

Commonwealth Of Kentucky

Court Of Appeals

NO. 1997-CA-002908-MR

BILLY JOE STEWART and
TAMMY BOWLING BADGETT

APPELLANTS

v. APPEAL FROM BOYD CIRCUIT COURT
HONORABLE C. DAVID HAGERMAN, JUDGE
ACTION NO. 94-CI-00292

SOUTHEASTERN GROUP, INC. d/b/a
BLUE CROSS AND BLUE SHIELD;
Estate of JAMES E. COOPER;
BETTY COOMER COOPER; and
WESTFIELD COMPANIES

APPELLEES

OPINION
AFFIRMING

** ** * * * * *

BEFORE: COMBS, DYCHE, and McANULTY, Judges.

COMBS, JUDGE: The appellants, Billy Joe Stewart and Tammy Bowling Badgett, appeal from the judgment of the Boyd Circuit Court. They argue that the court erred in failing to allow the jury the opportunity to consider the issue of punitive damages. Finding no error, we affirm.

On October 16, 1992, the appellants were injured in an automobile accident involving James E. Cooper (Cooper). Stewart was driving on Winchester Avenue in Ashland, Kentucky, when

Cooper failed to yield the right-of-way and pulled in front of him, resulting a collision of the two vehicles; Badgett was a passenger in the car driven by Stewart. Cooper was arrested at the scene of the accident and was charged with Driving Under the Influence, First Offense, to which he ultimately pleaded guilty. Subsequently, on April 5, 1994, the appellants filed an action against Cooper to recover both compensatory and punitive damages based upon the injuries they sustained in the accident.

Cooper died prior to trial, and upon motion of the appellants pursuant to CR 25.01, the court entered an order substituting Cooper's estate as a defendant in April, 1997. The court set a trial date of October 6, 1997. The estate filed a motion *in limine* on October 3, 1997, arguing that the appellants could not recover punitive damages since Cooper was now deceased. On the day of the trial, the court held a hearing in chambers on the parties' motions *in limine*. Pertinent to this appeal, the court held that the appellants could not recover punitive damages from the estate based upon Cooper's alleged negligence. The court reasoned that the dual purposes underlying punitive damages – punishment of the tortfeasor for his actions and deterrence as to future misconduct – could not be served by punishing the heirs of Cooper's estate, wholly innocent parties with respect to the alleged malfeasance of Cooper.

The case proceeded to trial on the issue of damages. Prior to trial, the parties had stipulated that Cooper was solely responsible for the car accident, but they disagreed as to the extent of his liability for the appellants' injuries. The estate

argued that the appellants had contributed to their injuries by their own negligent failure to wear seatbelts at the time of the accident. The jury returned a verdict awarding \$27,885.75 to Stewart and \$15,337.58 to Badgett in compensatory damages. Additionally, the jury apportioned liability: 80% to Cooper and 20% to the appellants. The court entered final judgment on October 16, 1997, and this appeal followed.

This case presents an issue of first impression in Kentucky: whether a plaintiff may recover punitive damages against the estate of a deceased tortfeasor. The legislatures and courts of approximately thirty-three other states have addressed this very issue. The majority rule is that punitive damages may not be recovered from the estate of a deceased tortfeasor based upon the rationale that:

[I]f the wrongdoer is no longer living, he cannot be punished by any earthly court or judgment, nor is there any necessity to do anything to deter him from committing any further wrong, and therefore the only possible reason for awarding exemplary damages for the wrong done by him has ceased to exist. Accordingly, these courts have ruled that the representatives of a deceased person such as an executor or administrator are not liable for exemplary or punitive damages in an action begun or continued against such representative for a tort committed by the deceased person.

30 ALR 4th 707, Survival of Punitive Damages Claim §2 at 710 (1984).

The courts in the jurisdictions which have permitted recovery of punitive or exemplary damages from the estate of a deceased tortfeasor have generally cited the purposes of punitive damages as consisting of more than simply punishment and

deterrence. In Texas, where the courts have upheld the recovery of punitive damages against a tortfeasor's estate, they have held that punitive damages not only punish and deter wrongdoers, but that they also provide a vehicle for victims to recover reimbursement for inconvenience, for attorneys' fees, and for losses too remote to be considered compensation. Hofer v. Lavender, 679 S.W.2d 470 (Tex. 1984). Following the same rationale, West Virginia courts have viewed punitive damages as a means of providing an extra cushion of compensation to victims of reckless and wanton conduct. Perry v. Melton, 171 W.Va. 397, 299 S.E.2d 8 (1982). Additionally, some jurisdictions allow the imposition of punitive damages against the tortfeasor's estate in order to set an example to deter others from engaging in similar conduct. See generally, Tillett v. Lippert, 275 Mont. 1, 909 P.2d 1158 (1996); Penberthy v. Price, 281 Ill. App. 3d 16, 666 N.E.2d 352 (1996).

"The concept of permitting punitive damages in addition to compensatory damages is one of longstanding in Kentucky." Horton v. Union Light, Heat & Power Co., Ky., 690 S.W.2d 382, 388 (1985). The term *punitive damages* means "damages, other than compensatory and nominal damages, awarded against a person to punish and to discourage him and others from similar conduct in the future." (Emphasis added). KRS 411.184(1)(f). In civil law, they amount to a "penalty for the violation of the rights of another." Bisset v. Goss, Ky., 481 S.W.2d 71, 73 (1972). The focus is more on the egregious nature of the offense in societal

terms rather than the impact on the individual plaintiff suffering the injury:

"The theory of exemplary, punitive, or vindictive damages, or 'smart money,' as they are sometimes called, involves a blending of the interests of society in general with those of the aggrieved individual in particular. According to the more generally accepted doctrine, such damages are allowed not because of any special merit in the injured party's case, but are awarded by way of punishment to the offender, and as a deterrent, warning, or example to defendant and others, or even, it has been said as an expression of the indignation of the jury."

Bisset, supra at 74 (citing 25 C.J.S. Damages §117 (1), p. 1107).

Thus, it is clear that both the legislature and the courts in this jurisdiction justify the imposition of punitive damages on the grounds that they serve to punish the wrongdoer and to deter others. The doctrine of punitive damages serves the "useful purposes of expressing society's disapproval of intolerable conduct and deterring such conduct where no other remedy would suffice." Horton, 690 S.W.2d at 390 (quoting Mallor and Roberts, Punitive Damages Toward a Principled Approach, 31 Hastings L.J. 639, 641 (1980)). While punitive damages inevitably constitute extra compensation for the victim, the emphasis shifts from the victim to the flagrant conduct of the perpetrator; they are awarded in addition to compensatory damages for "conduct that is outrageous, because of the defendant's evil motive or his reckless indifference to the rights of others." Id. at 389 (quoting Restatement of Torts § 908(2) (1979)).

Mindful of the policy purposes underlying punitive damages in this jurisdiction, we are persuaded to join the majority of states in this country in holding that punitive damages are not recoverable against the estate of a deceased tortfeasor. "[T]he purposes of punishment and deterrence are not accomplished by enabling recovery of punitive damages from the estate of deceased tortfeasors." Jamarillo v. Providence Washington Insurance Company, 117 N.M. 337, 871 P.2d 1343, 1352 (1994). To make the estate of a tortfeasor liable for punitive damages would visit undeserved punishment upon a decedent's heirs – as well as upon creditors of the estate. A decedent's family would be deprived of whatever financial support that they might derive from the tortfeasor's estate. "With the wrongdoer dead, there is no one to punish, and to punish the innocent ignores our basic philosophy of justice." Lohr v. Byrd, 522 So.2d 845, 847 (Fla. 1988).

As to the deterrent effect of an award of punitive damages against a tortfeasor's estate, the Supreme Court of Alaska provided some guidance in Doe v. Colligan, 753 P.2d 144, 146 (Alaska 1988):

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 and thus, in our view, falls short of furnishing a justifiable ground for an award of punitive damages against the tortfeasor's estate.

It is true that KRS 411.184, the statute which codifies the imposition of punitive damages in this jurisdiction, does not

specifically preclude the recovery of punitive damages against a tortfeasor's estate. However, the legislature has specifically stated in KRS 411.184(1)(f) that the policy purpose justifying an award of punitive damages is that of punishment and deterrence. Thus, the policy purpose of punitive damages would be wholly distorted by allowing recovery under the circumstances in this case, resulting in financial injury or deprivation to the decedent's family members, who had no connection with or responsibility for his wrongful act. Such an award would neither achieve nor advance policy purpose clearly articulated by our own punitive damages statute.

We emphasize that our holding in this case is narrowly tailored to pertain solely to recovery of punitive damages from the estate of a tortfeasor as opposed to a living tortfeasor. In no way does it restrict or govern a victim's right to seek recovery of punitive damages from a living tortfeasor. KRS 411.140 provides that "[n]o right of action for personal injury or for injury to real or personal property shall cease or die with the person injuring or injured" with a few limited exceptions. In the case before us, the appellants' action survived Cooper's death, and they were allowed to proceed against his estate to recover compensation for their injuries. If Cooper had not died during litigation, they could have sought punitive damages from him as well. The well-established jural right of a plaintiff to seek punitive damages from a tortfeasor for negligent conduct remains unchanged. However, we hold that

punitive damages may not be recovered from the estate of a deceased tortfeasor.

We find that the circuit court did not err in refusing to instruct the jury on the issue of punitive damages. Therefore, we affirm the judgment of the Boyd Circuit Court.

McANULTY, JUDGE, CONCURS.

DYCHE, JUDGE, DISSENTS AND FILES A SEPARATE OPINION.

DYCHE, JUDGE, DISSENTING: For the reasons ably expressed in the majority opinion, I would reverse the trial court and allow the claim for punitive damages to proceed. The policy of deterring **other people** from such conduct could then be served, as well as the plaintiffs being more adequately compensated for their damages. As it now stands in this state, a person injured by a tortfeasor can never be made totally whole, because attorney fees are not a recoverable cost. The allowance of punitive damages in proper cases would be a step toward remediation of that problem.

BRIEF FOR APPELLANTS:

James D. Keffer
Michael J. Curtis
Ashland, KY

Robert F. Duncan
Lexington, KY

BRIEF FOR APPELLEES:

William P. Emrick
Ashland, KY