfeasor dead); J. GHIARDI & J. KIRCHNER, *PUNITIVE DAMAGES LAW AND PRACTICE* § 9.10, at 30-32 (1981) (implicit categorization of survival statutes in author's rationale when determining which jurisdictions allow award of exemplary damages under survival statute when tortfeasor is dead).

32. *See, e.g., COLO. REV. STAT. § 13-20-101* (1973) (“[P]unitive damages shall not be awarded nor penalties adjudged after the death of the person against whom such punitive damages or penalties are claimed”); *GA. CODE ANN. § 3-505* (Supp. 1984) (“[I]n the event of the death of the wrongdoer . . . there shall be no punitive damages against the personal representative.”); *NEV. REV. STAT. § 41.100* (1979) (“In an action against an executor or an administrator, any damages may be awarded which would have been recovered against the decedent if he had lived, except damages . . . for the sake of example or to punish the defendant.”). *But see OKLA. STAT. tit. 12, § 1052* (Supp. 1984-85) (survival statute provides for nonabatement of action upon death of one or both parties).

tiff's estate seeks the right to punitive damages against a tortfeasor who has died before trial.³³ The final category of states are those states which discuss the effect a broadly worded survival statute has when an award of punitive damages against the estate of a decedent tortfeasor is an issue before the court.³⁴

Before July 11, 1984, Texas had considered the issue of awarding punitive damages against the estate of a tortfeasor only twice.³⁵ The first decision, *Wright's Administratrix v. Donnel*,³⁶ was rendered by the Texas Supreme Court in 1870, before the Texas Survival Statute had been passed.³⁷ The majority in *Wright* held that punitive damages were not assessable against the estate of a decedent tortfeasor.³⁸ The second decision, *Sears, Roebuck and Co. v. Jones*,³⁹ was decided in 1957 by the Waco court of appeals.⁴⁰ Although the Texas Survival Statute had been passed more than fifty years before the *Jones* decision, the court failed to consider the possible effects of the Texas Survival Statute on the award of punitive damages against a

33. See *Meighan v. Birmingham Terminal Co.*, 51 So. 775, 777-78 (Ala. 1910) (in not allowing award of exemplary damages against decedent tortfeasor, statutory considerations left unmentioned); *Holm Timber Indus. v. Plywood Corp.*, 51 Cal. Rptr. 597, 603-04 (Ct. App. 1966) (only case law utilized when issue of whether punitive damages may be awarded against estate of tortfeasor determined).

34. See *Thompson v. Estate of Petroff*, 319 N.W.2d 400, 407-08 (Minn. 1982) (survival statute declared partially unconstitutional but still construed as prohibiting punitive damages); *Allen v. Anderson*, 562 P.2d 487, 489 (Nev. 1977) (construing NEV. REV. STAT. § 41.100 (1977)). The Nevada statute was amended in 1979 to specifically exclude the assessment of punitive damages against the estate of a tortfeasor. See NEV. REV. STAT. § 41.100 (1979). At the time of the *Allen* decision, the survival statute was "broadly phrased." See *Allen v. Anderson*, 562 P.2d 487, 489 (Nev. 1977) (survival statute viewed by court as nonspecific); *Atlas Property v. Didich*, 213 So. 2d 278, 281 (Fla. Dist. Ct. App. 1968) (exemplary damages allowed under Florida survival statute), *cert. dismissed*, 226 So. 2d 684 (Fla. 1969). The Second District Court of Appeals of Florida explicitly adopted the third district's holding in *Atlas* one year later. See *Johnson v. Rhinesmith*, 238 So. 2d 659, 660 (Fla. Dist. Ct. App. 1969), *cert. denied*, 241 So. 2d 857 (Fla. 1970).

35. See *Wright's Adm'x v. Donnell*, 34 Tex. 291, 298 (1870) (punitive damages against decedent's estate strictly prohibited); *Sears, Roebuck & Co. v. Jones*, 303 S.W.2d 432, 437 (Tex. Civ. App.—Waco 1957, writ ref'd n.r.e.) (plaintiff cannot recover punitive damages against estate of defendant).

36. 34 Tex. 291, 291 (1870).

37. See *id.* at 291. The Texas Survival Statute was subsequently passed in 1895. See Law of May 4, 1895, ch. 89, § 1-2, 1895 Tex. Gen. Laws 143, 10 H. GAMMEL, LAWS OF TEXAS 873 (1898).

38. See *Wright's Adm'x v. Donnell*, 34 Tex. 291, 298 (1870). The court was amazed that anyone would propose recovery of punitive damages from the estate of a "dead man." See *id.* at 298.

39. 303 S.W.2d 432, 432 (Tex. Civ. App.—Waco 1957, writ ref'd n.r.e.).

40. See *id.* at 437. Relying on the Texas Supreme Court's decision in *Wright*, the Waco court of appeals found punitive damages unavailable against the estate of the tortfeasor. See *id.* at 437.

wrongdoer who died before trial.⁴¹ The second decision, like the first, found the assessment of punitive damages against a defendant's estate improper.⁴²

While many states have addressed the issue of awarding punitive damages under a wrongful death act when the defendant is dead,⁴³ very few states have focused specifically on the award of punitive damages under a non-specific survival statute when the defendant has died before a civil suit could be completed.⁴⁴ Only three states have rendered decisions on this narrow issue of awarding punitive damages pursuant to a broadly phrased survival statute.⁴⁵ Since Nevada has subsequently amended its survival statute to specifically prohibit the award of punitive damages,⁴⁶ Florida and Minnesota are the only two jurisdictions with case law interpreting a broadly worded survival statute when awarding punitive damages.⁴⁷ The Florida court rea-

41. *See id.* at 436-37. The majority relied on case law and not their own construction of the Texas Survival Statute in arriving at their holding. *See id.* at 437.

42. *See id.* at 437. In addition to the *Wright* decision, the court attempted to find controlling precedent in *Wright v. E-Z Fin. Co.*, 267 S.W.2d 602, 605 (Tex. Civ. App.—Dallas 1954, writ ref'd n.r.e.) (right to punitive damages exists only where sufficient facts will support their award).

43. *See, e.g.*, *Shirley v. Shirley*, 73 So. 2d 77, 85 (Ala. 1954) (punitive damages awardable against estate of decedent tortfeasor under wrongful death act); *Thorpe v. Wilson*, 293 S.E.2d 675, 677 (N.C. Ct. App. 1982) (recovery of punitive damages against estate of defendant prohibited under wrongful death act); *Perry v. Melton*, 299 S.E.2d 8, 12-13 (W. Va. 1982) (wrongful death action to recover exemplary damages against tortfeasor who has died). The court in *Hofer* did not extensively consider the effect of the Texas Wrongful Act because J.D. and Joan Hofer are not in that class of persons who can recover exemplary damages in a wrongful death action. *See Hofer v. Lavender*, 679 S.W.2d 470, 475 (Tex. 1984).

44. *See Reynolds, Punitive Damages After Death—Can Tort Law Create Heaven and Hell*, 26 OKLA. L. REV. 63, 71 (1973) (relatively small amount of authority on whether punitive damages can be awarded when wrongdoer dies before trial could be held). The author addressed the issue of awarding punitive damages against the estate of a decedent tortfeasor in any circumstance, not just under the auspices of a survival statute. *See id.* at 71.

45. *See Atlas Properties v. Didich*, 213 So. 2d 278, 280-81 (Fla. Dist. Ct. App. 1968) (allowing exemplary damages under survival statute), *cert. denied*, 226 So. 2d 684 (Fla. 1964); *Thompson v. Estate of Petroff*, 319 N.W.2d 400, 408 (Minn. 1982) (although declaring part of survival statute unconstitutional, court still found award of punitive damages invalid when tortfeasor is dead); *Allen v. Anderson*, 562 P.2d 487, 488 (Nev. 1977) (construing broadly worded survival statute as prohibiting exemplary damages sought under its auspices).

46. *Compare* NEV. REV. STAT. § 41.100 (1977) (no proscription of award of exemplary damages against estate of tortfeasor) *with* NEV. REV. STAT. § 41.100 (1979) (award of exemplary damages against estate of tortfeasor specifically proscribed). The Nevada statute was enacted after the *Allen* decision in 1977. *See Allen v. Anderson*, 562 P.2d 487, 489 (Nev. 1977) (citing numerous cases to avoid existing possibility of awarding punitive damages pursuant to the then broadly worded Nevada survival statute).

47. *See Atlas Properties v. Didich*, 213 So. 2d 278, 281 (Fla. Dist. Ct. App. 1968) (punitive damages allowed under survival statute), *cert. denied*, 226 So. 2d 684 (Fla. 1969); *Thompson v. Estate of Petroff*, 319 N.W.2d 400, 408 (Minn. 1982) (survival statute does not allow award of punitive damages against deceased defendant).

soned, by judicial interpretation of its survival statute, that punitive damages are recoverable under its survival statute.⁴⁸ Minnesota, on the other hand, held that punitive damages, as allowed by a broadly worded statute, are not awardable when the tortfeasor has died before trial.⁴⁹ Although there are a plethora of decisions considering the award of punitive damages when the tortfeasor has died before trial,⁵⁰ these decisions are based on common law causes of actions and do not address the effect of a survival statute which neither prohibits nor allows punitive damages.⁵¹

In *Hofer v. Lavender*,⁵² the Texas Supreme Court allowed recovery of exemplary damages from the estate of a tortfeasor pursuant to the Texas Survival Statute.⁵³ This holding was based on the majority's determination that exemplary damages had been awarded for a multiplicity of purposes in previous Texas judicial decisions.⁵⁴ Since past Texas case law stated that the award of exemplary damages was not limited to the deterrence and punishment of a particular tortfeasor, the majority reasoned that it would be logical

48. See *Atlas Properties v. Didich*, 213 So. 2d 278, 280-81 (Fla. Dist. Ct. App. 1968), *cert. denied*, 226 So. 2d 684 (Fla. 1969). The court found that the legislative intent of its survival statute allowed for the award of punitive damages after the death of the tortfeasor, despite a possible contrary state common law view. See *id.* at 280.

49. See *Thompson v. Estate of Petroff*, 319 N.W.2d 400, 408 (Minn. 1982). The Minnesota Supreme Court refused to allow the award of punitive damages against the estate of the tortfeasor after the plaintiff had brought suit under the Minnesota survival statute, MINN. STAT. § 573.01 (1980). See *id.* at 401, 408.

50. See, e.g., *Barnes v. Smith*, 305 F.2d 226, 231 (10th Cir. 1962) (punitive damages not available from estate of wrongdoer); *Johnson v. Levy*, 47 So. 422, 424 (La. 1908) (exemplary damages not allowed against defendant's heirs); *McAdams v. Blue*, 164 S.E.2d 490, 494 (N.C. Ct. App. 1968) (however aggravated the circumstances, vindictive damages not recoverable against decedent's estate).

51. See, e.g., *Wolder v. Rahm*, 249 N.W.2d 630, 632 (Iowa 1977) (punitive damages do not survive wrongdoer's death when plaintiff brings medical malpractice suit); *Pearson v. Galvin*, 454 P.2d 638, 642 (Or. 1969) (plaintiff's cause of action in tort, alleging false imprisonment, will not sustain award of punitive damages once tortfeasor is dead); *Dalton v. Johnson*, 129 S.E.2d 647, 650-51 (Va. 1963) (personal injury action by plaintiff will not support award of punitive damages when wrongdoer dies before trial).

52. 679 S.W.2d 470 (Tex. 1984).

53. See *id.* at 475. The holding of the majority is based on an analysis embedded in discovering the purposes of exemplary damages. See *id.* at 474.

54. See *id.* at 474. The court relied heavily on the "purposes of exemplary damages" rationale because other jurisdictions which addressed the exemplary damage/deceased tortfeasor issue relied on a purpose analysis. See *id.* at 474-75; see *Atlas Properties v. Didich* 213 So. 2d 278, 280-81 (Fla. Dist. Ct. App. 1968) (public policy purposes provide basis for decision), *cert. denied*, 226 So. 2d 684 (Fla. 1969); *Thompson v. Estate of Petroff*, 319 N.W.2d 400, 408 (Minn. 1982) (purpose of punitive damages determinative in holding); *Allen v. Anderson*, 562 P.2d 487, 490 (Nev. 1977) (reasons for punitive damages control in decision); *Perry v. Melton*, 299 S.E.2d 8, 13 (W. Va. 1982) (interests served by award of punitive damages provide court with theory to decide issue of awarding punitive damages against estate of tortfeasor).

to award exemplary damages when the other purposes authorized by previous case law could be met.⁵⁵ The court also found that public policy called for equal consideration of all purposes met by the award of punitive damages.⁵⁶ With equal weight given to all purposes, the majority found no reason to proscribe the award of exemplary damages when the deterrence/punishment purpose was not present.⁵⁷

Justice Spears, writing for the dissent, is in accord with the majority's view that the Texas Survival Statute is not conclusive as to whether exemplary damages are awarded under the statute's auspices.⁵⁸ Contrary to the majority, however, Justice Spears notes only two purposes to be met by the award of exemplary damages in Texas: (1) punishment of the wrongdoer; and (2) making an example of the wrongdoer.⁵⁹ The dissent also states that no jurisdictions, including Texas, have addressed the issue of whether exemplary damages can be awarded under a broadly worded survival statute.⁶⁰ Asserting that no case law is therefore available to guide the court in its decision, Justice Spears relies on his own opinion that the dual aims of exemplary damages, deterrence and punishment, should not be separated.⁶¹ According to the dissenting opinion, when both purposes in assessing exemplary damages against the estate of a tortfeasor cannot be met, they should not be awarded.⁶²

55. *See Hofer v. Lavender*, 679 S.W.2d 470, 475 (Tex. 1984). The court restated previous Texas case law purposes met by the award of exemplary damages: (1) serves as example to others; (2) reimbursement for losses too remote to be considered as elements of actual damages; (3) compensation for inconvenience; and (4) payment for plaintiff's attorney's fees. *See id.* at 474.

56. *See id.* at 475. The majority found that all purposes to be met by the award of punitive damages must be given equal consideration. *See id.* at 475.

57. *See id.* at 475. With the majority's holding, the decision in *Wright's Adm'x v. Donnell*, that exemplary damages are not assessable against the estate of defendant, was effectively overruled, and dictum in *Sears, Roebuck & Co. v. Jones*, that exemplary damages are not recoverable against the estate of the tortfeasor, was disapproved. *See id.* at 475.

58. *See id.* at 477 (Spears, J., dissenting). Justice Spears found that the Texas Survival Statute did not expressly allow or disallow for the award of punitive damages under its auspices. *See id.* at 477 (Spears, J., dissenting).

59. *See id.* at 477 (Spears, J., dissenting). The dissent did not recognize the purposes of paying for attorney's fees, awarding damages too remote for actual damage consideration, and compensation for inconvenience, which were proffered by the majority. *See id.* at 477 (Spears, J., dissenting).

60. *See id.* at 478 (Spears, J., dissenting). Justice Spears divided other jurisdictional case law into two categories: (1) holdings which did not discuss the effect of a survival statute; and (2) holdings where the survival statutes specifically excluded recovery of exemplary damages. *See id.* at 478 (Spears, J., dissenting).

61. *See id.* at 478 (Spears, J., dissenting). Justice Spears used the words "in my opinion" to base his decision. *See id.* at 478 (Spears, J., dissenting).

62. *See id.* at 478 (Spears, J., dissenting). The dissent stated that the general deterrence effect of exemplary damages was premised on the public being aware of the tortfeasor's punish-

In *Hofer*, the supreme court quickly dispensed with the issue of awarding punitive damages in a case where the plaintiff has died, but the defendant remains alive.⁶³ The more difficult question of first impression before the supreme court was whether to award punitive damages against the estate of a decedent tortfeasor pursuant to a survival statute.⁶⁴ Although the court's decision goes against the majority of jurisdictions that do not allow punitive damages to be recovered against the estate of a decedent tortfeasor,⁶⁵ it must be remembered that these jurisdictions limited to two the purposes for which exemplary damages can be awarded: deterrence and punishment.⁶⁶ In view of the fact that up to eight purposes are met by the award of punitive damages,⁶⁷ the court in *Hofer* was following the more modern view as to how tort law and its damage awards should serve the public.⁶⁸ By not focusing

ment. *See id.* at 478 (Spears, J., dissenting). Since a deceased tortfeasor cannot be punished in public view, the dissent found the deterrence function to be nonsupportable. *See id.* at 478 (Spears, J., dissenting).

63. *See id.* at 472 (citing *Castleberry v. Goolsby Bldg. Co.*, 617 S.W.2d 665, 666 (Tex. 1981) and *Houston Am. Life Ins. Co. v. Tate*, 358 S.W.2d 645 (Tex. Civ. App.—Waco 1962, no writ)) (accepted judicial precedent that estate of deceased plaintiff can recover punitive damages against living tortfeasor).

64. *See Hofer v. Lavender*, 679 S.W.2d 470, 472-73 (Tex. 1984). The court seems intrigued by this issue of first impression evidenced by a rhetorical question at the outset of the opinion, "[t]he argument advanced by the Hofers is that as the survival statute has been interpreted to allow the recovery of exemplary damages to survive the death of one injured, why would not the same survival statute permit the recovery of exemplary damages against a deceased tortfeasor?" *See id.* at 472.

65. *See Allen v. Anderson*, 562 P.2d 487, 489 (Nev. 1977) (by great weight of authority, punitive damages do not survive death of tortfeasor); J. GHIARDI & J. KIRCHNER, PUNITIVE DAMAGES LAW AND PRACTICE § 9.10, at 30-32 (1981) (general rule appears to be punitive damages are not recoverable against estate of deceased wrongdoer); *see also* M. MINZER, J. NATES, C. KIMBLE & D. AXLEROD, DAMAGES IN TORT ACTIONS § 40.52, at 136, 137 (1984) (majority of jurisdictions do not allow recovery from estate or personal representative of tortfeasor who dies before judgment entered).

66. *See, e.g., Campbell v. Government Ins. Co.*, 306 So. 2d 525, 527 (Fla. 1975) (function of punitive damages to deter and punish); *Motor Equip. Co. v. McLaughlin*, 133 P.2d 149, 159 (Kan. 1943) (exemplary damages are to deter others and punish tortfeasor for his wrong); *Thompson v. Estate of Petroff*, 319 N.W.2d 400, 408 (Minn. 1982) (purpose of punitive damages to punish tortfeasor and deter him from repeating wrongful act).

67. *See Ellis, Fairness and Efficiency in the Law of Punitive Damages*, 56 S. CAL. L. REV. 1, 3 (1982-83). The author lists the following purposes gleaned from judicial opinions and commentators: (1) punishing the defendant; (2) deterring the defendant from committing a like offense; (3) preserving peace; (4) inducing private law enforcement; (5) compensating victims for losses otherwise uncompensable; (6) deterring others from committing an offense; (7) paying attorney's fees. *See id.* at 3. Revenge has been cited as an eighth purpose. *See Note, Exemplary Damages in the Law of Torts*, 70 HARV. L. REV. 517, 521-22 (1957).

68. *See Atlas Properties v. Didich*, 213 So. 2d 278, 281 (Fla. Dist. Ct. App. 1968) (public policy dictates that where tortfeasor's wrongful act causes death, there should not be escape from retribution), *cert. denied*, 226 So. 2d 684 (Fla. 1969); *Perry v. Melton*, 299 S.E.2d 8, 12

on only two purposes when determining if an award of exemplary damages is to be made,⁶⁹ the court followed previous Texas law⁷⁰ and other jurisdictions which expand the purposes for awarding exemplary damages.⁷¹ The court reasoned that the death of a defendant should not prevent a plaintiff from recovering punitive damages where the public deterrence purpose, as well as other purposes, could still be served by their award.⁷²

Despite the dissent's posture,⁷³ previous Texas case law has found the purpose of exemplary damages to be beyond the restrictive deterrence/punishment function.⁷⁴ By stipulating that both purposes, deterrence and punishment, must be present in order to permit exemplary damages under a survival statute,⁷⁵ the dissent has limited the award of exemplary

(W. Va. 1982) (public policy interests go beyond mere punishment of wrongdoer in award of exemplary damages; therefore, purposes for their award do not cease with death of tortfeasor).

69. *See* *Hofer v. Lavender*, 679 S.W.2d 470, 474-75 (Tex. 1984) (attorney's fees, reimbursement for losses too remote under compensation damages, and recovery as an example to public were other purposes mentioned by court). The majority stated that all reasons for the existence of exemplary damages should be given equal weight and consideration. *See id.* at 508.

70. *See, e.g., Planet Plows, Inc. v. Evans*, 600 S.W.2d 874, 877 (Tex. Civ. App.—Amarillo 1980, no writ) (attorney's fees for plaintiff can be considered when awarding punitive damages); *Pan Am. Petroleum Corp. v. Hardy*, 370 S.W.2d 904, 908 (Tex. Civ. App.—Waco 1963, writ ref'd n.r.e.) (inconvenience to plaintiff element for jury to consider in award of punitive damages); *Allison v. Simmons*, 306 S.W.2d 206, 211 (Tex. Civ. App.—Waco 1957, writ ref'd n.r.e.) (losses beyond scope of actual or compensatory damages valid reason to award punitive damages).

71. *See, e.g., Ray Dodge, Inc. v. Moore*, 479 S.W.2d 518, 523 (Ark. 1972) (punitive damages serve to deter others); *Doroszka v. Lavine*, 150 A. 692, 693 (Conn. 1930) (punitive damages for compensation of plaintiff); *Wise v. Daniel*, 190 N.W. 746, 747 (Mich. 1922) (exemplary damages viewed as further compensation to plaintiff for injuries suffered); *see also Hofer v. Lavender*, 679 S.W.2d 470, 475 (Tex. 1984) (following jurisdictions advocating expansion of purposes for award of exemplary damages).

72. *See Hofer v. Lavender*, 679 S.W.2d 470, 474-75 (Tex. 1984). The majority found other equally important policy considerations to be fulfilled by the award of exemplary damages besides the punishment of a tortfeasor, including compensating the injured plaintiff for losses too remote to be considered under actual damages, providing an example to the public, deterring future wrong similar to that of the defendant, and furnishing remuneration to plaintiff for inconvenience. *See id.* at 474.

73. *See id.* at 478 (Spears, J., dissenting) (recognizing only deterrence and punishment as purposes to be served by award of punitive damages).

74. *See McDonald v. Bennett*, 674 F.2d 1080, 1093 (5th Cir. 1982) (applying Texas law, court found exemplary damages not restricted to punishment and deterrence function); *Pan Am. Petroleum Corp. v. Hardy*, 370 S.W.2d 904, 908 (Tex. Civ. App.—Waco 1963, writ ref'd n.r.e.) (plaintiff's inconvenience as result of tortfeasor's wrong aspect to be considered when awarding punitive damages).

75. *See Hofer v. Lavender*, 679 S.W.2d 470, 478-79 (Tex. 1984) (Spears, J., dissenting). Justice Spears advances the proposition that exemplary damages will deter the public-at-large from future wrong similar to that of defendant only if the public can observe the tortfeasor's punishment. Thus, with the deterrence function dependent on the punishment being observa-

damages to a narrow range of situations.⁷⁶ The only time punitive damages would be permissible, according to Justice Spears' dissent, would be when two specific purposes, to the exclusion of other purposes, were before the court.⁷⁷ This would leave unrecognized other possible reasons for the awarding of punitive damages against a decedent tortfeasor.⁷⁸ The dissent's position is in conflict with the rationale of modern judicial theorists who decline to follow the logic that a fortuitous event, such as death of a tortfeasor, should prevent an award of exemplary damages, stemming from a cause of action in tort, where such damages would otherwise be permissible.⁷⁹ Although the majority's opinion is the current minority view,⁸⁰ it would seem to be that the rationale behind allowing a plaintiff to recover damages against the estate of a decedent tortfeasor follows public policy interests which go beyond simple punishment of the wrongdoer.⁸¹

The majority in *Hofer* views the function of punitive damages as extending beyond a simplistic punishment/deterrence rationale.⁸² This approach provides for judicial flexibility and does not artificially limit the many purposes

ble, Justice Spears asserts that the death of the tortfeasor, preventing any possibility of tortfeasor punishment, *ipso facto* destroys the deterrent affect of punitive damages. *See id.* at 478.

76. *Cf. id.* at 478 (Spears, J., dissenting) (separation of dual aims of exemplary damages will lead to flood of litigation). *But see* *Bank of N. Am. v. Bell*, 493 S.W.2d 633, 636 (Tex. Civ. App.—Houston [14th Dist.] 1973, no writ) (no mention of possibility of multiplicity of suit, despite inclusion of mental anguish and inconvenience as elements to be considered in awarding punitive damages).

77. *See Hofer v. Lavender*, 679 S.W.2d 470, 478 (Tex. 1984) (Spears, J., dissenting) (award of exemplary damages only valid when dual purposes of exemplary damages can be met); *see also* *Thompson v. Estate of Petroff*, 319 N.W.2d 400, 408 (Minn. 1982) (finding purpose of punitive damages limited to punishment and deterrence in relation to defendant's future conduct).

78. *See, e.g.,* *Wise v. Daniel*, 190 N.W. 746, 747 (Mich. 1922) (exemplary damages can be considered as possible compensation to injured plaintiff); *Fay v. Parker*, 53 N.H. 342, 382 (1872) (punitive damages compensation for plaintiff, not punishment of defendant); *Allison v. Simmons*, 306 S.W.2d 206, 211 (Tex. Civ. App.—Waco 1957, writ *ref'd n.r.e.*) (punishment of defendant can serve as example for good of public).

79. *See Perry v. Melton*, 299 S.E.2d 8, 12-13 (W. Va. 1982) (in view of public policy, exemplary damages should not be relegated to two categories); PROSSER, *HANDBOOK OF THE LAW OF TORTS* § 126, at 901 (West 1971) (ultimately all actions in tort will survive death of either plaintiff or defendant when cause of action is pursuant to survival statute).

80. *See Braun v. Moreno*, 466 P.2d 60, 62 (Ariz. Ct. App. 1970) (citing numerous instances where decedent tortfeasor's estate cannot be liable for punitive damages); *Allen v. Anderson*, 562 P.2d 487, 488-89 (Nev. 1977) (majority of jurisdictions hold death of defendant will cut off damage claims against estate of tortfeasor).

81. *See Note, Exemplary Damages in the Law of Torts*, 70 HARV. L. REV. 517, 532-33 (1957) (considerations to be served by exemplary damages go beyond mere deterrence and punishment).

82. *See Hofer v. Lavender*, 679 S.W.2d 470, 475 (Tex. 1984). The majority's refusal to limit the purposes of punitive damages to punishment and deterrence of the tortfeasor stems

of punitive damages. By recognizing all of the purposes to be met by the award of punitive damages, as delineated in prior Texas case law,⁸³ the court's holding prevents a mere adventitious event, the death of the tortfeasor, from cutting off the plaintiff's right to relief.⁸⁴ A more constricted approach would lock nineteenth century jurisprudential technicalities into a twentieth century society.

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from public policy considerations giving equal consideration to other purposes met by the award of punitive damages. *See id.* at 475.

83. *See Pan Am. Petroleum Corp. v. Hardy*, 370 S.W.2d 904, 908 (Tex. Civ. App.—Waco 1963, writ ref'd n.r.e.) (punitive damages may be awarded to compensate for inconvenience, reasonable attorney's fees, and "other losses too remote to be considered" under rubric of actual damages).

84. *See Hofer v. Lavender*, 679 S.W.2d 470, 474-75 (Tex. 1984).