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To make whole, punitive legislation needed

A rear-end trucking accident claimed the life of a minivan's driver and leaves his passenger to cope with a lifetime of profound, permanent injuries. Discovery reveals that the trucking company knew that the driver had a history of unsafe driving, was driving in excess of Federal Motor Carrier Safety Administration hours of service regulations and failed to complete required safety training following a company policy.

Certainly, this scenario presents a reasonable likelihood of proving facts at trial sufficient to support an award of punitive damages. The conduct of the wrongdoer is identical toward both plaintiffs, however, under Illinois law the estate of the decedent, unlike the injured minivan occupant, would be precluded from seeking punitive damages under the current interpretation of the Wrongful Death Act and Survival Act.

Illinois courts hold that punitive damages are not recoverable in actions brought pursuant to both statutes. The Illinois Supreme Court's preclusion of punitive damages in wrongful-death and survival actions is based on the court concluding that the Survival Act precludes punitive damages and because there is no common-law right to punitive damages in wrongful death actions. *Mattyasovszky v. West Towns Bus Co.*, 61 Ill. 2d 31, 330 N.E. 2d 509 (1975).

The Illinois legislature should consider amending both statutes that would equitably permit punitive damages in cases such as these. Such damages are determined at assessing whether conduct rises to the level of

willful and wanton versus whether tortious conduct resulted in death — two different issues.

One reason set forth by the Illinois Supreme Court in continuing to bar punitive damages in wrongful-death and survival actions is to prevent “disservice” to plaintiffs in prior death cases who were precluded from seeking punitive damages. *Froud v. Celotex Corp.*, 98 Ill. 2d 324, 334, 74 Ill. Dec. 629, 456 N.E. 2d 131 (1983).

Here, this dicta in *Froud* should instead be interpreted by lawmakers to recognize that past decisions should not prevent future instances of fatal reprehensible conduct from being left unpunished.

The Illinois Supreme Court also has held that “it should be presumed a plaintiff has been made whole for his injuries by compensatory damages, so punitive damages should only be awarded if the defendant’s culpability, after having paid compensatory damages, is so reprehensible as to warrant the imposition of further sanctions to

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achieve punishment or deterrence.” *International Union of Operating Engineers, Local 150 v. Lowe Excavating Co.*, 225 Ill. 2d 456, 312 Ill. Dec. 238, 870 N.E. 2d 303 (2006).

This language supports the position that punitive damages are assessed under the context of a defendant’s conduct, and, therefore, whether one was injured or died should be of no

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relevance in assessing punitive damages.

Illinois’ Wrongful Death Act provides that “the jury may give such damages as they shall deem a fair and just compensation with reference to the pecuniary injuries resulting from such death, including damages for grief, sorrow and mental suffering,” but includes no express language prohibiting punitive damages.

Further, Illinois’ Survival Act permits “actions to recover injury to the person” but also contains no express language prohibiting punitive damages. Moreover, Illinois’ Wrongful Death Act includes the language

for punitive damages under New Jersey’s survival statute, which includes no express language permitting punitive damages, was permissible. *Smith v. Whitaker*, 313 N.J. Sup. 165, 713 A. 2d (1998).

In another example, with South Carolina’s wrongful-death statute expressly permitting punitive damages, South Carolina allows an estate to seek punitive damages in a wrongful-death action, including in medical-malpractice cases. *Scott v. Porter*, 340 S.C. 158, 168, 530 S.E. 2d 389, 394 (Ct. App. 2000).

Under the above hypothetical, had both occupants of the minivan died, the trucking company, under current Illinois law, would be able to escape punitive damages, despite such egregious conduct. Here, that same company would go unpunished where no punitive damages would be available to serve as a catalyst for change.

Under both Illinois statutes, no express, unequivocal language exists that outright precludes Illinois courts from permitting punitive damages in wrongful death and survival actions. Nonetheless, current Illinois courts have long-standing precedent heavily hindering a change in the law.

The legislature should take this issue under consideration by introducing an amendment that would expressly provide for punitive damages under both statutes.

Here, estates would have an avenue, just as an injured living plaintiff has, to seek punitive damages to punish punitive conduct and better prevent a future family from losing a loved one due to prior unpunished, willful conduct.