

IN THE SUPREME COURT OF THE STATE OF VERMONT

JULIE JENSEN, individually and
CHARLES MEYER, by and through
his next friend, JULIE JENSEN,
Plaintiffs/Counterclaim Defendants/Appellants

v.

ELAINE CASHIN, as ADMINISTRATOR
for the ESTATE OF NORMAN WOOLARD
and
PAUL AND ELAINE LENO, as
ADMINISTRATORS for the ESTATE OF
PHILIP LENO

Defendants/Counterclaim Plaintiffs/Appellees

* United States District Court
* for the District of Vermont
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* Trial Court Docket No.: 2:06-cv-41 wks
*
* Supreme Court Docket No.: 2007-255
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CERTIFICATE OF SERVICE

I, Thomas Hayes, Esq., of the law firm of HAYES & WINDISH, attorneys for Defense Research Institute, as an *Amicus Curiae*, hereby certify that on the 17th day of September, 2007, I served one copy of the attached **MOTION FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE** and two copies of the attached **BRIEF OF AMICUS CURIAE** on the below identified counsels of record, by depositing the copies thereof in securely sealed, duly postpaid and properly addressed envelopes in a depository under the exclusive care of the United States Postal Service in Woodstock, Vermont:

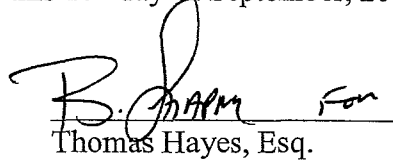
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MOTION FOR LEAVE TO FILE BRIEF
AS AMICUS CURIAE

NOW COMES, the Defense Research Institute ("DRI"), by and through the law firm Hayes and Windish, and hereby moves for leave to file a brief of *amicus curiae* in support of the position taken by Plaintiffs/Counterclaim Defendants/Appellants, Julie Jensen, individually and Charles Meyer, by and through his next friend, Julie Jensen, pursuant to Vermont Rule of Appellate Procedure 29, on two of the three certified questions, namely whether punitive damages are awardable under Vermont's Wrongful Death Act, 14 V.S.A. § 1492, and Vermont's Survival Statute, 14 V.S.A. § 1452.

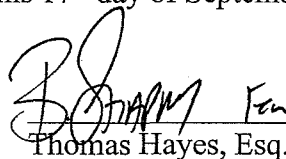
DRI is an international organization that includes more than 22,000 attorneys involved in the defense of civil litigation. DRI is committed to enhancing the skills, effectiveness, and professionalism of defense attorneys. Because of this commitment, DRI seeks to address issues germane to defense attorneys and the civil justice system, to promote the role of the defense attorney, and to improve the civil justice system. DRI has long been a voice in the ongoing effort

to make the civil justice system more fair, efficient, and – where national issues are involved – consistent.

DRI participates as an *amicus curiae* in cases that raise issues of vital concern to its membership. This is such a case. The Vermont District Court certified these questions because there are no controlling precedents in the decisions of the Vermont Supreme Court. DRI believes that resolution of the important issue this petition presents is necessary because punitive damages are not a product of common law, but instead the tort policies of each state as established by the Legislature and interpreted by the Courts. DRI's members are frequently confronted with the focal issue raised by this petition, and their clients are affected by the outcome. As damages in wrongful death and survival claims are governed by 14 V.S.A. §1492 and § 1452 the interpretation of what damages are included is a function of statutory construction by the trial court. The Vermont Statutes do not expressly provide for the recovery of punitive damages. The Legislature has not amended these statutes to include punitive damages. As there is no statutory directive including these damages or any case law interpreting the punitive damage issue, the outcome of this case is of interest to all those practicing civil litigation. To that end, DRI respectfully submits this brief to further outline the legal issues and considerations for the Court.

WHEREFORE, DRI respectfully requests this Court grant this motion for leave to file an *amicus curiae* in support of the position taken by Plaintiffs/Counterclaim Defendants/Appellants.

DATED at Woodstock, Vermont, this 17th day of September, 2007.


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BRIEF OF AMICUS CURIAE

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STATEMENT OF THE ISSUES

1. Does Vermont's Wrongful Death Act, Vt. Stat. Ann. tit. 14 § 1492, allow the recovery of punitive damages?
2. Does Vermont's Survival Statute, Vt. Stat. Ann. tit. 14 § 1452, allow the recovery of punitive damages?

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ARGUMENT

Summary of Argument

The certified questions raised by the United States District Court for the District of Vermont arise out of the consideration of punitive damages in death actions brought under the Wrongful Death Act and Survival Statute.¹ There is a companion consideration in this case, as the claimants in the underlying action seek to assess punitive damages against a minor. In filing this *Amicus Curiae* Brief, Defense Research Institute (DRI) supports the contentions of the Plaintiff/Counterclaim Defendant/Appellants in arguing that punitive damages are not allowable under Vermont's Wrongful Death Act and Survival Statute.

As a general matter, Vermont has long held that punitive damages may be assessed only when there is evidence that there was actual malice. "This may be shown by conduct manifesting personal ill will or carried out under circumstances evidencing insult or oppression, or even by conduct showing a reckless or wanton disregard of one's rights."

Brueckner v. Norwich Univ., 169 Vt. 118, 129, 730 A.2d 1086, 1095 (1999) (quoting ***Shortle v. Central Vt. Pub. Serv. Corp.***, 137 Vt. 32, 33,

¹ As this Brief is being submitted as an *amicus curiae* on the Certified questions and in support of the arguments raised by Plaintiff/Counterclaim Defendant/Appellants, the Statement of the Case and Standard of Review of the Plaintiff/Counterclaim Defendant/Appellants are hereby adopted and incorporated into this Brief.

399 A.2d 517, 518 (1979). “The crucial inquiry is not the particular tort committed, but rather the nature of the defendant’s conduct in committing it.” **Clymer v. Webster**, 156 Vt. 614, 631, 596 A.2d 905, 915 (1991). The conduct necessary to satisfy this standard must be directed at the plaintiff by the defendant and with a specific objective to unload personal feelings of ill will or insult upon the plaintiff. Punitive damages are not compensatory - they are to “punish morally culpable conduct [and] deter a wrongdoer . . . from repetitions of the same or similar actions.” **Coty v. Ramsey Assocs.**, 149 Vt. 451, 467, 546 A.2d 196, 207 (1988) (quoting **Davis v. Williams**, 92 Misc.2d 1051, 1054, 402 N.Y.S.2d 92, 94 (Civ.Ct. 1977)).

Where an individual is injured by the actions of another and the injury results in death, two statutory claims arise: a claim for wrongful death and a survival claim. 14 V.S.A. § 1492; 14 V.S.A. § 1452, respectively. These statutes are a derogation of common law, which held that all claims for personal injury expired upon the death of the person if the death resulted from the offending injury. **Lazelle v. Town of Newfane**, 70 Vt. 440, 443, 41 A. 511, 511-12 (1898). The respective statutes revive the decedent’s claims and specify the recovery that the statutes allow. Neither statute’s language specifically calls for recovery of punitive or exemplary damages. Vermont’s interpretation and

application of both the Wrongful Death Act and Survival Statute does not support a conclusion that punitive damages were within the Legislature's intent and may be recoverable in these actions.

The determination of the Vermont Supreme Court on these matters is of great importance in considering other states' applications of death statutes where punitive damages are sought. As a general matter, most states' death statutes flow from Lord Campbell's Act and permit damage awards to a decedent's next of kin only for the recovery of "pecuniary losses". ***Smith v. Brown & Williamson Tobacco Corp.***, S.W.3d, 2007 WL 2175034 at * 4, 18 (Mo. 2007). The analysis of these statutes by state courts is a valuable tool for sister states when such states are called upon to interpret their own language. "[T]he allowance of punitive damages in wrongful death actions is a function of the governing statute construed in light of legislative intent and public policy." ***Behrens v. Raleigh Hills Hosp., Inc.***, 675 P.2d 1179, 1184 (Utah 1983) (citing 1 S. SPEISER, RECOVERY FOR WRONGFUL DEATH § 3:1 at 183 at 360 (2d ed. 1975)).

Given Vermont's statutory language, this Court is urged to disallow punitive damages under both the Wrongful Death Act and the Survival Statute. It is the province of the Legislature to set the tort policy considered here as a derogation of the common law. As the statutory construction does not support allowing a punitive award under either

claim, the Court should not expand the category of recoverable damages where the political body responsible for establishing public policy in this field has never seen fit to do so.

Does Vermont's Wrongful Death Act, Vt. Stat. Ann. tit. 14 § 1492, allow the recovery of punitive damages?

At common law, civil actions for wrongful death were not permitted, as the case died with the person. *Lazelle*, 70 Vt. at 443, 41A. at 511-12. In 1849, the Vermont Legislature passed an act that allowed damages recovery in wrongful death claims. *Needham v. Grand Trunk Ry.*, 38 Vt. 294 (1865). The Vermont Wrongful Death Act is “based on Lord Campbell’s Act and generally awards damages to the decedent’s next of kin only for ‘pecuniary loss,’” representing a limitation on the damages available. 14 V.S.A. § 1492; *Harnett v. Union Mut. Fire Ins. Co.*, 153 Vt. 152, 153, 569 A.2d 486, 487 (1989) (other citations omitted); see also *Clymer*, 156 Vt. at 622, 596 A.2d at 910. The original Act stated that “the court or jury before whom the issue shall be tried, may give such damages as they may deem just, with reference to the pecuniary injury resulting from such death to the wife and next of kin of such deceased person.” *Id.* The purpose of this Act was to “make the damage, or pecuniary injury resulting from such death to the widow or next of kin, the subject of a new cause of action and right of recovery, wholly distinct from the consequences of the wrong to the injured party,

and wholly distinct from his claim for damages resulting from such injury.” *Id.*

This Court, on numerous occasions, has had the opportunity to review and apply the Wrongful Death Act. ***Dubaniewicz v. Houman***, 2006 VT 99, ¶ 2-14, 910 A.2d 897, 899-902 (2006); ***Harnett***, 153 Vt. at 153-157, 569 A.2d at 487-490; ***Clymer***, 156 Vt. at 622-625, 596 A.2d at 910-912; ***Mobbs v. Ctr.***, 150 Vt. 311, 314-317, 553 A.2d 1092, 1094-1096 (1988); ***Vaillancourt v. Medical Ctr. Hosp. of Vt.***, 139 Vt. 138, 140-143, 425 A.2d 92, 93-95 (1980). In ***Vaillancourt***, the question was whether recovery was allowable for the negligently caused wrongful death of a full-term, unborn, viable child. The Court construed “person” under the language of the statute to include a viable fetus, noting as one of the reasons for this allowance: “[i]f no right of action is allowed, there is a wrong inflicted for which there is no remedy.” This decision did not effect any change in the allowable damages; rather, merely interpreted who may seek to recover.

In 1976, the Vermont Legislature amended the Act to broaden the scope of compensable losses to include pecuniary losses for a minor decedents. ***Harnett***, 153 Vt. at 154, 569 A.2d at 487. In making this change, the Legislature adopted language from a Washington statute. This Court had the opportunity to apply this new provision in ***Harnett***

and it looked to Washington's interpretation of this language for direction. *Id.* at 154. The focal issue was whether the newly added language also allowed recovery of damages for grief, mental anguish, or suffering to the parent. *Id.* Prior to the amendment, the statute's provision concerning "pecuniary damages" had generated controversy when applied to minor decedents, as it was often interpreted to afford no such recovery. *Id.* at 153. A minor child's death at common law gave rise to little if any "pecuniary loss," in its strictest sense as economic losses. With the inclusion of language now permitting damages awards for "loss of love and companionship of the child and for the destruction of the parent-child relationship," the court held it must include grief, mental anguish, and suffering, or it is "largely a meaningless concept." *Id.* at 156. The Court specifically noted that in enacting the amendment the Legislature indicated that it was "no doubt aware of the long line of cases from this Court limiting recovery in child death cases and chose to act to expand the compensable elements of the damage award." *Id.* However, the Court did not expand the category of damages recoverable beyond "pecuniary," instead, the holding expressly noted that the "compensable *elements* of a damage award" were intended to be expanded by the Legislature. 153 Vt. at 156 (emphasis added).

Statutory construction as it relates to "pecuniary damages" was

again revisited in ***Mobbs v. Central Vermont Ry.***, 150 Vt. 311, 553 A.2d 1092 (1988). In ***Mobbs***, this Court held that the Wrongful Death Act did not foreclose a brother's claim for pecuniary damages as a result of his sister's death. In evaluating whether "pecuniary damages" implicated recovery beyond economic losses, the Court stated "[d]amages for pecuniary injuries are allowed only for losses 'which the circumstances of the particular case establish with reasonable certainty will be suffered by the beneficiary of the statute in the future, because of the death of the victim.'" *Id.*, 150 Vt. at 316. The Court also noted, the statutory language directing that the court or jury "may give such damages as are just, with reference to the *pecuniary* injuries resulting from such death." *Id.* at 314 (emphasis added). The statutory construction by the Court did not expand the scope of recoverable damages - instead, it addressed only the elements that may be considered in calculating pecuniary loss.

In 1991, the Vermont Supreme Court again visited the issue of what constituted "pecuniary injury" under the Wrongful Death Act. ***Clymer***, 156 Vt. at 622-625, 596 A.2d at 910-912. In that case, the parents sought damages resulting from the death of their eighteen-year-old daughter. The Court noted that "pecuniary damages" is not limited to purely economic losses. *Id.* at 628 (citing ***Mobbs***, 150 Vt. at 316, 553 A.2d at 1095). It went on to acknowledge that the Wrongful Death Act

“does not preclude the parents of an adult child from showing that the death of their child did in fact injure them by depriving them of the society of that child.” *Id.* 156 Vt. at 629-630, 596 A.2d at 914-915. As in **Harnett**, the Court held that the term “pecuniary injuries” was not limited to economic losses, and that other considerations as to the relationship of the decedent to the survivor should be considered in determining those injuries. *Id.* 156 Vt. at 629-630, 596 A.2d at 914-915. The Court did not read into the statute any new category of damages, nor has the Legislature moved beyond the “pecuniary injuries” limitation expressly set forth in the statute.

Most recently, the Vermont Supreme Court reviewed the Wrongful Death Act in **Dubaniewicz v. Houman**, 2006 VT 99, 910 A.2d 897 (2006). In that case, a shooting victim’s brother brought a wrongful death claim, and the Court was required to consider the right of recovery for the brother’s loss of companionship. Citing the statutory language, the Court emphasized that the statute allows “such damages as are just, with reference to the pecuniary injuries resulting from such death.” *Id.* While the Court noted the modern trend to permit recovery of damages for loss of companionship, care, nurture, and protection, it held that all of those damages were within the modern rubric of “pecuniary damages.” *Id.* 910 A.2d at 899-901. The Illinois Supreme Court’s interpretation of

that state's similar Wrongful Death Act - which allowed "fair and just compensation with reference to pecuniary injuries" - was helpful to the Court's analysis. ***In re Estate of Finley***, 601 N.E2d 699, 702 (Ill. 1992). Recognizing the importance of statutory construction and interpretation, the Court went on to note that the Vermont Legislature, despite its amendment to the Act in 1996, failed to overturn the decision in ***Clymer***, permitting "loss of companionship" damages as an aspect of pecuniary damages. ***Dubaniewicz***, 910 A.2d at 901-902.

Importantly, the dissent in ***Dubaniewicz*** disagreed with the expansion of the recovery, which was "most properly left to the Legislature that created the cause of action in the first place." *Id.* 910 A.2d at 906. The nature of "[p]ecuniary loss' ordinarily means economic loss, commonly measured by the 'reasonable expectation by the next of kin of deriving some pecuniary advantage or benefit from the continuance of the life of the deceased.'" ***Dubaniewicz v. Houman***, *Id.* 910 A.2d at 904. (Burgess, D.J., dissenting) (*citing D'Angelo v. Rutland Ry. Light & Power Co.*, 100 Vt. 135, 135 A. 598 (1927)). To that end, the dissent believed that the Wrongful Death Act did not support an expanded interpretation of "pecuniary damages" without affirmative action on the part of the Legislature to change the applicable language in the Act.

The Wrongful Death Act changes the common law, under which claims for personal injuries resulting in death died with the plaintiff. The Wrongful Death Act revives this claim for damages by permitting recovery of pecuniary damages consistent with and as limited by the statutory language. Vermont's current Wrongful Death Act allows "[t]he court or jury before whom the issue is tried [to] give such damages are just, with reference to the pecuniary injuries resulting from such death" on behalf of the decedent's spouse or next of kin. 14 V.S.A. § 1492(b). This recovery, and its distribution "shall be in proportion to the pecuniary injuries suffered". 14 V.S.A. § 1492(c). The Vermont Wrongful Death Act is "remedial in nature, designed to alleviate the harsh common-law rule of no liability because the person injured had died." See **Vaillancourt v. Medical Ctr. Hosp.**, 139 Vt. 138, 141, 425 A.2d 92, 94 (1980) (noting that the statutory construction of the Act as a "derogation" of common law, in a strict, as opposed to liberal, manner, is open to debate.) Where the meaning of a statute is clear and unambiguous, we must construe and enforce it according to its express meaning. See **Littlefield v. Dep't. of Employment & Training**, 145 Vt. 247, 253, 487 A.2d 507, 510 (1984). It is a common tenet of statutory construction that where the statutory language is clear and unambiguous, the plain meaning of the statute controls and must be enforced according to its express terms.

Planned Parenthood of Vt., Inc. v. City of Burlington, 146 Vt. 348, 352, 503 A.2d 545, 547 (1985). Likewise, “[w]here the meaning of a statute is plain on its face, this Court will enforce the statute according to its terms for there is no need for construction; the legislative intent is to be ascertained from the act itself. **Burlington Elec. Dep’t v. State Dep’t of Taxes**, 154 Vt. 332, 335-36, 576 A.2d 450, 452 (1990) (quoting **Hill v. Conway**, 143 Vt. 91, 93, 463 A.2d 232, 233 (1983) (internal quotations omitted)). “Wrongful death actions are creatures of statute and the right to maintain such an action is afforded only by the Legislature.” **Quensel v. Town of Middlebury**, 167 Vt. 252, 258, 706 A.2d 436, 439 (1998) (citing **Lewis v. Regional Ctr. of East Bay**, 174 Cal.App.3d 350, 220 Cal.Rptr. 89, 92 (1985)). “It cannot seriously be argued that a statutory entitlement to sue for the wrongful death of another is itself a ‘fundamental’ or constitutional right.” *Id.* (citing **Parham v. Hughes**, 441 U.S. 347, 358 n.12, 99 S.Ct. 1742, 1749 n.12, 60 L.Ed.2d 269 (1979)). While there may be arguments to expand the liability and recoverability in connection with the statute, “such arguments should be addressed to the Legislature, not the courts.” **Quensel**, 167 Vt. at 258. This Court, in interpreting the legislative design, has awarded only pecuniary damages, as the interpretation of those damages has evolved in the case law. The Court has not

expanded, nor should it, the statutory framework to include categories of damages outside the express language of the statute.

Other jurisdictions have consistently held that punitive damages are not recoverable in wrongful death claims “unless the governing provision expressly or by clear implication confers the right to such damages.” 22A AM. JUR. 2D DEATH § 225 (2007). “Punitive damages are not compensation for injury. Instead, they are private fines levied by civil juries to punish reprehensible conduct and to deter its future occurrence.” *Int’l. Bhd. of Elec. Workers v. Foust*, 442 U.S. 42, 48, 99 S.Ct. 2121, 2125, 2126, 60 L.Ed.2d 698 (1979) (quoting *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 350, 94 S.Ct. 2997, 41 L.Ed.2d 789 (1974)).

The Seventh Circuit had the opportunity to review the assessment of punitive damages in detail in a complex air crash disaster, with the resulting deaths of 273 people. *In re Air Crash Disaster Near Chicago, Ill.*, 644 F.2d 594 (7th Cir. 1981). The court’s analysis involved a survey of the conflicting substantive law of the six states to be applied. The Seventh Circuit also considered constitutional objections to the disallowance of punitive damages. The plaintiffs had urged two constitutional arguments: first, that precluding recovery of punitive damages in wrongful death cases, coupled with the inclusion of punitive

damages in survival actions, violated the federal and state constitutions.²

Concerning the first constitutional issue raised, the court determined that each state's denial of punitive damages in wrongful death actions survived the rational-relationship test, being rationally related to legitimate state purpose. *Id.* at 609. The court noted that the purpose of denying punitive damages is to avoid excessive liability, which represents an appropriate legislative determination that each state's interest in protecting defendants from excessive damages outweighs its interest in punishing or deterring misconduct. *Id.* at 610 (internal citations omitted). The state has legitimate interests both in the amount of damages paid to the survivors of persons wrongfully killed and in the protection of defendants. Denying recovery of punitive damages is clearly a rational method of limiting damages in wrongful death cases. *Id.* at 610.

The individual state's interests have been well expressed in the statutory construction of wrongful death and survival statutes.

Mattyasovsky v. West Town Bus Co., 313 N.E.2d 496, 500-502 (Ill. 1974); ***Durham v. U-Haul Int'l***, 745 N.E.2d 755, 758-760 (Ind.2001).

Similar to the Vermont statute, the Delaware Wrongful Death Statute

² Plaintiffs also argued that the difference in damages between survival and wrongful death actions represented "special legislation" in violation of the Illinois constitution, an issue not relevant here.

allows recovery for “such sum as will fairly compensate for the injury resulting from the death”. ***Sterner v. Wesley Coll., Inc.***, 747 F.Supp. 263, 268 (Del. 1990) (*citing* 10 Del.C. § 3724). The statute goes on to specifically enumerate the elements considered in the award, which include deprivation of the expectation of pecuniary benefits, loss of contribution, loss of services, funeral expenses and mental anguish. *Id.* The Court, however, has consistently interpreted that similar statutory language as not permitting the recovery of punitive damages. 747 F. Supp. at 268-269. Although the Delaware legislature had amended the statute to identify elements of damage, including mental anguish, it continued to avoid introducing “punitive damages” into the Wrongful Death Act. “Punitive damages are fundamentally different from compensatory damages both in purpose and formulation. Compensatory damages aim to correct private wrongs, while assessments of punitive damages implicate other societal policies.” ***Sterner***, *Id.* at 268 (*citing* ***Jardel Co. v. Hughes***, 523 A.2d 518 (Del.1987)).

There is no express language in Vermont’s Wrongful Death Act that permits a decedent’s next of kin to recover punitive damages. Instead, the language of the Act allows the finder of fact to award “such damages as are just, with reference to the pecuniary injuries resulting from such death.” 14 V.S.A. § 1492(b). Each Vermont case that has analyzed this

statutory language has resolutely limited recovery to only those “pecuniary” damages. The Court has not expanded the statutory construction beyond its intended framework, and it should not do so here. Although the Vermont Legislature has amended the statute on several occasions since its original enactment, that body has never effected any change that would include or permit recovery of “punitive damages.” This Court has variously interpreted what may be recoverable within the permissible scope of “pecuniary injuries,” as elements of such a damages award, but has not expanded the scope of recoverable damages beyond *pecuniary* damages. **Harnett**, 153 Vt. at 156. Likewise, the Court has never even suggested that recovery beyond pecuniary damages would ever be considered to be allowable under the language of the Act. That the Legislature has amended the Act on several occasions and never expanded recovery beyond the “pecuniary injuries” is telling.

The recovery of wrongful death damages and the limitations on that recovery “have little or nothing to do with conduct. They are concerned not with how people should behave but with how survivors should be compensated.” **Myers v. Langlois**, 168 Vt. 432, 637, 721 A.2d 129, 132 (1998) (citing **Reich v. Purcell**, 67 Cal.2d 551, 63 Cal.Rptr. 31, 432 P.2d 727, 7301-31 (Cal. 1967) (discussing conflict of laws in the application of wrongful death statutes)).

The Court's role is to analyze the application of the statutory language to the facts of the case and the request for recovery by the parties. In this case, a claim for "punitive damages" cannot survive in the face of Vermont's Wrongful Death Act. The nature and purpose of punitive damages is inherently different from the right to recover pecuniary damages as a result of the death of a family member. As the Wrongful Death Act makes clear, "[t]he measure of damages . . . is not the loss or suffering of the deceased, but the injury resulting from his death to his family." **Needham**, 38 Vt. at 294 (additional citation omitted). Punitive damages, on the other hand, punish the wrongdoer for the malicious actions and ill will manifested toward the plaintiff. **Brueckner**, 169 Vt. at 129. To read punitive damages into the pecuniary recovery of the Wrongful Death Act would distort both the Act's intention and the purpose for imposing punitive damages.

Does Vermont's Survival Statute, Vt. Stat. Ann. tit. 14 § 1452, allow the recovery of punitive damages?

Vermont's survival statute states that, upon the death of a person injured by the act or default of the defendant, an action for the recovery of "damages for a bodily hurt or injury" arises and may be pursued by the estate of the decedent. 14 V.S.A. § 1452. Much like the Wrongful Death Act, this statute abrogates the common-law rule that personal injury actions die with the person. **Whitchurch v. Perry**, 137 Vt. 464,

469, 408 A.2d 627, 630 (1979). Where the death is caused by the “wrongful act, neglect or default” of another, “the person or corporation liable . . . shall be liable to an action for damages.” 14 V.S.A. § 1491. The issue here is whether “damages for a bodily hurt or injury,” includes punitive damages. Again, because this statute is remedial in nature, it is entitled to liberal construction. **Vaillancourt**, 139 Vt. at 138. However, this liberal construction is not open-ended. The “rule of liberal construction does not allow [the court] to expand the statutory exemption beyond its terms.” **Mercier v. Partlow**, 149 Vt. 523, 525, 546 A.2d 787, 789 (1988). Instead, the court evaluates any “indication of legislative intent in the statutory language”. *Id.* The Vermont Survival Statute does not permit recovery beyond the “damages for a bodily hurt or injury” which by definition are compensatory damages. There is no specific mention of the availability of “punitive damages” in connection with a survival claim, as either a category of damages or an element of “damages for a bodily hurt or injury.”

Vermont has had but one opportunity to rule on exemplary damages in the context of a survival action. See **Earl v. Tupper**, 45 Vt. 275, 1873 WL 994 (1873). The court’s holding is far from clear as it relates to recovery of punitive damages in all survival suits. In that case, a husband brought a survival action for the death of his wife, seeking

both compensatory and punitive damages. This Court held that the trial court erred in charging the jury on the issue of exemplary damages “to compensate the party fully for his expenses and trouble he had been to about the case, that parties always have to incur, not taxable costs, but counsel fees”. *Id.* at *4. The Court reversed and remanded the action stating that “the plaintiff is entitled as a matter of right, to recover compensatory damages for the injury done to him by the act recovered for, with his legal costs, and that the jury, *in cases proper for exemplary damages*, are to be governed wholly by the malice or wantonness of the defendant, as shown by the conduct they find him liable for in the action, in awarding them.” *Id.* at *8 (emphasis added).

Further, that case can be easily distinguished from the argument here. In ***Earl***, the Court’s consideration, and criticism, focused on the trial court’s allowing attorneys’ fees and costs as recoverable damages as part of the awardable “exemplary damages.” Vermont has long held that, generally speaking, absent an applicable statutory or contractual provision, Vermont follows the “American Rule” that litigating parties must bear their own attorneys’ fees. ***D.J. Painting, Inc. v. Baraw Enters., Inc.***, 172 Vt. 239, 246, 776 A.2d 413, 419 (2001). The ***Earl*** Court affirmed that punitive damages are appropriate only in proper cases. It did not comment specifically as to whether a punitive award is

proper in an action under the Survival Statute.

Since the **Earl** decision, the doctrine of punitive damages has narrowed significantly. Punitive damages are available only where there is evidence that “defendant’s wrongdoing has been intentional and deliberate, and has the character of outrage frequently associated with crime.” **Brueckner**, 169 Vt. at 129 (*quoting* W. KEETON *et. al.*, PROSSER & KEETON ON THE LAW OF TORTS § 2 (5th ed. 1984)). Likewise, the language of the Survival Statute has become more restrictive in its scope and application. In its current form - and that is the language implicated in this case - recovery is for “damages for a bodily hurt or injury,” resulting from the “act or default” of the defendant. 14 V.S.A. § 1452. Read together with the rigorous standard for imposition of punitive damages, an action resulting in “bodily hurt or injury,” arising from “act or default” does not amount to a right, under the statutory language, to recover punitive damages.

Punitive damages are other than compensatory damages, which by definition, are intended to “compensate the injured party for the injury sustained, and nothing more . . . The rationale behind compensatory damages is to restore the injured party to the position he or she was in prior to the injury.” BLACK’S LAW DICTIONARY, at 270 (6th Ed. 1991). Compensatory damages “differ from punitive damages, both in the

reasons for their existence and in the method of their computation.”

RESTATEMENT (SECOND) OF TORTS § 903 (1979). Punitive damages are simply not damages that arise from the simple “act or default” of an individual. Instead, they are those that are at least “willful, wanton and reckless,” elements of the action that are absent from the statutory directive in the Vermont Survival Statute.

Under similar statutory language, the Illinois Supreme Court noted that the words “damages for injury to the person” mean “clearly and unequivocally” damages that are physical in nature. ***Mattyasovsky***, 313 N.E.2d at 502. Punitive damages are “assessed in the interest of society to punish the defendant and to warn him and others that such acts are offenses against society.” *Id.* As the recovery of damages under a survival claim is statutory in nature, the language limiting recovery to damages of a physical nature restricts recovery to compensatory damages. *Id.* The Legislature created the avenue for recovery as it did not exist at common law. To that end, it is the Legislature that “may restrict or deny the allowance of such damages at will.” *Id.*

Analysis of the Vermont Statute leads to the same conclusion: punitive damages are not included in the recovery permitted because the statute does not permit such recovery. 14 V.S.A. § 1452. “Our rules of statutory construction require us to consider the statute as a whole,

giving effect to a statute's every word, sentence, and clause, when possible.” **Holton v. Dep’t of Employment & Training**, 2005 VT 42, ¶ 21, 149 Vt. 523, 178 Vt. 147, 156, 878 A.2d 1051, 1058 (2005). The Vermont Survival Statute allows recovery for one category of damages: “for a bodily hurt and injury.” The absence of any mention of punitive damages is a strong indication that such damages are not recoverable under this statutory derogation of the common law. Statutory interpretation limits the inclusion of terms that are conspicuously absent. **Payne v. Rozendaal**, 147 Vt. 488, 500, 520 A.2d 586, 593 (1986) (applying “long established and applied maxim of statutory construction, *inclusio unius est exclusio alterius* the inclusion of one thing [in a statute] implies the exclusion of others”).

Considering the nature and purpose of punitive damages, to judicially amend the Survival Statute to include and allow recovery of such damages would be error, as the Statute reflects a legislative intent to allow recovery only for “bodily hurt and injury” in the form of compensatory damages. As the Legislature clearly omitted punitive damages from the statutory framework, there is no logical or precedential basis for this Court to do so. Further, the conduct necessary to support a punitive damage award has developed into a standard rivaling that of a criminal conduct, to read such damages into the statute would distort

the application of punitive damages as whole. A statute providing for punitive damages should be consistent with the standards set forth in the case law for awarding those damages, i.e., the language must express the standards set forth in cases such as **Brueckner** and more recently in **Bolsta v. Johnson**, 2004 VT 19, 176 Vt. 602, 848 A.2d 306 (2004).

Otherwise, the scope of the statutory damages would be more expansive than Vermont's well-established case law would support. Without action by the Legislature to amend the Survival Statute to broaden the scope of awardable damages, an estate is and must be limited in its permissible recovery to those compensatory damages that flow from the Statute itself.

Conclusion

The function of Vermont's Wrongful Death Act is to create a statutory action for wrongful death because such claims did not survive the death of the decedent at common law. The Act's language has never included an express or specific provision to allow recovery of punitive damages. The Act's purpose is to allow recovery of the pecuniary losses suffered by the decedent's next of kin. It is not concerned with the nature of the tortfeasor's conduct - only the loss to the decedent's next of kin. Because punitive damages serve to punish and deter the actor, they are not within the scope of "pecuniary damages" recoverable under the Act. Punitive damages represent unique and entirely separate category

of damages.

The right of statutory recovery under the Act is derived solely from the language employed by the Legislature, which is vested with the right and responsibility to determine whether and to what extent Vermont's citizens may recover for a cause of action not provided at common law. The Legislature is charged with considering the interests of the public as well as the judiciary in formulating the standard for recovery. Accordingly, we must look to the Legislature's intent in applying the Act. At no point since the inception of the Act has our Legislature included a category of damages beyond pecuniary injuries. While this Court has interpreted the pecuniary injuries limitation in deciding that it includes elements of damages such as loss of companionship or mental anguish for a decedent's loss, it has never ignored the Act's express language to permit recovery of damages only that are pecuniary in nature. Absent legislative directive to the contrary, the Court should not do so here.

Likewise, the Vermont Survival Statute is a product of legislative action. The Legislature has allotted for the recovery of damages arising out of "bodily hurt or injury," which are clearly compensable in nature. The Legislature has not broadened that right of recovery to include punitive damages. As the law has long held a distinctive difference in the purpose and nature of compensatory and punitive damages, the Court

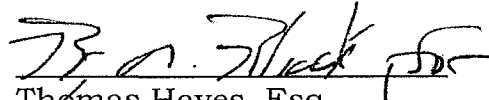
should not read punitive damages into the Survival Statute where the Legislature has failed to expressly provide for them.

WHEREFORE, DRI, as an *Amicus Curiae*, respectfully submits that punitive damages are not properly awarded under either Vermont's Wrongful Death Act or Vermont's Survival Statute, unless and until the Legislature so amends the language to include this right of recovery.

RULE 31.1(d) CERTIFICATION

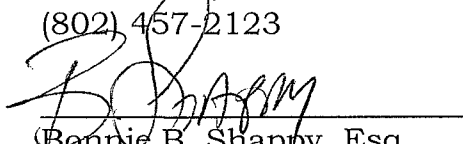
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DATED at Woodstock, Vermont, this 17th day of September, 2007.



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