

Memorandum: Wrongful Death & Survival Damages in the District of Columbia

An Estate has filed a Complaint in the Superior Court of the District of Columbia for both wrongful death and survival act damages. The Complaint names the defendant driver and his employer, a landscape company. The Complaint alleges negligent operation of the company pick-up truck by driver and alleges claims against employer based on respondeat superior and wrongful entrustment. The Complaint also alleges the defendants are liable for punitive damages.

1. Liability

The driver's conduct was willful and wanton, and was outrageous and reckless towards the safety of the Decedent. He not only ran a red light and struck a pedestrian in a cross walk, but he was traveling at recklessly high rate of speed, he fled the accident scene, and he was driving drunk, with a .25 BAC. There is evidence the police downloaded the black box from the truck which revealed defendant driver was traveling about 40 MPH in a 25 MPH zone. Further, defendant driver had previously been convicted of drunk driving in 2002 in the District of Columbia. There is also evidence of another alcohol offense from Maryland. Finally, defendant driver tested positive for cocaine after his arrest. Defendant driver pleaded guilty to involuntary manslaughter and DWI. He was sentenced to 7 years of incarceration.

The Estate has alleged that defendant driver had permission from his employer to operate the pick-up truck after normal work hours. The Estate believes that discovery will establish that employer knew or should have known of the fact the driver was unfit to operate a motor vehicle due to his abuse of alcohol and possibly cocaine. A record check would have revealed the prior DWI conviction and it is probable that the representatives of the landscape company were exposed to evidence of driver's addiction to alcohol, an addiction which was acknowledged by driver's defense counsel at the sentencing.

II. Damages

The Estate has filed a Complaint in the Superior Court of the District of Columbia alleging damages under both the Survival and Wrongful Death Statutes. The Decedent is survived by his mother and 3 adult brothers. One of the brothers, has qualified as the personal representative.

A. Survival Action

The survival action is brought on behalf of the Estate and permits an award for medical expenses and for bodily injury, conscious pain and suffering, mental anguish and discomfort experienced by Decedent prior to his death. The survival action also permits an award for the economic loss suffered by the Estate. This award is based on the amount of money the deceased would have accumulated over the course of his lifetime, which requires a deduction for personal consumption and taxes.

Decedent was two months shy of his 46th birthday when he died. He was single and did not have any dependents.

1. Bodily Injury, Pain and Suffering & Medical Expenses
(Post Impact Pain and Suffering and Pre Impact Fright)

The collision occurred at approximately midnight. The records from the hospital where the decedent was transported reflect that Decedent was unconscious when he arrived at the hospital and was pronounced at 12:38 AM. The autopsy report lists the cause of death as “multiple fractures with internal hemorrhage due to blunt impact trauma.” The manner of death is recorded as “ACCIDENT.”

The Estate has engaged a pathologist who will testify that Decedent was most probably conscious after being struck by the drunk truck driver. These facts will not only support a claim of post collision suffering, but they will also support a claim pre-injury fright. The Decedent likely realized he was about to die. While the evidence may establish that the Decedent may not have been conscious for more than a brief time, even a brief exposure to knowledge of imminent death should form the foundation for a significant verdict.

The Estate’s claim for post-impact pain and suffering will get to the jury despite any defense argument that there exists no direct evidence that Decedent was conscious after the impact. The lead case on this subject, Doe v Binker, 492 A.2d 857 (1985) rejected the argument that pain and suffering must be established by direct evidence. Instead, the Court held that “in survival actions, the circumstances surrounding an accident often preclude the introduction of direct evidence of consciousness or of pain an suffering....[T]he existence of conscious pain and suffering may be inferred from the nature of the decedent’s injuries or the circumstances surrounding his death.” Doe v Binker, 492 A2d at 861. Where circumstantial evidence is sufficient to allow the jury to draw a reasonable inference of pain and suffering, a verdict will stand. Id. The majority in Doe v Binker refused to adopt the dissent which would have rejected the claim for pain

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and suffering because the Plaintiff offered “no evidence of Mr. Binker’s consciousness” between the impact and death. Where circumstances will allow the jury to infer conscious pain and suffering, it is not necessary that the Estate present any direct evidence, expert or otherwise. A claim for pain and suffering followed shortly by death is a matter for the jury. “It will be up to the trier of fact to determine whether Green was conscious at all after the accident and how much did he suffer “Pippin v. Potomac Elec. Power Co., 132 F. Supp. 2d 379, 394 (D. Md. 2001) (decedent driver struck utility pole head-on). “Defendant's argument that four to six minutes is too brief a time to recover pain and suffering is without merit. Id. Pippin, citing Tri-State Poultry Coop v. Carey, 190 Md. 116, 125 (1948) held that recovery may be had although the period between accident and death is short. Pippin held “[I]t will be up to the trier of fact to determine whether Green was conscious at all after the accident and how much did he suffer. Id.

The Estate has also made a claim for pre-impact fright. This cause of action is recognized in Maryland, and almost certainly will be recognized in the District of Columbia. Benyon v Montgomery Cablevision, 718 A2d 1161 (Md. 1998). In Benyon, the decedent died instantly after his vehicle skidded 71 feet and rear-ended a tractor trailer. The Benyon Court held the skid marks established sufficient circumstantial evidence to support a reasonable inference the decedent experienced pre-impact fear or fright. Despite the absence of any direct evidence of pre-impact fright, the jury awarded \$1,000,000.00 for this element of damage. In accord is Smallwood v Bradford, 720 A.2d 586 (Md.1998), allowing pre-impact fright damages where there was circumstantial evidence (defensive driving) that the decedent driver was aware of the impending collision. Smallwood, 720 A2d 591-92. In accord: Elahi v. Islamic Republic of Iran, 124 F. Supp. 2d 97 (D.D.C. 2000)(noting such element of damage is recoverable but finding the evidence did not support the claim).

In the instant case, there is also circumstantial evidence that the Decedent experienced pre-impact fright as the pick-up truck bore down on him in the cross-walk. The oncoming headlights and the sound of the truck’s engine provide more than enough circumstantial evidence of Decedent’s pre-impact fright to uphold any verdict on this element of damage.

Decedents medical expenses for treatment from this collision were approximately \$3,000.00.

2. Economic Loss

Employment and tax records reflect that a few years before his death, Decedent held a very stable job at a local university where he was employed as an administrative assistant. His total income for 2003 was \$36,560.00. Decedent resigned from his employment with the university to move out of state to assist in the care of his mother, who was ill. He returned to the District of Columbia later in 2004 and worked a number of different jobs as reflected by the W-2 forms. Decedent spoke of finishing his college degree and applying to law school. For that reason, he sought employment in the legal field and was hired in November 2004 by an attorney as a legal assistant. He was a full time employee of this attorney at the time of his death. His employers all thought very highly of Decedent.

Decedent graduated from high school and attended 2 years of college, working towards a degree in special education.

a. Vocation Rehabilitation Report

The Estate retained the services of a vocational rehabilitation expert. The vocational rehabilitation expert concludes, somewhat conservatively, that the Decedent would have been earning nearly \$50,000.00 within 5 years of his death. Based on anecdotal evidence, counsel for the Estate believes that paralegals in the District of Columbia earn in excess of \$60,0000.00.

b. Economist Report

The Estate also retained the services of a well known and well respected economist. He concludes that the Estate suffered losses of from \$195,000 to \$203,000. It is noted that evidence revealed that Decedent had extraordinarily low living expenses, as he shared an apartment with a friend and paid very little rent. The economist ignored this evidence and calculated the losses based on average living expenses for a resident of the District of Columbia. This fact, and the low salary figures used by the vocational rehabilitation expert lead to the conclusion a jury could easily find the losses to the Estate to be much greater than the figures provided by the economist.

The Defendants will argue that the Decedent had not accumulated any savings at the time of his death. While this appears to be accurate, it should be noted Decedent had cashed in his retirement plan from the local university when he resigned his position in to move out of Washington, D.C. to care of his mother. Decedent earned less than \$10,000 in 2004, and over \$5,000 of that sum was earned in November and December 2004 after Decedent was hired by the local attorney. It is clear that Decedent needed his savings for living expenses when he resigned from the local university. Due to his untimely death, he had not been re-employed long enough to rebuild his savings.

3. Punitive Damages

The Estate is entitled to an award of punitive damages against the defendant driver if it proves with clear and convincing evidence that the defendant acted in willful disregard for the rights of the Decedent, and if the defendants' conduct was reckless toward the safety of the Decedent. Direct or circumstantial evidence will suffice to establish these elements of punitive damages. Model Jury Instruction 16-1. The Estate is entitled to a punitive damage award against the employer if it establishes (1) that its driver is liable for punitive damages; (2) and also establishes by clear and convincing evidence that an officer, director or managing agent of the employer authorized or approved driver's operation of the company truck despite knowing he was a drunk and a danger. Crawford v. Andrew Sys., 119 F.3d 925 (11th Cir. 1997)(upholding jury verdict under Alabama law of \$2,250,000 punitive damages for wrongful death based on negligent entrustment). See also, Breeding v. Massey, 378 F.2d 171 (8th Cir. 1967)(citing Arkansas law upholding jury verdict for punitive damages on negligent entrustment claim.), La Croix v. Spears Mattress Co., 2005 U.S. Dist. LEXIS 16867 (D. Ga. 2005)(citing Georgia law in permitting negligent entrustment and punitive damage claims to survive summary judgment), Came v. Micou, 2005 U.S. Dist. LEXIS 40037 (D. Pa. 2005)(citing Pennsylvania law in permitting negligent entrustment and punitive damage claims to survive summary judgment), Shook v. Rossignol Transp., Ltd., 2004 U.S. Dist. LEXIS 5622 (D. Ohio 2004)(citing Ohio law in permitting negligent entrustment and punitive damage claims to survive summary judgment), DeMatteo v. Simon, 112 N.M. 112 (N.M. Ct. App. 1991)(allowing claim of negligent entrustment to support award of punitive damages), Holben v. Midwest Emery Freight System, Inc., 525 F. Supp. 1224 (D. Pa. 1981)(claims for negligent entrustment and punitive damages survive summary judgment).

The Estate is confident that a jury will find that defendant driver acted in willful disregard of the rights of the Decedent when it hears that the driver consumed about 12 alcoholic drinks in an hour and then drove the pick-up truck through a red light at a high rate of speed. The Estate also believes discovery will reveal that managing agents of the

defendant landscaping company were aware of driver's addition to alcohol and the fact he was likely to drive while drunk. These claims will likely go to the jury, which could be so incensed by the outrageous conduct of the defendants that it could return seven figure punitive damages verdict.

B. WRONGFUL DEATH

1. Support for Decedent's Mother

Decedent did not leave any dependents, although it is likely he would have contributed to the support of his mother. Mother is widowed and she is 75 years old. Her life expectancy on the date of her son's death was about 13 years. Mother has been retired for 10 years from her position as a bookkeeper at a mental health institution. Decedent was Mother's only unmarried child and he was the most likely of her children to provide support.

2. Funeral and Burial Expenses

Decedent's family paid funeral and burial expenses of \$12,149.76.