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Jackson v. Housing Authority: The Availability of Punitive Damages in Wrongful Death Actions Against Municipal Corporations

An attorney represents the administrator of the estate of an elderly woman who met an untimely death as the tragic result of a city worker's wanton and reckless negligence. Naturally, the administrator chooses to sue, and the attorney, mindful that the taxpaying public will ultimately pay any damages awarded, questions whether his client should be able to recover punitive damages against the city in the action for wrongful death. In *Jackson v. Housing Authority*¹ the North Carolina Supreme Court decided this issue of first impression by holding that a plaintiff may recover punitive damages against a defendant municipal corporation in an action brought pursuant to the North Carolina Wrongful Death Act.² Justice Meyer, joined by Chief Justice Branch, vigorously dissented from Justice Billings' majority opinion. Justice Meyer argued, first, that the court had misconstrued the Wrongful Death Act and, second, that the court had misapplied the general rule that, absent an express statutory provision to the contrary, punitive damages are not recoverable against a municipal corporation.³ Indeed, a thorough analysis of the court's majority holding reveals that, although espousing a rule seemingly consistent with a major principle of statutory construction, the *Jackson* opinion nonetheless misinterprets the Wrongful Death Act. Furthermore, as Justice Meyer contended, the *Jackson* majority disregarded a catalog of public policy considerations militating against the recovery of punitive damages from municipal corporations.⁴

On February 19, 1978, Mary Magdalene Jackson, an eighty-four year old woman, was found dead at her High Point, North Carolina residence in the Clara Cox Apartments, a low income housing project owned and operated by the Housing Authority for the City of High Point.⁵ The cause of death was carbon monoxide poisoning.⁶ Willie H. Jackson, the son of the decedent and

1. 316 N.C. 259, 341 S.E.2d 523 (1986).

2. *Id.* at 265, 341 S.E.2d at 526. The North Carolina Wrongful Death Act provides in part:

(a) When the death of a person is caused by a wrongful act, neglect or default of another, such as would, if the injured person had lived, have entitled him to an action for damages therefor, the person or corporation that would have been so liable, and his or their personal representatives or collectors, shall be liable to an action for damages

(b) Damages recoverable for death by wrongful act include:

. . .

(5) Such punitive damages as the decedent could have recovered had he survived, and punitive damages for wrongfully causing the death of the decedent through maliciousness, wilful or wanton injury, or gross negligence

N.C. GEN. STAT. § 28A-18-2 (1984).

3. *Jackson*, 316 N.C. at 265, 341 S.E.2d at 527 (Meyer, J., dissenting, joined by Branch, C.J.); see also *Long v. City of Charlotte*, 306 N.C. 187, 208, 293 S.E.2d 101, 115 (1982) (stating the general rule prohibiting the recovery of punitive damages against municipal corporations).

4. *Jackson*, 316 N.C. at 268-72, 341 S.E.2d at 529-31 (Meyer, J., dissenting).

5. *Id.* at 260, 341 S.E.2d at 524; Brief for Defendant-Appellee at 2-4, *Jackson* (No. 8318 SC1118).

6. *Jackson*, 316 N.C. at 260, 341 S.E.2d at 524.

administrator of her estate, filed suit against the Housing Authority, alleging that the fatal carbon monoxide exposure had been the result of a blockage in the chimney pipe connecting the decedent's chimney and natural gas heater.⁷ Plaintiff Jackson sued on theories of negligence, strict liability, breach of contract, and breach of express and implied warranties of habitability.⁸ Furthermore, incident to the negligence and breach of warranty claims, Jackson asserted claims for punitive damages, charging the Housing Authority with willful, wanton, and gross negligence, and with intentional, malicious, and wanton conduct with respect to the alleged breaches of warranty.⁹ Finally, plaintiff¹⁰ amended the complaint and appended a claim for wrongful death.¹¹

In November 1982 the trial court allowed defendant's pretrial motion to dismiss plaintiff's claims for punitive damages.¹² At the close of plaintiff's evidence, the court awarded the Housing Authority a directed verdict on all claims, including the claims for punitive damages.¹³

In ordering a new trial, the North Carolina Court of Appeals reversed the trial court's holding with respect to all but plaintiff's strict liability and breach of contract claims.¹⁴ The court of appeals concluded that the negligence and breach of implied warranty of habitability claims presented legitimate issues for the trial court¹⁵ and that punitive damages are recoverable against a municipal corporation in an action brought under North Carolina's Wrongful Death Act.¹⁶ The court of appeals acknowledged that the question whether punitive damages are available against a municipal corporation in an action brought pursuant to North Carolina's Wrongful Death Act was an issue of first impression in North Carolina.¹⁷ Judge Phillips, writing for the majority, stated that the

7. City workers discovered a bird's nest, a bird carcass, and other debris in the chimney pipe. *Id.*; Brief for Defendant-Appellee at 4.

8. The basis of plaintiff's negligence claim was the Housing Authority's alleged failure to exercise reasonable care in maintaining the heating lines. *Jackson*, 316 N.C. at 260, 341 S.E.2d at 524. The strict liability claim rested on defendant's alleged violation of its statutory obligation to provide tenants with fit premises. *Id.*; see N.C. GEN. STAT. § 42-42 (1984); Record at 1-4. The breach of contract and warranty claims arose out of the Housing Authority's alleged failure to maintain the premises in a safe and sanitary condition. Record at 4-5.

9. *Jackson*, 316 N.C. at 260, 341 S.E.2d at 524.

10. Approximately one year after filing suit, but before the action came to trial, Willie Jackson died. Linda Jackson, the new administratrix of the decedent's estate, assumed the role of plaintiff in the action. Brief for Defendant-Appellee at 2.

11. Record at 15.

12. *Jackson*, 316 N.C. at 261, 341 S.E.2d at 524. The trial court ruled that punitive damages are not recoverable against municipal corporations. Brief for Plaintiff-Appellant at 19, *Jackson v. Housing Auth.*, 73 N.C. App. 363, 326 S.E.2d 295 (1985) (No. 8318SC1118), *aff'd*, 316 N.C. 259, 341 S.E.2d 523 (1986).

13. *Jackson*, 316 N.C. at 261, 341 S.E.2d at 524. Curiously, the trial court never explained why it granted the directed verdict on the punitive damage claims, which had already been dismissed. See *infra* note 24.

14. The court of appeals reasoned that defendant Housing Authority could not be held strictly liable because providing a tenant with heat in the form of natural gas does not constitute an ultrahazardous activity. *Jackson v. Housing Auth.*, 73 N.C. App. 363, 373, 326 S.E.2d 295, 301 (1985), *aff'd*, 316 N.C. 259, 341 S.E.2d 523 (1986).

15. *Id.*

16. *Id.* at 371, 326 S.E.2d at 300; see N.C. GEN. STAT. § 28A-18-2 (1984).

17. *Jackson*, 73 N.C. App. at 370, 326 S.E.2d at 299.

Wrongful Death Act contains no language insulating municipal corporations from liability for punitive damages.¹⁸ Judge Webb, however, argued in dissent that the court of appeals had overstepped its bounds in considering this issue, because the evidence in the record would not have supported a finding of wanton, willful, or malicious conduct.¹⁹

Defendant Housing Authority, based on Judge Webb's dissent, filed notice of appeal with the North Carolina Supreme Court on the issue of punitive damages.²⁰ Because the supreme court's review of an appeal as of right is limited to an examination of the issues specifically considered in the dissenting opinion giving rise to the appeal,²¹ the Housing Authority also filed a petition for discretionary review of the lower appellate court's order for a new trial.²² The petition for discretionary review, however, was denied,²³ and the supreme court therefore considered only the issue of the availability of punitive damages against a municipal corporation in an action brought under North Carolina's Wrongful Death Act.²⁴

The supreme court first addressed the rule set forth in *Long v. City of Charlotte*.²⁵ In *Long* the North Carolina Supreme Court ruled that in the absence of

18. *Id.* at 371, 326 S.E.2d at 300. The court of appeals also declared that, as a matter of policy, indigent tenants of public housing should enjoy the same rights of recovery as tenants renting from private landlords. *Id.* Therefore, according to the court, it would be inequitable to deny a tenant the opportunity to recover punitive damages from a public housing authority in cases in which such damages would be available to tenants of private landlords. *Id.* (citing *Arlington Heights v. Metropolitan Hous. Dev. Corp.*, 429 U.S. 252 (1977) (reasoning that actions which adversely affect one race more than another suggest a discriminatory purpose)).

19. *Id.* at 374, 326 S.E.2d at 301 (Webb, J., dissenting); see also Brief for Defendant-Appellee at 17 (contending that the record was devoid of any evidence of maliciousness, willfulness, or gross negligence).

20. *Jackson*, 316 N.C. at 261, 341 S.E.2d at 524.

21. See N.C.R. APP. P. 16(b).

22. See N.C. GEN. STAT. § 7A-31 (1986). If a party fails to qualify for an appeal as of right to the North Carolina Supreme Court under North Carolina General Statutes § 7A-30, he or she may seek the supreme court's discretionary review of the lower court holding pursuant to North Carolina General Statutes § 7A-31. The latter section provides for discretionary review when, for example, the subject matter of the appeal involves "significant public interest," or "legal principles of major significance to the jurisprudence" of North Carolina. N.C. GEN. STAT. § 7A-31(b) (1986).

23. *Jackson v. Housing Auth.*, 313 N.C. 603, 330 S.E.2d 610 (1986), denying disc. rev. to 73 N.C. App. 363, 326 S.E.2d 295 (1985).

24. Neither party was certain of the actual issue on appeal. Plaintiff contended that the only issue before the court was the sufficiency of the evidence to support an award of punitive damages, the question addressed in Judge Webb's dissent. *Jackson*, 316 N.C. at 261, 341 S.E.2d at 524-25. The Housing Authority, however, argued that the question of sufficiency of the evidence was never before the court because the punitive damage claims had been dismissed before trial. *Id.* at 261, 341 S.E.2d at 525. Moreover, according to defendant the trial court's directed verdict on the punitive damage claims was superfluous, and Judge Webb's dissent related to the trial court's dismissal of, rather than the directed verdict on, the punitive damage claims. *Id.* Therefore, the issue necessarily was whether the trial court erred in dismissing the punitive damage claims on the grounds that a municipal corporation is not liable for punitive damages in an action brought under the wrongful death statute. *Id.*

The supreme court acknowledged this procedural confusion, and because both parties were prepared to argue the issue of the availability of punitive damages against the defendant Housing Authority, the court agreed to entertain this issue, rather than the evidentiary question. *Id.* at 262, 341 S.E.2d at 525; see N.C. R. APP. P. 2 (permitting the supreme court to alter the procedural rules to prevent hardship to a party or to facilitate a decision in the public interest). Thus, the court spared itself the task of untangling the procedural disorder.

25. 306 N.C. 187, 293 S.E.2d 101 (1982).

an explicit statutory provision to the contrary, a municipal corporation would be exempt from the assessment of punitive damages.²⁶ The *Jackson* court classified defendant as a municipal corporation and confirmed the applicability of the rule in *Long*.²⁷ Next, the court considered the question whether North Carolina's Wrongful Death Act,²⁸ the basis of Jackson's action, explicitly provides for the recovery of punitive damages against a municipal corporation. The court noted that, by the terms of the statute, the "person or corporation"²⁹ liable for the wrongful death also may be accountable for punitive damages.³⁰ Furthermore, the court recognized that for purposes of statutory construction, the term "person" may mean a natural person, a corporation, or a body politic, and thus encompasses a municipal corporation.³¹ The court surmised that the North Carolina General Assembly presumably drafted the Wrongful Death Act with this rule of statutory construction in mind and, therefore, intended to subject municipal corporations to liability for punitive damages in appropriate circumstances.³²

To understand the significance of the *Jackson* court's treatment of this issue, it is necessary to consider the history of municipal immunity in tort. The common-law doctrine of municipal immunity originated in 1798, in the English case of *Russell v. Men of Devon*.³³ Early North Carolina cases, however, rejected the doctrine³⁴ because municipal immunity was not yet a part of the Eng-

26. *Id.* at 208, 293 S.E.2d at 115.

27. See *Jackson*, 316 N.C. at 262, 341 S.E.2d at 525 (citing *Cox v. City of Kinston*, 217 N.C. 391, 393-94, 8 S.E.2d 252, 255 (1940) (holding that a public housing authority is a municipal corporation)).

28. N.C. GEN. STAT. § 28A-18-2 (1984).

29. *Id.* § 28A-18-2(a). For the statutory language, see *supra* note 2.

30. *Jackson*, 316 N.C. at 263-64, 341 S.E.2d at 526.

31. See *id.* at 263, 341 S.E.2d at 526. North Carolina General Statutes § 12-3 provides that "unless such construction would be inconsistent with the manifest intent of the General Assembly, . . . (6) The word 'person' shall extend and be applied to bodies politic and corporate, as well as to individuals, unless the context clearly shows to the contrary." N.C. GEN. STAT. § 12-3 (1986).

32. *Jackson*, 316 N.C. at 264-65, 341 S.E.2d at 526.

33. 2 Term. Rep. 667, 100 Eng. Rep. 359 (1788). In *Russell* the court ruled that an unincorporated town could not be held liable for damage caused by a defective bridge. When *Russell* was decided, municipalities were not separate governmental entities, so claims asserted against municipalities were essentially claims against entire city populations. For a review of the history of the development of the municipal immunity doctrine, see *Long v. City of Weirton*, 214 S.E.2d 832, 851-53 (W. Va. 1975); PROSSER AND KEETON ON THE LAW OF TORTS § 131, at 1051 (W. Keeton 5th ed. 1984) [hereinafter PROSSER & KEETON]; Borchard, *State and Municipal Liability in Tort—Proposed Statutory Reform*, 20 A.B.A. J. 747, 747-48 (1934); James, *Tort Liability of Governmental Units and Their Officers*, 22 U. CHI. L. REV. 610, 621-23 (1955); Note, *Municipal Tort Immunity in Virginia*, 68 VA. L. REV. 639, 640-41 (1982); 57 AM. JUR. 2D *Municipal, School, and State Tort Liability* § 28 (1971). Thus, the basis for the immunity was the theretofore unusual nature of, and lack of precedent for, an action levied against an entire city population. See *City of Weirton*, 214 S.E.2d at 852; PROSSER & KEETON, *supra*, § 131, at 1051; James, *supra*, at 621; Note, *supra*, at 640. In addition, no city treasuries existed to satisfy adverse judgments. See *Russell*, 2 Term. Rep. at 668, 100 Eng. Rep. at 360; *City of Weirton*, 214 S.E.2d at 852; PROSSER & KEETON, *supra*, § 131, at 1051; Note, *supra*, at 640. Municipal immunity, therefore, enjoyed a rationale different from that of the doctrine of sovereign or governmental immunity, whose precept was that "the king can do no wrong." See PROSSER & KEETON, *supra*, § 131, at 1051; Comment, *Local Government Sovereign Immunity: The Need for Reform*, 18 WAKE FOREST L. REV. 43, 43 (1982).

34. See *Wright v. City of Wilmington*, 92 N.C. 156 (1885); *Meares v. Commissioners*, 31 N.C. (1 Ired.) 73 (1848).

lish common law when the North Carolina General Assembly adopted the English common law as of the date of the Declaration of Independence.³⁵ In 1885 the North Carolina courts finally recognized municipal immunity in *Moffitt v. City of Asheville*,³⁶ and the doctrine eventually established itself firmly in North Carolina law.³⁷

Although the doctrine of municipal immunity enjoys certain justifications that remain valid in modern times,³⁸ inroads on the doctrine have gradually evolved.³⁹ For example, several states have simply abolished the principle, either by judicial decision or by statute.⁴⁰ Indeed, the American Law Institute presently states that municipalities enjoy no general immunity.⁴¹ The North Carolina General Assembly, sensitive to this general trend, has declared that municipalities may be held liable to the extent of their liability insurance coverage.⁴² Naturally, once a municipality may be sued, the availability of punitive

35. See LAWS OF NORTH CAROLINA 1777-1778, ch. V, § 2 (1778), reprinted in 24 THE STATE RECORDS OF NORTH CAROLINA, ch. V, § 2, at 162 (Clark ed. 1905). See generally *Steelman v. City of New Bern*, 279 N.C. 589, 591-94, 184 S.E.2d 239, 241-42 (1971) (tracing the history of municipal immunity in North Carolina).

36. 103 N.C. 237, 255, 9 S.E. 695, 697 (1889) (municipality not liable for plaintiff's illness resulting from the municipality's alleged failure to maintain a warm and habitable prison cell).

37. See *Smith v. State*, 289 N.C. 303, 311-12, 222 S.E.2d 412, 418-19 (1976); *Steelman v. City of New Bern*, 279 N.C. 589, 594, 184 S.E.2d 239, 241 (1971); *Casey v. Wake County*, 45 N.C. App. 522, 523, 263 S.E.2d 360, 361, *disc. rev. denied*, 300 N.C. 371, 267 S.E.2d 673 (1980).

38. Municipalities earn no profits and, therefore, are unable to compensate injured plaintiffs without diverting tax funds that are intended to serve public purposes. PROSSER & KEETON, *supra* note 33, § 131, at 1051-52; Borchard, *supra* note 33, at 748; James, *supra* note 33, at 614; Note, *supra* note 33, at 643; 57 AM. JUR. 2D *Municipal, School, and State Tort Liability* § 28, at 40 (1971). Moreover, impending threats of liability and fiscal disaster resulting from the payment of damage awards may inhibit the local government's decision-making process. See Borchard, *supra* note 33, at 748; James, *supra* note 33, at 614; Note, *supra* note 33, at 643; see also *infra* notes 106-07 and accompanying text (discussing the risk of fiscal devastation to municipal corporations posed by the malicious conduct and negligent acts and omissions of municipal employees). See generally PROSSER & KEETON, *supra* note 33, § 131, at 1052 (discussing the obsolescence of the rationale underlying municipal immunity and the various state decisions abolishing the doctrine).

39. Certain reasons for the creation of the municipal immunity, see *supra* note 33, no longer apply, because municipalities are now separate governmental entities. Municipal corporations, as self-governing bodies, undertake and must accept responsibility for the consequences of various public services. In addition, municipalities enjoy the power to tax and, therefore, can afford to compensate injured plaintiffs. PROSSER & KEETON, *supra* note 33, § 131, at 1052; Note, *supra* note 33, at 644-49. As a result, there have been many efforts by state legislatures to limit or abolish the doctrine. PROSSER & KEETON, *supra* note 33, § 131, at 1052; Note, *supra* note 33, at 639 n.2; see *infra* note 40.

40. See, e.g., *Gorrell v. City of Parsons*, 223 Kan. 645, 650, 576 P.2d 616, 620 (1978) ("We conclude that the rule that a municipality is not liable for the negligent acts of its officers and employees in the performance of a 'governmental' function should be abolished. It does not promote justice, and serves no rational purpose."); *Long v. City of Weirton*, 214 S.E.2d 832, 859 (W. Va. 1975) (abrogating municipal tort immunity because of changing social needs, growing governmental responsibilities, and the risks to individuals flowing from increasing governmental activities); *Oroz v. Board of County Comm'rs*, 575 P.2d 1155, 1158 (Wyo. 1978) (repudiating municipal immunity and declaring it anachronistic and obsolete: "Henceforth, the rule is liability—the exception is immunity . . ."); TENN. CODE ANN. §§ 29-20-202 to -206 (1980) (removing municipal immunity for injuries resulting from unsafe streets and highways, dangerous structures, and negligent acts and omissions of municipal employees). See generally PROSSER & KEETON, *supra* note 33, § 131, at 1052 (discussing the obsolescence of the rationale underlying municipal immunity and the various state decisions abolishing the doctrine).

41. See RESTATEMENT (SECOND) OF TORTS § 895C (1977).

42. N.C. GEN. STAT. § 160A-485 (1982). In *Steelman v. City of New Bern*, 279 N.C. 589, 184 S.E.2d 239 (1971), the North Carolina Supreme Court discussed the general assembly's past at-

damages becomes an issue.⁴³

Arguably, municipal immunity from punitive damages is unrelated to the old common-law rule of general municipal immunity, because of the special nature of punitive damages and because an entirely different set of reasons supports the maintenance of municipal immunity against punitive damages.⁴⁴ The principal purposes of punitive damages are to punish the wrongdoer for his or her aggravated conduct and to deter others from committing similar offenses.⁴⁵ Punitive damages are not compensatory and are not a matter of right for the plaintiff.⁴⁶ An award of punitive damages requires a showing of aggravated conduct such as malice, fraudulent motive, or deliberate, wanton disregard of the rights of others.⁴⁷ Indeed, the concept underlying punitive damages is an example of the criminal law's influence on the law of torts.⁴⁸ This concept has been called "an anomaly in the law" in North Carolina.⁴⁹

Because of the extraordinary nature of punitive damages, courts have developed a common-law rule prohibiting the recovery of punitive damages against municipal corporations.⁵⁰ The principal explanation for the maintenance of this rule, despite the demise of general municipal immunity, is that an assessment of punitive damages against a municipal corporation would not satisfy the two fundamental purposes of punitive damages: punishment and deterrence.⁵¹ Courts

tempts to eliminate the doctrine of municipal immunity. "The General Assembly has modified the doctrine but has never abolished it. In fact, a bill was introduced in the 1971 General Assembly to abolish governmental immunity in its entirety, but this bill failed to pass." *Id.* at 595, 184 S.E.2d at 243. The court conceded that the immunity might be obsolete, but because of the doctrine's established place in North Carolina jurisprudence, the court asserted that "any further modification or the repeal of the doctrine of sovereign immunity should come from the General Assembly, not this Court." *Id.*

43. See Note, *Punitive Damage Liability of Municipal Corporations*, 22 WASH. & LEE L. REV. 126, 128 (1965) (discussing the relationship between sovereign immunity and the rule prohibiting the recovery of punitive damages against municipal corporations).

44. See *George v. Chicago Transit Auth.*, 58 Ill. App. 3d 692, 694, 374 N.E.2d 679, 681 (1978); *Feingold v. Southeastern Pa. Transp. Auth.*, 339 Pa. Super. 15, 27, 488 A.2d 284, 291 (1985); *Township of Bensalem v. Press*, 93 Pa. Commw. 235, 248-49, 501 A.2d 331, 338 (1985). But see *Young v. City of Des Moines*, 262 N.W.2d 612, 620 (Iowa 1978) (associating the rule precluding the recovery of punitive damages against municipal corporations with the general doctrine of municipal tort immunity); *Wilson v. City of Eagan*, 297 N.W.2d 146, 149 (Minn. 1980) (discussing policy arguments underlying the allowance of punitive damages against municipal corporations in the context of general sovereign immunity).

45. See PROSSER & KEETON, *supra* note 33, § 2, at 9; Ervin, *Punitive Damages in North Carolina*, 59 N.C.L. REV. 1255, 1256 (1981). But see *Ray v. City of Detroit*, 67 Mich. App. 702, 707, 242 N.W.2d 494, 496 (1976) (mentioning an additional purpose of reimbursing the plaintiff).

46. See *Hardy v. Toler*, 288 N.C. 303, 306, 218 S.E.2d 342, 344 (1975); *Allred v. Graves*, 261 N.C. 31, 35, 134 S.E.2d 186, 190 (1964); PROSSER & KEETON, *supra* note 33, § 2, at 9; Ervin, *supra* note 45, at 1255.

47. See *Hinson v. Dawson*, 244 N.C. 23, 27, 92 S.E.2d 393, 396 (1956); *Lutz Indus. v. Dixie Home Stores*, 242 N.C. 332, 344, 88 S.E.2d 333, 342 (1955); *Binder v. General Motors Acceptance Corp.*, 222 N.C. 512, 516, 23 S.E.2d 894, 896 (1943); PROSSER & KEETON, *supra* note 33, § 2, at 9.

48. PROSSER & KEETON, *supra* note 33, § 2, at 9-10.

49. Ervin, *supra* note 45, at 1256.

50. See, e.g., *City of Gary v. Falcone*, 169 Ind. App. 295, 296, 348 N.E.2d 41, 42 (1976); *Sharapata v. Town of Islip*, 56 N.Y.2d 332, 334, 437 N.E.2d 1104, 1105, 452 N.Y.S.2d 347, 348 (1982); *Feingold v. Southeastern Pa. Transp. Auth.*, 339 Pa. Super. 15, 27, 488 A.2d 284, 291 (1985); *Cole v. City of Houston*, 442 S.W.2d 445, 451 (Tex. Civ. App. 1969).

51. See 18 E. McQUILLIN, *THE LAW OF MUNICIPAL CORPORATIONS* § 53.18a, at 221 (3d rev. ed. 1984); PROSSER & KEETON, *supra* note 33, § 2, at 12.

and scholars agree that if such damages were available against municipal corporations, the impact of the award would fall on innocent taxpayers, and the party truly responsible would not be punished.⁵² Furthermore, plaintiffs have typically been unable to convince the courts that the added threat of punitive damages against municipal corporations would deter public officials from engaging in the wanton and willful conduct that typically calls for the imposition of such damages.⁵³ Generally, courts bar recovery of punitive damages against municipalities despite the trend towards broader municipal liability.⁵⁴

Presently, the overwhelming majority of jurisdictions endorse the rule that, absent an explicit statutory provision to the contrary, punitive damages are not recoverable against a municipal corporation.⁵⁵ In 1982 the North Carolina

52. See, e.g., *City of Newport v. Fact Concerts, Inc.*, 453 U.S. 247, 266-67 (1981); *Smith v. District of Columbia*, 336 A.2d 831, 832 (D.C. 1975); *Chappell v. City of Springfield*, 423 S.W.2d 810, 814 (Mo. 1968); *Nixon v. Oklahoma City*, 555 P.2d 1283, 1285 (Okla. 1976); 18 E. McQUILLIN, *supra* note 51, § 53.18a, at 221; PROSSER & KEETON, *supra* note 33, § 2, at 12; Morris, *Punitive Damages in Tort Cases*, 44 HARV. L. REV. 1173, 1204 (1931); Note, *Punitive Damage Liability of Municipal Corporations in Pennsylvania*, 84 DICK. L. REV. 267, 274 (1979-80).

53. See, e.g., *Smith v. District of Columbia*, 336 A.2d 831, 832 (D.C. 1975); *City of Gary v. Falcone*, 169 Ind. App. 295, 296-97, 348 N.E.2d 41, 42 (1976); *Ranells v. City of Cleveland*, 41 Ohio St. 2d 1, 6-7, 321 N.E.2d 885, 888 (1975); 18 E. McQUILLIN, *supra* note 51, § 53.18a, at 221; Morris, *supra* note 52, at 1204; Note, *supra* note 52, at 275.

54. See, e.g., 18 E. McQUILLIN, *supra* note 51, § 53.18a, at 221; PROSSER & KEETON, *supra* note 33, § 2, at 12.

55. 18 E. McQUILLIN, *supra* note 51, § 53.18a, at 221-22; Annotation, *Recovery of Exemplary or Punitive Damages from Municipal Corporations*, 1 A.L.R.4th 448 (1980); see, e.g., *State v. Sanchez*, 119 Ariz. 64, 66, 579 P.2d 568, 570 (1978); *Smith v. District of Columbia*, 336 A.2d 831, 832 (D.C. 1975); *Fisher v. City of Miami*, 172 So. 2d 455, 457 (Fla. 1965); *City of Columbus v. Myszka*, 246 Ga. 571, 573, 272 S.E.2d 302, 305 (1980); *Fulton County v. Baranan*, 240 Ga. 837, 838, 242 S.E.2d 617, 619 (1978), *cert. denied*, 461 U.S. 929 (1983); *Sudeikis v. Chicago Transit Auth.*, 81 Ill. App. 3d 838, 842, 401 N.E.2d 1114, 1117 (1980); *George v. Chicago Transit Auth.*, 58 Ill. App. 3d 692, 693, 374 N.E.2d 679, 680 (1978); *Speer v. City of Dodge City*, 6 Kan. App. 2d 798, 800-01, 636 P.2d 178, 181 (1981); *McHugh v. City of Wichita*, 1 Kan. App. 2d 180, 183-84, 563 P.2d 497, 500 (1977); *Foss v. Maine Turnpike Auth.*, 309 A.2d 339, 345 (Me. 1973); *Michaud v. City of Bangor*, 160 Me. 285, 288, 203 A.2d 687, 689 (1964); *Herilla v. Mayor of Baltimore*, 37 Md. App. 481, 492, 378 A.2d 162, 169 (1977); *Desforge v. City of West St. Paul*, 231 Minn. 205, 208, 42 N.W.2d 633, 634 (1950); *Urban Renewal Agency v. Tackett*, 255 So. 2d 904, 905 (Miss. 1971); *Chappell v. City of Springfield*, 423 S.W.2d 810, 813 (Mo. 1968); *Rascoe v. Town of Farmington*, 62 N.M. 51, 55, 304 P.2d 575, 577 (1956); *Brown v. Village of Deming*, 56 N.M. 302, 316, 243 P.2d 609, 618 (1952); *Long v. City of Charlotte*, 306 N.C. 187, 208, 293 S.E.2d 101, 115 (1982); *Ranells v. City of Cleveland*, 41 Ohio St. 2d 1, 7-8, 321 N.E.2d 885, 888 (1975); *Berke v. Ohio Dept. of Pub. Welfare*, 52 Ohio App. 2d 271, 273-74, 369 N.E.2d 1056, 1058 (1976); *Nixon v. Oklahoma City*, 555 P.2d 1283, 1285 (Okla. 1976); *Township of Bensalem v. Press*, 93 Pa. Commw. 235, 249, 501 A.2d 331, 338 (1985); *Tipton County Bd. of Educ. v. Dennis*, 561 S.W.2d 148, 152 (Tenn. 1978); *Johnson v. Smith*, 621 S.W.2d 570, 572 (Tenn. Ct. App. 1981); *San Antonio River Auth. v. Garrett Bros.*, 528 S.W.2d 266, 279 (Tex. Ct. App. 1975).

Frequently, decisions upholding awards of punitive damages against municipalities have lost precedential value as a result of subsequent legislative or judicial action. For example, the court in *Young v. City of Des Moines*, 262 N.W.2d 612, 622 (Iowa 1978), held that the same rules of liability should apply to municipal and private corporations. Four years later, however, the Iowa Legislature brought that state in line with the vast majority of jurisdictions, providing for municipal liability for punitive damages only when expressly imposed by statute. See IOWA CODE ANN. § 613A.4.5 (West Supp. 1986); see also *Sharapata v. Town of Islip*, 56 N.Y.2d 332, 437 N.E.2d 1104, 452 N.Y.S.2d 347 (1982) (overruling trial court decision holding that municipalities could be liable for punitive damages); *Township of Bensalem v. Press*, 93 Pa. Commw. 235, 501 A.2d 331 (1985) (overruling a federal district court decision holding that municipalities may be liable for punitive damages under Pennsylvania law). *But cf.* *Ray v. City of Detroit*, 67 Mich. App. 702, 707-08, 242 N.W.2d 494, 496 (1976) (noting that a municipal corporation may be liable for exemplary damages, when such damages are compensatory in nature and signify an enlargement of actual damages).

Supreme Court adopted this rule in *Long*,⁵⁶ an inverse condemnation and nuisance action arising out of the operation of Charlotte's Douglas International Airport.⁵⁷

The supreme court's approval of the majority rule in *Long* has made it necessary for the court to interpret individual statutes to determine whether they contain express provisions permitting recovery of punitive damages against municipal corporations. In *Jackson* the statute in question was North Carolina's Wrongful Death Act.⁵⁸ Initially, the Act offered decedents' representatives a right of action for the benefit of the decedents' heirs, but the damages recoverable were strictly compensatory.⁵⁹ In 1969 the North Carolina General Assembly comprehensively rewrote the statute to provide for punitive damages.⁶⁰ The resulting Wrongful Death Act "in no way resemble[d] its predecessor,"⁶¹ especially regarding the availability of punitive damages.⁶² The present wrongful death statute clearly contemplates the award of punitive damages under proper circumstances.⁶³ Against this background, the *Jackson* court undertook to determine whether the wrongful death statute provides for punitive damages against municipal corporations.

Prior to *Jackson* no North Carolina appellate level decision had sought to determine whether a municipal corporation would fall within the scope of the Wrongful Death Act's "person or corporation" language.⁶⁴ Therefore, no binding precedent guided the *Jackson* court on the issue of municipal immunity from punitive damages under the Wrongful Death Act.⁶⁵ As a result, the court relied

56. 306 N.C. at 208, 293 S.E.2d at 115.

57. In deciding this issue of first impression in North Carolina, Justice Meyer, writing for the majority, stated, "We hold that in the absence of statutory provisions to the contrary, municipal corporations are immune from punitive damages." *Id.*

58. N.C. GEN. STAT. § 28A-18-2 (1984); *Jackson*, 316 N.C. at 263, 341 S.E.2d at 526.

59. *Hoke v. Atlantic Greyhound Corp.*, 226 N.C. 332, 337, 38 S.E.2d 105, 109 (1946).

60. See Act of April 14, 1969, ch. 215, § 1, 1969 N.C. Sess. Laws 194, 194.

61. Comment, *The New North Carolina Wrongful Death Statute*, 48 N.C.L. REV. 594, 595 (1970).

62. Byrd, *Recent Developments in North Carolina Tort Law*, 48 N.C.L. REV. 791, 801 (1970).

63. See N.C. GEN. STAT. § 28A-18-2 (1984). In 1974 the general assembly repealed the 1969 statute, Act of April 14, 1969, ch. 215, § 1, 1969 N.C. Sess. Laws 194, 194, and replaced it with the present version, Act of April 12, 1974, ch. 1329, 1974 N.C. Sess. Laws 629 (codified at N.C. GEN. STAT. § 28A-18-2 (1984)), which retains the provision for recovery of punitive damages. For the relevant statutory language of the Wrongful Death Act, see *supra* note 2.

64. For the pertinent statutory language of the Wrongful Death Act, see *supra* note 2. In *Thorpe v. Wilson*, 58 N.C. App. 292, 299, 293 S.E.2d 675, 680 (1982), the only North Carolina opinion attempting to define the scope of this statutory language, the North Carolina Court of Appeals ruled there could be no recovery of punitive damages against the personal representative of a deceased wrongdoer.

65. Nonetheless, the Housing Authority argued that the proscription of punitive damage claims made against representatives of deceased wrongdoers, developed in *Thorpe v. Wilson*, 58 N.C. App. 292, 299, 293 S.E.2d 675, 680 (1982), should prohibit by analogy all punitive damage claims against municipal corporations. See *Jackson*, 316 N.C. at 270, 341 S.E.2d at 530 (Meyer, J., dissenting); Brief for Defendant-Appellant at 8. One reason for the court's holding in *Thorpe* was that "[t]he death of the wrongdoer preclude[d] his being punished by the assessment of punitive damages." *Thorpe*, 58 N.C. App. at 299, 293 S.E.2d at 680. Similarly, an imposition of punitive damages against a municipal corporation would fail to punish the wrongdoer because those bearing the brunt of the award would be the innocent taxpayers. See *infra* notes 95-99 and accompanying text. The *Jackson* majority, however, was not persuaded by this line of reasoning.

The court also lacked persuasive authority from other jurisdictions considering precisely the

entirely⁶⁶ on North Carolina's legislative rules of statutory construction⁶⁷ in finding that the general assembly intended to allow awards of punitive damages against municipal corporations.⁶⁸ The North Carolina Wrongful Death Act provides for punitive damages against the "person" liable for the death,⁶⁹ and for purposes of statutory construction, the term "person" may include munici-

same issue. Research could discern no cases on point construing, for the purpose of determining municipal liability for punitive damages, statutory language similar to that in *Jackson*.

Given the general presumption against municipal liability for punitive damages, *see supra* text accompanying note 55, wrongful death actions frequently require courts to interpret wrongful death statutes to determine if they contain the requisite express provision for punitive damages. Under the general rule, whether a statute expressly provides for punitive damages is the threshold issue, and courts often never reach the question of a municipal corporation's liability for such damages. *See, e.g., Bennett v. City of Cleveland*, No. 50479, slip op. at 9 (Ohio Ct. App. June 5, 1986). The Arizona Supreme Court, however, has confronted this issue. In *State v. Sanchez*, 119 Ariz. 64, 579 P.2d 568 (1978), the court announced that a plaintiff could not recover punitive damages from defendant State of Arizona or its political subdivisions under the State's wrongful death statute. *Id.* at 68-69, 579 P.2d at 572-73. The court's reasoning was based on the public policy considerations that have given rise to the general rule prohibiting the recovery of punitive damages against municipal corporations. *See id.* at 66-67, 579 P.2d at 570-71; *see also infra* text accompanying notes 95-108 (discussing the policy considerations underlying the general rule). The wrongful death statute at issue in *Sanchez* imposed liability for punitive damages on "the person or the corporation" responsible for the wrongful death, ARIZ. REV. STAT. ANN. §§ 12-611, -613 (1982), but for purposes of statutory construction the term "person" did not include bodies politic. *See ARIZ. REV. STAT. ANN.* § 1-215 (1973). The Arizona court could have denied plaintiff's claim for punitive damages simply on the basis of this statute, but instead the court dealt directly with the policy implications of subjecting municipal corporations to liability for punitive damages without delving into the mechanics of statutory construction. *See Sanchez*, 119 Ariz. at 66-68, 579 P.2d at 570-72.

Perhaps the *Jackson* court chose not to look to *Sanchez* for guidance because the "person or corporation" language in the Arizona statute simply could not be construed to include municipal corporations. Yet the North Carolina Supreme Court should have noted that, notwithstanding the rules of statutory construction, the Arizona court deemed the overriding policy considerations to be dispositive of the issue of municipal liability for punitive damages.

In *Brown v. Morgan County*, 518 F. Supp. 661 (N.D. Ala. 1981), the Federal District Court for the Northern District of Alabama noted that plaintiffs seeking recovery under that state's wrongful death statute could receive only punitive damages; compensatory damages were not available. *See id.* at 663; *Hardin v. Sellers*, 270 Ala. 156, 157-58, 117 So. 2d 383, 384-85 (1960); ALA. CODE § 6-5-410 (1975). In that situation a plaintiff could recover punitive damages against a defendant municipal corporation. *See Brown*, 518 F. Supp. at 663; *see also Ray v. City of Detroit*, 67 Mich. App. 702, 707-08, 242 N.W.2d 494, 496 (1976) (holding that municipal corporations may be liable for exemplary damages when such damages are "compensatory" in nature); *Myers v. City of San Francisco*, 42 Cal. 215, 217 (1871) (an antiquated precedent seldom relied on that equitably construed a wrongful death statute to impose liability for punitive damages on municipalities).

In *Bond v. City of Huntington*, 276 S.E.2d 539 (W. Va. 1981), the West Virginia Supreme Court of Appeals determined that, under that state's wrongful death statute, punitive damages could be recovered in appropriate circumstances. *Id.* at 545. Thus, the court reversed the trial court's summary judgment in favor of defendant municipality, but it never ruled on the question of municipal liability for punitive damages, because the parties failed to raise the issue at trial. *Id.* at 546 n.9.

66. The majority opinion in *Jackson* never adopted, nor even discussed, the policy arguments that weigh in favor of allowing punitive damages against municipal corporations. For example, courts arguably should not create discriminatory double standards by denying indigent and low-to-moderate income occupants of public housing the same avenues of recovery that are available to tenants who can afford to rent from private landlords. *See infra* text accompanying notes 110-14. Furthermore, according to an "enterprise liability" theory, the costs of a government's torts are simply costs of government, and the public should maintain these costs in the form of taxes. Members of the public benefit from government, and so it is reasonable to expect these citizens to bear the costs of government. *See infra* text accompanying notes 115-16.

67. N.C. GEN. STAT. § 12-3 (1986).

68. *See supra* text accompanying notes 29-32.

69. *See supra* note 2.

pal corporations.⁷⁰

In accordance with this syllogism, the court honored the "legislative intent" underlying the Wrongful Death Act. As the majority maintained, had the general assembly intended to shield municipal corporations from punitive damage liability in wrongful death actions, it could have done so explicitly in the statute.⁷¹ Furthermore, the court's holding appears consistent with the recent trend of North Carolina courts in liberally granting punitive damages.⁷² The *Jackson* court reached its conclusion with noticeable ease,⁷³ when in fact the issues involved deserved considerable attention and analysis. Consequently, several problems, including considerations of statutory construction and public policy, plague the majority opinion.

To apply the rule adopted in *Long*⁷⁴ the court was required to determine whether the Wrongful Death Act expressly provides for the availability of punitive damages against municipal corporations. In his dissent, Justice Meyer argued that, in construing the statute, the court erred in two respects.⁷⁵ First, based on the wording of the statute, a plaintiff should not be able to recover punitive damages for wrongful death in a situation in which the decedent could not have recovered such damages had the decedent lived.⁷⁶ Had Mary Magdalene Jackson survived the carbon monoxide exposure, she could not have asserted a claim for punitive damages. Defendant was a municipal corporation⁷⁷ and there would have been no applicable statute expressly providing for punitive damages, as required for an award of such damages by *Long*.⁷⁸

70. N.C. GEN. STAT. § 12-3(6) (1986); see *supra* note 31.

71. *Jackson*, 316 N.C. at 264, 341 S.E.2d at 526.

72. Traditionally, punitive damages in North Carolina have been an "anomaly in the law," and judges have manifested an "unwillingness to expand the doctrine beyond the limits imposed by authoritative decisions of the court." Ervin, *supra* note 45, at 1256. In actions for fraud, for example, plaintiffs in North Carolina were once required to demonstrate elements of insult, indignity, malice, and oppression to win awards for punitive damages. See, e.g., *Swinton v. Savoy Realty Co.*, 236 N.C. 723, 726, 73 S.E.2d 785, 787 (1953), overruled by *Newton v. Standard Fire Ins. Co.*, 291 N.C. 105, 229 S.E.2d 297 (1976). In 1976 the supreme court overruled *Swinton* insofar as that holding required aggravated conduct in addition to actionable fraud for a plaintiff to receive punitive damages. *Newton v. Standard Fire Ins. Co.*, 291 N.C. 105, 113-14, 229 S.E.2d 297, 302 (1976). The North Carolina Court of Appeals recently held that punitive damages are recoverable against drunk drivers without regard to motive or intent. *Huff v. Chrismon*, 68 N.C. App. 525, 532-33, 315 S.E.2d 711, 714, *disc. rev. denied*, 311 N.C. 756, 321 S.E.2d 134 (1984).

73. The court settled the issue by simply allowing substitution of the words "body politic," see *supra* note 31, for the word "person" in the wrongful death statute, see *supra* note 2. The court thus inferred a legislative intent to subject municipal corporations to punitive damage liability in wrongful death actions from this mere statutory implication. *Jackson*, 316 N.C. at 265, 341 S.E.2d at 527 (Meyer, J., dissenting).

74. In *Long* the North Carolina Supreme Court adopted the rule enunciated in the vast majority of jurisdictions, see *supra* note 55 and accompanying text, that, absent an express statutory provision to the contrary, punitive damages are not recoverable against a municipal corporation. *Long*, 306 N.C. at 208, 293 S.E.2d at 115.

75. *Jackson*, 316 N.C. at 265, 341 S.E.2d at 527 (Meyer, J., dissenting).

76. A plaintiff has an actionable claim under the Wrongful Death Act "[w]hen the death of a person is caused by a wrongful act, neglect or default of another, such as would, if the injured person had lived, have entitled him to an action for damages therefor . . ." N.C. GEN. STAT. § 28A-18-2(a) (1984).

77. *Long*, 306 N.C. at 208, 293 S.E.2d at 115.

78. *Jackson*, 316 N.C. at 265, 341 S.E.2d at 527 (Meyer, J., dissenting); see *supra* note 76. Curiously, the majority opinion never specifically addressed this aspect of Justice Meyer's dissent.

Second, in Justice Meyer's estimation, the court erred in interpreting the Wrongful Death Act to provide expressly for punitive damages against municipal corporations.⁷⁹ The majority ignored the copious considerations of public policy that militate against the imposition of punitive damages on municipalities.⁸⁰ The court mechanically substituted the language of one statute for that of another.⁸¹ This overly formalistic approach, Meyer argued, resulted in an attenuated statutory construction, which, because of the policy implications involved, could not have been consistent with the intentions of the general assembly in drafting the wrongful death statute.⁸²

Certainly the *Jackson* court adhered to the letter of the legislative rule of statutory interpretation in equating the word "person" in the Wrongful Death Act with the term "body politic" in the rule of statutory construction.⁸³ Nonetheless, the court overlooked several fundamental common-law rules of statutory construction. For instance, statutes in derogation of the common law must be strictly construed.⁸⁴ In *Long*,⁸⁵ the supreme court openly adopted the common-law rule proscribing the recovery of punitive damages against municipal corporations.⁸⁶ In *Jackson*, however, the court construed the statute in derogation of the rule to permit such a recovery, despite the absence of an express provision for municipal liability.⁸⁷ Municipal immunity from punitive damages was the established common-law rule, and the wrongful death statute's language was not sufficiently explicit to divest municipal corporations of this protection firmly grounded in North Carolina law.⁸⁸

Moreover, in divining the true meaning of a statute, the court should heed such matters as the general state of the law at the time of the statute's enactment and the prevailing public policies relating to that area of the law.⁸⁹ The public policy concerns that militate against the imposition of punitive damage liability on municipal corporations⁹⁰ were no less valid in 1973, the year of the present Wrongful Death Act's implementation. Thus, it is unreasonable to conclude that the general assembly, against the formidable backdrop of judicial opinion following the policy-laden general rule,⁹¹ would have contemplated the availa-

79. *Jackson*, 316 N.C. at 266, 341 S.E.2d at 527 (Meyer, J., dissenting).

80. See *infra* notes 95-108 and accompanying text.

81. *Jackson*, 316 N.C. at 271, 341 S.E.2d at 530 (Meyer, J., dissenting).

82. *Id.*

83. See *supra* notes 28-32 and accompanying text.

84. *Ellington v. Bradford*, 242 N.C. 159, 162, 86 S.E.2d 925, 927 (1955); *McKinney v. Deneen*, 231 N.C. 540, 542, 58 S.E.2d 107, 109 (1950); *Grimes v. Grimes*, 207 N.C. 778, 780, 178 S.E. 573, 574 (1935); see also *Swift & Co. v. Tempelos*, 178 N.C. 487, 491, 101 S.E. 8, 10 (1919) (statute is not to be construed so as to include more than its plain and natural meaning.).

85. *Long* involved a claim for punitive damages in an inverse condemnation and nuisance suit. See *supra* text accompanying note 57.

86. *Long*, 306 N.C. at 208, 293 S.E.2d at 115.

87. See *Jackson*, 316 N.C. at 271, 341 S.E.2d at 530 (Meyer, J., dissenting).

88. *Id.*; see *Long*, 306 N.C. at 206-08, 293 S.E.2d at 114-15.

89. *Kendall v. Stafford*, 178 N.C. 461, 464, 101 S.E. 15, 16 (1919); *Nance v. Southern Ry.*, 149 N.C. 366, 374-75, 63 S.E. 116, 119 (1908).

90. See *infra* notes 95-108 and accompanying text.

91. See *supra* note 55 and accompanying text.

bility of punitive damages against municipal corporations.⁹² At any rate, had the general assembly intended to subject municipal corporations to punitive damage liability, it would most likely have done so explicitly.⁹³ This supposition is supported by the unmistakable reluctance on the part of the vast majority of jurisdictions to grant recovery of punitive damages against municipal corporations.⁹⁴

Not only did the *Jackson* court interpret the wrongful death statute broadly, but it did so in the face of various adverse public policy ramifications. Most immediately, the court's holding in *Jackson* offends the two principal rationales that gave rise to the rule prohibiting awards of punitive damages against municipal corporations absent explicit statutory provisions to the contrary.⁹⁵ The first of these rationales pertains to the central function of punitive damages: punishment. One purpose of punitive damages is to vindicate the public by punishing wrongdoers.⁹⁶ An award of punitive damages against a municipal corporation, however, serves only to penalize and burden the public by raising the costs of government and by increasing the public's tax liability.⁹⁷ The United States Supreme Court has asserted, "Neither reason nor justice suggests that such retribution should be visited upon the shoulders of blameless or unknowing taxpayers."⁹⁸ Yet, with respect to wrongful death actions, the *Jackson* court has effectively provided for windfalls to plaintiffs at the expense of the public.⁹⁹

The second of the two principal rationales apparently unheeded by the *Jackson* court is the deterrent function of punitive damages. Courts grant punitive damages to deter future willful or wanton conduct.¹⁰⁰ Yet when a court awards punitive damages against a municipal corporation, it is by no means self-evident that public officials will be deterred from the conduct sought to be de-

92. See *Jackson*, 316 N.C. at 271, 341 S.E.2d at 530 (Meyer, J., dissenting).

93. See *id.*

94. See *supra* note 55 and accompanying text.

95. See *supra* notes 50-54 and accompanying text.

96. *City of Newport v. Fact Concerts, Inc.*, 453 U.S. 247, 267 (1981); *Jackson*, 316 N.C. at 268, 341 S.E.2d at 529 (Meyer, J., dissenting); 18 E. McQUILLIN, *supra* note 51, § 53.18a, at 221.

97. *Fact Concerts*, 453 U.S. at 267; *Jackson*, 316 N.C. at 269, 341 S.E.2d at 529 (Meyer, J., dissenting); 18 E. McQUILLIN, *supra* note 51, § 53.18a, at 221; see *supra* note 52 and accompanying text.

98. *Fact Concerts*, 453 U.S. at 267. In *Fact Concerts*, the United States Supreme Court, in ruling that municipalities are exempt from punitive damages in actions brought under 42 U.S.C. § 1983 (1982), further discussed the undesirable policy ramifications flowing from an allowance of punitive damages against municipal corporations:

Punitive damages by definition are not intended to compensate the injured party, but rather to punish the tortfeasor whose wrongful action was intentional or malicious, and to deter him and others from similar extreme conduct. Regarding retribution, it remains true that an award of punitive damages against a municipality "punishes" only the taxpayers, who took no part in the commission of the tort. These damages are assessed over and above the amount necessary to compensate the injured party Indeed, punitive damages imposed on a municipality are in effect a windfall to a fully compensated plaintiff, and are likely accompanied by an increase in taxes or a reduction of public services for the citizens footing the bill.

Id. at 266-67.

99. See *id.* at 267; *Jackson*, 316 N.C. at 269, 341 S.E.2d at 529 (Meyer, J., dissenting).

100. See *supra* note 45 and accompanying text; 18 E. McQUILLIN, *supra* note 51, § 53.18a, at 221.

terred.¹⁰¹ The mere threat of punitive damages is no more likely to deter a public official from such conduct than are general expectations that public officials will perform their jobs well.¹⁰² Nor is it clear that the discharge of the tortfeasor-public official will inevitably follow simply as a result of a recovery of punitive damages from a municipal corporation.¹⁰³ Courts and scholars agree, on the other hand, that sufficient measures of deterrence are available through the electoral process, so that an official with a public record stained by evidence of deplorable conduct will lose his or her position at the hands of the voting public.¹⁰⁴

The *Jackson* holding also contravenes public policy in other respects. Because wrongful death plaintiffs in North Carolina may now seek punitive damages against municipal corporations, courts will allow evidence of the unlimited taxing power of the defendant municipal corporations.¹⁰⁵ The door is therefore open to ever larger damage awards, and the risk of fiscal devastation to municipal corporations is apparent,¹⁰⁶ especially in light of the prevailing municipal insurance crisis.¹⁰⁷ Furthermore, allowing punitive damage awards will deplete municipal funds that would otherwise finance governmental services, allowing

101. See *supra* note 53 and accompanying text.

102. *Fact Concerts*, 453 U.S. at 268; *Chappell v. City of Springfield*, 423 S.W.2d 810, 814 (Mo. 1968); *Ranells v. City of Cleveland*, 41 Ohio St. 2d 1, 6-7, 321 N.E.2d 885, 888 (1975); 18 E. McQUILLIN, *supra* note 51, § 53.18a, at 221.

In *Fact Concerts* the United States Supreme Court maintained:

[I]t is far from clear that municipal officials . . . would be deterred from wrongdoing by the knowledge that large punitive awards could be assessed based on the wealth of their municipality Thus, assuming, *arguendo*, that the responsible official is not impervious to shame and humiliation, the impact on the individual tortfeasor of this deterrence in the air is at best uncertain.

453 U.S. at 268-69.

103. *Fact Concerts*, 453 U.S. at 268-69; *Jackson*, 316 N.C. at 269, 341 S.E.2d at 529 (Meyer, J., dissenting).

104. *E.g.*, *Chappell v. City of Springfield*, 423 S.W.2d 810, 814 (Mo. 1968); 18 E. McQUILLIN, *supra* note 51, § 53.18a, at 221; Note, *supra* note 52, at 276. The electoral process is thought to deter unelected officials as well from committing egregious acts, because these individuals are accountable to superior officials who are answerable to the voting public. 18 E. McQUILLIN, *supra* note 51, § 53.18a, at 221.

105. See, e.g., *Fisher v. City of Miami*, 172 So. 2d 455, 457 (Fla. 1965); *Ranells v. City of Cleveland*, 41 Ohio St. 2d 1, 8, 321 N.E.2d 885, 889 (1975); Note, *supra* note 52, at 277.

106. *Jackson*, 316 N.C. at 272, 341 S.E.2d at 531 (Meyer, J., dissenting). In *City of Newport v. Fact Concerts, Inc.*, 453 U.S. 247 (1981), the United States Supreme Court, in denying the recovery of punitive damages against municipalities in actions brought under 42 U.S.C. § 1983 (1982), stated:

Under this expanded liability, municipalities and other units of state and local government face the possibility of having to assure compensation for persons harmed by abuses of governmental authority covering a large range of activity in everyday life. To add the burden of exposure for the malicious conduct of individual government employees may create a serious risk to the financial integrity of these governmental entities.

Id. at 270.

107. See generally Blodgett, *Premium Hikes Stun Municipalities*, A.B.A. J., July 1, 1986, at 48 (discussing the municipal insurance crisis and its causes, such as the evaporation of municipal tort immunity, the recent tort litigation explosion, and the increase in damage awards); Hunter & Borzilleri, *The Liability Insurance Crisis: Insurers Put the Squeeze on Consumers*, TRIAL, April 1986, at 42 (discussing some of the problems caused by increases in insurance premiums and suggesting solutions); Young, *Tort Judgment Against Cities: The Sky's the Limit*, 1983 DET. C.L. REV. 1509 (discussing the causes and consequences of large verdicts imposed on municipalities).

individual plaintiffs to profit at the expense of the general public.¹⁰⁸ The *Jackson* court, however, failed to consider these questions of public policy. Rather, the court, by relying on a formalistic construction of the wrongful death statute, was convinced that the general assembly had intended to remove municipal immunity from punitive damages. The court neither disputed the Housing Authority's policy arguments nor advanced any policy justifications on behalf of its holding.¹⁰⁹

This is not to say, however, that no policy rationales support the majority holding. Judge Phillips of the court of appeals noted, for instance, that courts should not promote discriminatory double standards by limiting the avenues of recovery available to penurious tenants of public housing; recovery of punitive damages, after all, is open to more affluent tenants who rent from private landlords.¹¹⁰ As a practical matter, a rule altogether precluding the recovery of punitive damages against municipal corporations would divest indigent tenants of an opportunity available to private tenants. Such a rule, however, would not signify any deprivation of a right because punitive damages are a matter of jury discretion and are not given as of right.¹¹¹ Furthermore, punitive damages, designed to punish and deter egregious conduct, are not compensation, but are instead a windfall awarded over and above what is necessary to make the plaintiff "whole."¹¹² Because an imposition of punitive damages on a municipality will not advance the principal purposes of such damages,¹¹³ a punitive damages award appears even more like a private benefit. In balancing public policy considerations, it is better that the innocent taxpaying public be spared the need of paying a penalty than a plaintiff receive a private windfall at the public's expense.¹¹⁴

Advocates of the majority decision in *Jackson* might also argue that damages paid by a municipality in an action brought on the basis of a governmental tort simply represent a cost of government, and that this cost should be borne by the public through the payment of taxes; the same citizens who benefit from government services should be responsible for the various costs of government.¹¹⁵ Again, however, the extraordinary nature of punitive damages undermines the validity of such a contention. To the extent that one accepts the

108. See, e.g., James, *supra* note 33, at 621; Comment, *supra* note 33, at 53; Note, *supra* note 33, at 643.

109. See *supra* notes 65-66. Furthermore, the majority merely admitted the existence of the Housing Authority's policy arguments. *Jackson*, 316 N.C. at 265, 341 S.E.2d at 526. The general assembly's intent as manifested in the wrongful death statute, insisted the court, was the overriding concern. *Id.*

110. See *Jackson*, 73 N.C. App. at 371, 326 S.E.2d at 300; see also *supra* note 18 (discussing the discriminatory effect of a rule denying public housing tenants the right to recover punitive damages against public housing authorities).

111. See *supra* note 46 and accompanying text.

112. *City of Newport v. Fact Concerts, Inc.*, 453 U.S. 247, 267 (1981); *Jackson*, 316 N.C. at 269, 341 S.E.2d at 530 (Meyer, J., dissenting).

113. See *supra* notes 95-104 and accompanying text.

114. See *Fact Concerts*, 453 U.S. at 267; *Jackson*, 316 N.C. at 269, 341 S.E.2d at 529 (Meyer, J., dissenting); 18 E. McQUILLIN, *supra* note 51, § 53.18a, at 221.

115. See *Smith v. State*, 289 N.C. 303, 312-13, 222 S.E.2d 412, 419 (1976); James, *supra* note 33, at 614; Comment, *supra* note 33, at 55.

"enterprise liability" theory, the compensation, or "making whole" of a plaintiff injured as the result of tortious conduct of a municipal agent would qualify as a just cost of government.¹¹⁶ Once again, however, an allowance of punitive damages, the purposes of which are to punish and deter aggravated conduct,¹¹⁷ is a windfall to the plaintiff who already has been made whole through the payment of compensatory damages.¹¹⁸ This payment is not a valid cost of government. The highest duty of any government should be to its broad base of taxpaying constituents.

To sustain a holding in defiance of the weight of the Housing Authority's persuasive policy arguments should have required a forceful demonstration of the general assembly's clear intent to remove municipal immunity from punitive damages in wrongful death actions. Yet the *Jackson* court upheld the availability of these damages on the basis of a bare inference of legislative intent grounded in "the simple tactic of reading the words 'body politic' into a statutory provision which 'merely provides for punitive damages.'"¹¹⁹ The rule adopted by the supreme court in *Long* provides for municipal immunity against punitive damages, except when statutory authority expressly removes the immunity.¹²⁰ The Wrongful Death Act embodies no such express statutory provision.¹²¹

The North Carolina Supreme Court has both misapplied the rule in *Long*,¹²² and misconstrued the Wrongful Death Act. Absent an express statutory provision to the contrary, it is not reasonable to infer a legislative intent to impose punitive damage liability on municipal corporations, especially in light of the decisive policy factors that favor the maintenance of municipal immunity against punitive damages.¹²³ Any provision in the wrongful death statute for punitive damages against municipal corporations, if indeed such a provision exists, is by no means express. The *Jackson* court's decision lacks merit from both a logical and a pragmatic point of view, and the North Carolina General Assem-

116. See *supra* note 112 and accompanying text.

117. See *supra* note 45 and accompanying text.

118. See *supra* notes 112-14 and accompanying text.

119. *Jackson*, 316 N.C. at 271, 341 S.E.2d at 530 (Meyer, J., dissenting) (quoting the majority opinion).

120. See *supra* notes 55-57 and accompanying text.

121. Justice Meyer declared:

Had our legislature intended to authorize the recovery of punitive damages in this situation, it could have done so by including "municipal corporations" when it provided "the person or corporation" language in the wrongful death statute. The reasoning of the majority in its analysis that the definition of person in the remote N.C.G.S. § 12-3(6) should be read into the wrongful death provision of N.C.G.S. Chapter 28A is strained and untenable. It is inescapable that the Wrongful Death Act contains no "express statutory authority" for recovery of punitive damages against municipalities as required by *Long*.

Jackson, 316 N.C. at 271, 341 S.E.2d at 530 (Meyer, J., dissenting).

122. See *supra* note 74.

123. See *supra* notes 95-108 and accompanying text.

bly should now come forward and clarify its position regarding punitive damage liability for municipal corporations under the Wrongful Death Act.

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