

2010 WL 5853933 (Ill.) (Appellate Brief)
Supreme Court of Illinois.

Thomas VINCENT, as Legal Representative of the Estate of Marjorie Vincent, deceased, Plaintiff-Appellant,
v.
ALDEN-PARK STRATHMOOR, INC., a corporation, Defendant-Appellee.

No. 110406.
November 16, 2010.

Appeal from the Appellate Court of Illinois, Second District, Appeal No. 2-09-0625
On Appeal from the Circuit Court for the 17th Judicial Circuit, Winnebago
County, Illinois, Circuit No. 07 L 448 Trial Judge: Honorable Edward Prochaska

Plaintiff-Appellant's Brief

Daniel T. Gilbert of Barrett & Gilbert, LLP, 1645 Temple Ln., Rockford IL, 61112, 815-332-9600, Frank A. Perrecone of Ferolie & Perrecone, Ltd., 321 West State Street, Suite 800, Rockford, IL 61101-1045, 815-962-2700, Attorneys for Plaintiff-Appellant.

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***4 INTRODUCTION**

This is a wrongful death and survival action brought by Thomas Vincent (“Thomas”) to recover damages occasioned by the injury and death of his mother, Marjorie Vincent (“Marjorie”), a resident of Defendant nursing home, Alden-Park Strathmoor, Inc. (“Alden-Park”). The First Amended Complaint alleges causes of action based upon violations of the Illinois Nursing Home Care Act, [210 ILCS 45/1-101, et. seq.](#), and common law medical negligence. On Alden-Park's motion, the trial court struck Thomas' claim for punitive damages. This appeal arises from the pleadings and results from a decision by the appellate court, Second District, answering a certified question of the trial court in the negative. *Thomas Vincent v. Alden-Park Strathmoor, Inc.*, No. 2-09-0625 (Ill. App. 2nd Dist., 4/7/2010)

ISSUE PRESENTED FOR REVIEW

The certified question presented by the trial court to the appellate court is as follows: “Whether common law punitive damages are available in an action brought by the personal representative of the estate of a deceased nursing home resident based on the Survival Act for willful and wanton violations of the Nursing Home Care Act which caused injuries that ultimately claimed her life.” R. C191. While punitive damages, as a general rule, do not survive the death of an injured party, this case presents the question of whether or not claims for punitive damages survive the death of a deceased nursing home resident whose ***5** injuries and death are alleged to have resulted from willful and wanton violations of the Illinois Nursing Home Care Act.

STATEMENT OF FACTS

Marjorie died before the filing of this lawsuit. R. C99. Prior to her death, Marjorie was a resident of Alden-Park, a nursing home. R. C100. Thomas, as Marjorie's legal representative, filed an action for damages against Alden-Park arising out of Alden-Park's care of Marjorie prior to her death. R. C99. The action sought compensatory and punitive damages pursuant to the Survival Act, [755 ILCS 5/27-6](#) [210 ILCS 45/1 et seq.](#), and the Wrongful Death Act. R. C99. Liability was premised on both negligent and willful and wanton violations of The Illinois Nursing Home Care Act, [740 ILCS 180/1, et seq.](#), as well as common law medical negligence. R. C99. In Count III of the First Amended Complaint, Thomas reserved the right to request punitive damages under [735 ILCS 5/2-604](#). R. C111. Punitive damages are not available by statute in medical negligence claims.

Alden-Park filed a motion to strike Thomas' reservation of the right to request punitive damages in Count III on the basis that such damages do not survive Marjorie's death and that punitive damages are not available under the Nursing Home Care Act. R. C121. These issues were briefed and argued before the trial court. On March 31, 2009, the trial court granted Alden Park's motion to strike Thomas' request for punitive damages. R. C179. Plaintiff then requested leave to file an interlocutory appeal of the order under ***6** [Supreme Court Rule 308\(a\)](#). R. C181. Leave was granted by the court on June 2, 2009. R. C191. The appellate court below granted Thomas' [Rule 308\(a\)](#) petition to answer the trial court's certified question on this issue. The appellate court answered the certified question in the negative and remanded the case for further proceedings consistent with its opinion. (Appendix part B) Thomas then sought and was granted leave to appeal the decision of the appellate court to this Court.

STANDARD OF REVIEW

This case comes before this Court pursuant to [Supreme Court Rule 308](#). The standard of review is limited to the question certified by the circuit court, which is a question of law. The standard of review is *de novo*. This is the only issue presented for review by this Court. The Court has long held that an interlocutory appeal regarding a certified question is a question of law, and as such, must be reviewed *de novo*. *Townsend v. Sears, Roebuck & Co.*, 227 Ill.2d 147, 153 (2007). See also *Thompson v. Gordon*, 221 Ill.2d 414, 426 (2006).

ARGUMENT

I. PUNITIVE DAMAGES MAY BE RECOVERED UNDER THE ILLINOIS NURSING HOME CARE ACT UPON PROOF OF WILLFUL AND WANTON VIOLATIONS THEREOF.

The Illinois Nursing Home Care Act (“the Act”) was enacted in 1979 amid grave concern over reports of “inadequate, improper and degrading treatment of patients in nursing homes.” *Harris v. Manor Healthcare Corp.*, 111 Ill.2d 350, 357-358 (1986). The Act repealed the previous laws dealing with nursing homes, sheltered care homes and homes for the aged. (*7 Ill. Rev. Stat.1977, ch.111 1/2, par. 35.16, *et. seq.*) and replaced the prior law with a comprehensive statutory scheme which established standards for the treatment of nursing home patients. It also created standards for certain nursing home employees caring for nursing home patients. The Act contains a resident’s “bill of rights,” which guaranteed to all residents of nursing homes--such as the right to manage their own finances, and the right to be free from abuse and **neglect** at the hands of the nursing home or its employees. [210 ILCS 45/2-101](#) through 2-113.

So that the provisions of the Act could be enforced, the law vested the Illinois Department of Public Health with comprehensive regulatory authority and enforcement power. The Act also created criminal penalties for its violation ([210 ILCS 45/3-119](#), 3-301 through 3-318) and expressly granted to residents a private right of action for damages and other relief against nursing homes and their owners if they violate the Act. [210 ILCS 45/3-601](#), 3-602, and 3-603. “In granting private remedies to nursing home residents, the General Assembly embraced the concept of a ‘private attorney general.’ It realized that the Department of Public Health could not police every nursing home on a daily basis and could not detect every violation of the Act. It realized that nursing home residents themselves are in the best position to know of and seek redress for violations.” *Eads v. Heritage Enterprises, Inc.*, 204 Ill.2d 92, 98 (2003). The *Eads* court explained that the Act achieves its purposes by the expansion of criminal and civil liability and by encouraging nursing home residents to press their *8 claims as private attorneys general. “Under the Act, litigation was viewed as an engine of reform.” *Eads*, 204 Ill.2d at 103.

As to the civil enforcement piece of the Act, Senator Daley, one of its principal sponsors, remarked: “[d]espite the best of intentions, the government can only do so much to regulate nursing home care. On the other hand, residents are always in the facilities and their friends, relatives, and community supporters can regularly keep an eye on conditions existing in facilities.” Daley and Jost, *The Nursing Home Reform Act of 1979*, 68 Ill.B.J. 448, 453 (1980).

As originally enacted, the Act contained a provision for treble damages for a prevailing plaintiff in a civil suit upon proof of violation of the Act. Ill.Rev.Stat. ch. 111 1/2. par. 4153-602. The Act also contains a provision, unchanged since its enactment, granting nursing home residents the right to maintain an action under the Act for any other type of relief, including injunctive and declaratory relief. [210 ILCS 45/3-603](#). This provision gives the plaintiff the right to recover punitive damages for willful and wanton violations of the Act, which, by contrast would not be available under many instances by reason of medical malpractice reform legislation which specifically bans the recovery of punitive damages in healing art malpractice cases. [735 ILCS 5/2-1115](#). *Eads*, 204 Ill.2d at 102-103. The *Eads* decision observes: “The opposing nature of the two sets of laws is evident from their provisions. The medical malpractice reform legislation expressly bans recovery of punitive damages in all cases in which the plaintiff seeks damage by reason of medical, hospital or other healing art malpractice. *9 [735 ILCS 5/2-1115](#) (West 2000). By contrast, the Nursing Home Care Act allows plaintiffs to recover common law punitive damages upon proof of willful and wanton misconduct on the part of defendants. *Dardeen v. Heartland Manor, Inc.*, 186 Ill.2d 291, 300, 238 Ill.Dec. 30, 710 N.E.2d 827 (1999).” *Eads*, 204 Ill.2d at 103-104.

In *Dardeen*, this court considered whether the repeal of the treble damages provision of the Act deprived a plaintiff of a vested right and should be applied prospectively only. The court concluded that the treble damages provision did not grant an injured nursing home plaintiff a vested right in treble damages and that this amendment could be applied to pending claims. In so ruling, the *Dardeen* court stated: “Under the amended version of the statute, plaintiff may recover actual damages and attorney fees upon proof of defendant's negligent violations of the Act, and may additionally recover common law punitive damages upon proof of willful and wanton misconduct on the part of defendant.” *Dardeen*, 186 Ill.2d at 300. It is clear, therefore, that the repeal of the treble damages provision of the Act only affected the statutorily set amount of punitive damages and not the right under the Act to recover punitive damages upon proof of willful and wanton conduct which are, by common law, not set or limited to any specific amount or formula.

Contrary to the appellate court opinion below, that the *Dardeen* court's pronouncement that punitive damages are recoverable under the Act was mere “*dicta*,” the statement should be considered “judicial *dicta*.” Judicial *dicta*, as *10 opposed to *obiter dicta*, is entitled to great weight and the point of law is to be followed as a judicial determination. *Exelon Corp. v. Department of Revenue*, 234 Ill.2d 266, 288 (2009).

The precise issue before the court in *Dardeen* was whether the repeal of treble damages would interfere with a vested right so as to allow treble damages in actions accruing before the amendment. *Dardeen*, 186 Ill.2d at 296. In *Dardeen*, the arguments made by the plaintiff administrator included that repeal of the treble damages provision deprived her of a substantial right of action. She argued that her burden of proof to recover punitive damages with the repeal of treble damages went from negligence to willful and wanton misconduct. *Dardeen*, 186 Ill.2d at 299.

In ruling that the plaintiff administrator had not been deprived of a substantial right the court stated, as quoted above, that she could still pursue punitive damages under the Act upon proof of willful and wanton misconduct. It appears obvious that the Court was instructing the trial court that the claim for common law punitive damages would survive the death of a nursing home resident upon proof of willful and wanton misconduct. The instruction became the law to be applied in the remand to the trial court. See *Dewan v. Ford Motor Company*, 343 Ill.App.3d 1062, 1074 (1st Dist., 2003) (law of the case doctrine includes a court's explicit decision as well as those issues decided by necessary implication).

*11 In the alternative, if the Court's pronouncement that punitive damages are recoverable is considered *dicta*, then it should not be considered *obiter dicta*, but rather judicial *dicta*. To determine whether *dicta* is judicial or *obiter*, the question is to what extent the issue was before the court. *Exelon*, 234 Ill.2d at 297.

The issue of willful and wanton right of action for punitive damages under the Act, after the repeal of treble damages, was squarely before the court. The court contrasted treble damages, which required a negligence standard of proof, to the remaining form of punitive damages under the Act, which required willful and wanton misconduct. *Dardeen*, 186 Ill.2d at 299-300. In ruling that repeal of treble damages did not affect a vested right, the court specifically stated that the plaintiff administrator still has the right to recover common law punitive damages. *Dardeen*, 186 Ill.2d at 300. Furthermore, the court's language appears to be distinctly crafted to provide guidance to the trial court so that it could properly address the punitive damages claim of the personal representative in that case. In other words, it became law for intents and purposes. The Supreme court identified her vested right of action (i.e. willful and wanton conduct) when it stated: “In order to recover under the Act, a violation of a resident's rights, as enumerated in part 1 of article II of the Act, must be established. See 210 ILCS 45/2-101 through 2-113.” *Dardeen*, 186 Ill.2d at 299. Therefore, the issue of willful and wanton common law punitive damages was sufficiently before the court for its statements to be considered judicial *dicta*. And, since the plaintiff was suing in her representative capacity for a deceased nursing home resident, the court's *12 pronouncement strongly supports the survival of punitive damages under the Act.

In accord is *Harris*, which considered whether the previous treble damages provision in Section 3-602 of the Act authorized a double recovery to the punitive damages available under Section 3-603 of the Act. In holding that the treble damages provision under the former Section 3-602 and punitive damages available to plaintiffs under Section 3-603 of the Act were “separate and

distinct remedies” and do not authorize a double recovery the court stated, “After applying the above principles to 3-603, we cannot agree with the defendant that the section authorizes recovery of both treble damages and common law punitive damages. Section 3-603 provides that a resident ‘may maintain an action under this Act for any other type of relief * * * permitted by law.’ (Ill.Rev.Stat. 1983, ch. 111 1/2, par. 4153-602.) The word ‘other’ means ‘[d]ifferent or distinct from that already mentioned.’ (Black’s Law Dictionary 992 (5th ed. 1979).) Thus, the section makes available to plaintiffs several remedies or actions for violations of the Act, which are ‘different and distinct’ from damages already provided for in section 3-602. These remedies include injunctive and declaratory relief. As such, we believe that the sole purpose of section 3-603 is to provide plaintiffs with a choice of remedies, and we do not think that the legislature intended to authorize a double recovery by inclusion of the section of the Act...Therefore, we do not construe section 3-603 as authorizing a double recovery of punitive damages.”

[Harris, 111 Ill.2d at 363-364.](#)

*13 Punitive damages are, therefore, a separate and distinct remedy-authorized to plaintiffs under section 3-603 of the Act. This court has been on record as to this a number of times. Had the General Assembly wished to eliminate punitive damages as a remedy available under the Act, similar to the provision banning claims for punitive damages under the medical malpractice reform legislation, it could have so specifically provided when it amended section 3-602 to eliminate treble damages, or at any other time it has amended the Act. In fact, the appellate opinion below fails to even distinguish between punitive damages and treble damages and the legislative intent, *ab initio*. The opinion misapprehends punitive damages under the Nursing Home Care Act, but repeals treble damages. This distinction was made unequivocally clear by Representative Art Tenhouse, a sponsor and supporter of House Bill 358 when he stated, “I think one thing that we need to point out here, we’re not eliminating punitive damages. Punitive damages can still be pursued in cases of abuse and personal injury. I think that we also need to point out that this proposal does not modify...This proposal does not modify the Section of the Nursing Home Act which provides that the owner and licensee are liable to resident for any intentional or negligent acts or admission (*sic*) by their agents or employees.” House Bill 358,” 89th General Assembly House of Representatives Transcription at page 30, May 23, 1995. From the General Assembly’s first attempt to repeal treble damages, it was not seeking to repeal punitive damages, as Representative Tenhouse explained. The Tenhouse statement expresses a *14 succinct and unequivocal view that punitive damages would remain as a viable remedy under section 3-603 of the Act. There is no subsequent history to suggest any other view.

Contrary to the appellate opinion below, the legislative attempts since the repeal of treble damages fail to demonstrate that the Act currently does not provide for punitive damages. House Bill 3391 was an attempt by the legislature to limit the power to award punitive damages in injury cases to judges in situations involving willful and wanton conduct. 91st Illinois General Assembly, House Bill 3391, 2000 Session. It is plaintiff’s position that since the repeal of treble damages, judges or juries have the power to award such damages. The fact that the bill expands the reach of punitive damages to death cases involving willful and wanton misconduct does not diminish its restriction of current law in injury cases.

The two other attempts to amend the statute, which again fail to demonstrate that punitive damages are not currently available under the Nursing Home Care Act when willful and wanton misconduct causes injury to a resident, were merely attempts to revive treble damages. See 95th Illinois General Assembly, House Bill 3445, 2007 Session and 95th Illinois General Assembly, House Bill 5213, 2008 Session. Like the treble damages in place before the repeal, the two bills would have allowed treble damages for violations of the Nursing Home Care Act, which has been interpreted as a negligence standard of care. [Myers v. Heritage Enterprises, Inc., 354 Ill.App.3d 241, 246-247 \(4th Dist. 2004\)](#) *15 However, as this court has said in *Harris* (pre-amendment), both treble damages and punitive damages are available under the Act, and a plaintiff may pursue both but only recover from one form of these damages. [Harris, 111 Ill.2d at 365.](#)

II. PUNITIVE DAMAGES SURVIVE THE DEATH OF AN INJURED NURSING HOME RESIDENT BECAUSE THEY HAVE A STATUTORY BASIS IN THE ILLINOIS NURING HOME CARE ACT.

It is obvious that the provision for permitting punitive damages under the Act is a separate question from the issue of the survivability of such damages following the death of an injured nursing home patient. This is an issue of vital importance, since nursing home residents and patients are overwhelmingly aged, in poor or precarious health, or both. Logic dictates that

a disproportionately large percentage of such plaintiffs will not survive from the time of their injury to the time a judgment is entered following a trial. Moreover, injuries to nursing home residents are much more likely to result in their death. The promise of remedies which are designed to protect nursing home residents and to prevent conduct which exposes them to aggravated or even intentionally caused harm but that abate upon their death, ring hollow and do not provide the protection that the law is seeking to offer them.

Claims for personal injury abated at common law upon the death of the plaintiff. To avoid the harsh results of such a rule, the Survival Act was passed, which provided for the survival of certain causes of action, including causes of action for injury to the person. 755 ILCS 5/27-6. However, the Survival Act has *16 been generally held not to provide for the survivability of punitive damages. *Mattyasovszky v. West Town Bus Co.*, 61 Ill.2d 31, 33 (1975).

Against this backdrop, however, are a line of cases which provide for the survival of punitive damages in certain circumstances. The first case considering such circumstances is *National Bank of Bloomington v. Norfolk & W. Ry. Co.*, 73 Ill.2d 160 (1978). *National Bank* dealt with an award of punitive damages in a case involving a railroad grade crossing accident and alleged violations of the Public Utilities Act. The Public Utilities Act contained a provision specifically permitting punitive damages for willful and wanton violations of the Act. The court found that the purpose of punitive damages under the Public Utilities Act was to punish an offender and to discourage others from repeating such offenses which result from willful and wrongful violation of the statute. The *National Bank* decision states: "It would pervert the Act's intention if reprehensible conduct, so severe in consequence that resultant injury, culminating in death, was to be insulated from punitive liability under the very act designed to vigilantly promote safety by public utilities. Punitive damages for injuries prior to death should be unaffected by the subsequent death of the injured person, for punitive recovery addresses only the nature and gravity of a defendant's wrongful and wilful act. Under the Act, defendant's punitive liability accrued from the moment decedent sustained personal injury and, upon decedent's death, his right to recovery passed unabated to his estate. Only in this manner can we observe the dictates of *Murphy* and provide for a 'full liability and a full *17 recovery * * * for damages up to the time of death' (56 Ill.2d 423, 431, 308 N.E.2d 583, 587)." *National Bank*, 73 Ill.2d at 174.

The *National Bank* court also interpreted the decision in *Mattyasovszky* as not based on a broad proposition that punitive damages are unrecoverable when the injury causes death. Instead, the court observed that *Mattyasovszky* held that punitive damages were improper because the fact that the party whose conduct was primarily responsible for the injury had been dismissed from the case. *National Bank*, 73 Ill.2d at 173. However, in *Froud v. Celetex Corp.*, 98 Ill.2d 324 (1983), this court declined an invitation to overrule *Mattyasovszky*, finding that the decisions in that case and *National Bank* were not irreconcilable and that *National Bank* had not implicitly overruled *Mattyasovszky*. The *Froud* court summed up its finding that the holding of *Mattyasovszky* was good law, even in light of the holding of *National Bank* as follows: "The conclusion that is ordained on the basis of the above analysis of *Mattyasovszky* and *National Bank* is clear. Because there is no statutory basis for the award of punitive damages in these cases comparable to the provisions of the Public Utilities Act referred to in *National Bank*, we must regard *Mattyasovszky* as the controlling precedent. Under *Mattyasovszky* the plaintiffs' claims cannot survive the death of the injured persons." *Froud*, 98 Ill.2d at 335.

Cases which have addressed this issue following *Mattyasovszky*, *National Bank*, and *Froud* have found that the law derived from these cases is that punitive damage claims will survive when either: (1) there is a "statutory basis" for such *18 claims or when punitive damages are an integral component of the statute's regulatory scheme and of the remedy which is available under it; or (2) "strong equitable considerations" support survival. *Raisl v. Elwood Industries, Inc.*, 134 Ill.App.3d 170, 175 (1st Dist. 1985); *Grunloh v. Effingham Equity, Inc.*, 174 Ill.App.3d 508, 519 (4th Dist. 1988); *Penberthy v. Price*, 281 Ill.App.3d 16, 20 (5th Dist. 1996).

In *Raisl*, the plaintiff filed a retaliatory discharge claim in connection with her having been fired for pursuing a worker's compensation claim. Her suit included a claim for punitive damages. During the pendency of the action, the plaintiff died, and her sister was substituted as representative plaintiff. The defendant moved to dismiss the action based upon abatement of the action upon the plaintiffs death and abatement of the claim for punitive damages upon the plaintiffs death. The trial court

granted dismissal. On appeal, the order of dismissal was reversed. As to punitive damages, the appellate court acknowledged that the Workers' Compensation Act provided for neither a tort of retaliatory discharge nor for punitive damages. However, the court held that the plaintiffs claim for punitive damages had a statutory basis and would thus survive the decedent. In its opinion, the appellate court pointed out that although the tort of retaliatory discharge and punitive damages were not expressly provided for in the Workers' Compensation Act, those claims did have a "statutory basis." *Raisl*, 134 Ill.App.3d at 175. The opinion points out that the public policy of permitting injured employees to freely file workers' *19 compensation claims was clearly a mandate of the Workers' Compensation Act as a comprehensive legislative scheme to provide prompt and equitable compensation to injured workers. Moreover, the court stated that this court had emphasized the crucial role that punitive damages play in protecting against the statutory scheme in protecting workers. *Raisl*, 134 Ill.App.3d at 175. Thus, even though punitive damages are not mentioned in the Workers' Compensation Act, let alone the survivability of such damages, the *Raisl* court found that without such damages the employee had been afforded an incomplete remedy and that there would be no available sanction against a party who violates an important public policy of this state. *Raisl*, 134 Ill.App.3d at 176. On this basis, the court held that the plaintiff's punitive damages claim survived.

The court in *Grunloh* dealt with the assignability of punitive damages under the Illinois Environmental Protection Act for pollution of the plaintiffs real property. The *Grunloh* court considered the issue of assignability of punitive damages in relationship to whether such damages would survive. *Grunloh*, 174 Ill.App.3d at 518. Although the court in *Grunloh* found that there was no statutory basis for the survival or assignability of punitive damages in that case, it observed as follows concerning the law of survival of punitive damages: "The factors generally considered in determining whether an action for punitive damages survives are: (1) whether under ordinary circumstances the requested punitive damages have a statutory basis or are an integral component of a regulatory scheme and the remedy available thereunder; and (2) whether strong *20 equitable considerations favor survival of an action for punitive damages." *Grunloh*, 174 Ill.App.3d at 519.

In the present case, Margorie's claim for punitive damages survives under the Act because there is a statutory basis for such damages. It has been consistently held that punitive damages are available to plaintiffs under the Act as a "separate and distinct" remedy provided for in section 3-603 of the Act. There is no other reasonable way to interpret *Harris*, *Dardeen*, and *Eads*. There are no cases, save for the appellate opinion below, which suggest that punitive damages are not part of the remedial package available to injured nursing home patients specifically under the Act. Under *Raisl*, it is not essential to the survivability of punitive damages for the words "punitive damages" or other such specific language to appear in the statute to obtain this result. What matters is that this court has consistently held, in conformity with the legislative history of the Act, that the availability of punitive damages are specifically provided for under the Act--to effectuate its purposes.

Contrary to the cases cited by the appellate opinion below, the Act is different from the statutes considered in those cases that found no basis for the survival of punitive damages. The opinion below cites *Glazewski v. Coronet Insurance Company*, 108 Ill.2d 243 (1985) (Uniform Deceptive Trade Practices Act); *Duncavage v. Allen*, 147 Ill.App.3d 88 (1st Dist. 1986) (Consumer Fraud Act); *Lasalle National Bank v. Willis*, 387 Ill.App.3d 307 (1st Dist. 2007) (Adjacent Landowner Excavation Protection Act). Apparently, each case denied the *21 availability of punitive damages because the words "punitive damages" or like words were not expressly stated in the various statutes. However, the damages provision contained in Section 3-603 of the Nursing Home Care Act is broader than the above-mentioned statutes. By its specific wording, Section 3-603 incorporates punitive damages into the Act: "A resident may maintain an action under this Act for any other type of relief, including injunctive and declaratory relief, permitted by law."

III. PUNITIVE DAMAGES SURVIVE THE DEATH OF AN INJURED NURSING HOME RESIDENT BECAUSE THEY ARE PART OF A REGULATORY SCHEME AND THE REMEDY AVAILABLE THEREUNDER.

Does the Act evidence a statutory and regulatory scheme which is designed to protect nursing home residents from physical, emotional, and financial abuse or **neglect**? The stated aims of the Act are found in the residents' "bill of rights" found in Sections 2-101 through 2-113. Included in these rights are the right of residents to manage their own financial affairs; a right to refuse treatment; the right to freely exercise their religious beliefs; the right to uncensored mail and telephone conversations; the right

to refuse performance of uncompensated labor; the right to inspect their personal records; the right to present their grievances free from the fear of retaliation; the right to privacy in their medical and personal care; and the right not to be subjected to abuse and **neglect**. It is clear from these rights that the primary purpose of the Act is to preserve the health and quality of life for all nursing home residents, and to ***22** prevent nursing homes from victimizing what can only be described as some of the most vulnerable among us.

To effectuate this laudable purpose, the General Assembly gave the Department of Public Health expanded regulatory and enforcement powers and created criminal as well as civil penalties for violations of the Act. [210 ILCS 45/3-305, 45/3-318](#). The Act also, in providing for private rights of action in civil court, as has been stated, provided for the concept of a “private attorney general” as a part of the regulatory scheme of this statute. [Harris, 111 Ill. 2d at 369](#). There can be no question that the Act provides a regulatory scheme for the treatment of nursing home residents by nursing homes in the state of Illinois. What possible sense would it make for the public Attorney General's office to seek enforcement through criminal remedies designed to punish and deter provided for under the Act (which are obviously punitive in nature) and for “private attorneys general” to be deprived of the right to seek punitive damages in appropriate cases for willful and wanton violations of the Act if the injured resident is not able to survive their injuries? The answer is that, under the regulatory scheme of the Act, it would make no sense. This is part of the statutory regulatory scheme provided for under the Act.

Section 3-606 of the Act provides as follows: “Any waiver by a resident or his legal representative of the right to commence an action under Sections 3-601 through 3-607, whether oral or in writing, shall be null and void, and without legal force or effect.” Section 3-608 of the Act also provides as follows: “A ***23** licensee or its agents or employees shall not transfer, discharge, evict, harass, dismiss, or retaliate against a resident, a resident's representative, or an employee or agent who makes a report under Section 2-107, brings or testifies in an action under Sections 3-601 through 3-607, or files a complaint under Section 3-702, because of the report, testimony, or complaint.” If, as we have already discussed, the law provides an action for punitive damages pursuant to the provisions of section 3-603 of the Act, do these two provisions sanction an action by the personal representative for such punitive damages as a part of the Acts regulatory scheme. Pursuant to the reasoning of the court in [Willis v. DeKalb Area Retirement Center, 175 Ill.App.3d 833 \(2nd Dist., 1988\)](#), sections 3-606 and 3-608 provide for the specific survival of punitive damages under the Act since these two provisions specifically state or imply that the personal representative of a deceased nursing home resident may pursue these remedies. [Willis, 175 Ill.App.3d at 839-840](#). In *Willis* the court was considering the survivability of the treble damages provision of section 2-602. The court held that these punitive damages were survivable and could be pursued by the personal representative of a deceased nursing home resident. [Willis, 175 Ill.App.3d at 844](#).

The defendants argued in *Willis* that treble damages under section 3-602 did not survive because if that was the legislature's intention, it would have specifically provided for that action. The court disagreed based upon sections 3-606 and 3-608 of the Act. The *Willis* court reasoned as follows: “Defendants' argument, however, overlooks the terms of section 3-606 and section 3-608 of the ***24** Act establishing, in our view, the rights of other persons to bring a cause of action for punitive damages under section 3-602... Thus, plaintiff, who as the administratrix of the decedent's estate is decedent's “legal representative,” can bring an action under 3-602. Otherwise, the legislature would not have included in the Act section 3-606 disallowing any waiver by a resident's legal representative of his right to commence an action under 3-602. Also, section 3-608 demonstrates that one other than a resident can bring an action under section 3-602...” [Willis, 175 Ill.App.3d at 839-840](#).

By identical reasoning, punitive damages which are provided for under the terms of section 3-603, as we have seen under *Harris, Eads and Dardeen*, must survive pursuant to sections 3-606 and 3-608, because these two sections indicate a personal representative is permitted to pursue claims provided for under 3-603 and the other specified sections.

In accord is *Myers v. Heritage Enterprises, Inc.*, in which the survivability of causes of action accruing to nursing home residents under the Act prior to their death was at issue. [Myers, 332 Ill.App.3d 514 \(4th Dist. 2002\)](#). The *Myers* court observed: “The Survival Act does not create a statutory cause of action and instead allows a representative of the decedent to maintain those statutory or common-law actions that had already accrued to the decedent prior to the decedent's death, *e.g.*, an action brought

under the Nursing Home Care Act. *Pietrzyk*, 329 Ill.App.3d at 1049, 769 N.E.2d at 139; *Dardeen v. Heartland Manor, Inc.*, 186 Ill.2d 291, 299, 710 N.E.2d 827, 832, 238 Ill.Dec. 30 (1999) (the *25 administrator of the estate of a nursing home resident who had died while in a nursing home sued the home under Nursing Home Care Act. Although the issues on appeal concerned the right to treble damages, the supreme court found that repeal of the right to treble damages ‘does not interfere with plaintiff’s substantive right to recover against defendant for violations under the Nursing Home Care Act’).” *Myers*, 332 Ill.App.3d at 516-517. Thus, since a cause of action for punitive damages under Section 3-603 accrues to a nursing home resident under the statutory scheme of the Act, then, logically, such cause of action must survive the death of a deceased injured nursing home patient such as Marjorie.

IV. STRONG EQUITABLE CONSIDERATIONS FAVOR SURVIVAL OF PUNITIVE DAMAGES UNDER THE ILLINOIS NURSING HOME CARE ACT.

A. VIOLATIONS OF THE ILLINOIS NURSING HOME CARE ACT OFFEND STRONG AND CLEARLY ARTICULATED PUBLIC POLICY.

The court below took exception with the proposition that claims for punitive damages would survive if strong equitable considerations would support survivability. This position directly conflicts with the holdings of *Mattyasovszky*, *National Bank*, *Froud*, *Raisl*, *Grunloh*, and *Penberthy*.

The court seemed to strain in its interpretation of those cases to reach the conclusion that it did. However, the holding in *Raisl* is a correct and imminently reasonable analysis of the holdings in these cases. In this vein, the *Raisl* court stated: “We interpret the supreme court’s opinions in *Mattyasovszky*, *National* *26 *Bank*, and *Froud* to hold that punitive damages claims will survive when either: (1) there exists a ‘statutory basis’ for such claims or when such claims are an ‘integral component of the regulatory scheme and of the remedy which is available under it’; or (2) ‘strong equitable considerations’ advocate survival.” *Raisl*, 134 Ill.App.3d at 175.

Based on this, the *Raisl* court found that strong equitable considerations supported the survival of claims for retaliatory discharge brought pursuant to the Workers’ Compensation Act: “We believe that the significant role of punitive damages in these cases provides strong equitable considerations which warrant holding that punitive damage claims survive the death of decedent. The supreme court has repeatedly held that a retaliatory discharge is “offensive to the public policy of this State * * *.” [citing cases] To hold that punitive damage claims abated would be to weaken the only effective means of deterring violations of this public policy and to afford victims only an incomplete remedy. We conclude that punitive damages in these cases are necessary to further the public policy of this State, to punish violators and to afford a complete remedy to unlawfully discharged employees.” *Raisl*, 134 Ill.App.3d at 176-177. In *Penberthy* the court considered the survivability of punitive damages in the context of an action to recover for injuries caused by driving under the influence of alcohol. The court, after considering *Raisl*, noted from *Grunloh* that the factors generally considered in determining whether a cause of action for punitive damages survive are “(1) whether under ordinary circumstances the requested punitive *27 damages have a statutory basis or are an integral component of a regulatory scheme and the remedy available thereunder; and (2) whether strong equitable considerations favor survival of an action for punitive damages. Matters which are relevant in considering the second of the above factors include whether the defendant’s alleged conduct offends against a strong and clearly articulated public policy; whether the underlying conduct constituted intentional misconduct which is also a crime, instead of mere wilful and wanton conduct which shades into simple negligence; and whether absent an award of punitive damages, a plaintiff who prevailed on the merits of his or her claim would at most be entitled to only a comparatively small recovery. *Grunloh*, 174 Ill.App.3d 508, 528 N.E.2d at 1037-38.” *Penberthy*, 281 Ill.App.3d at 21.

The *Penberthy* court found that equitable considerations supported the survival of punitive damages in cases involving injuries resulting from driving under the influence. In its ruling the court stated: “Defendant’s conduct, driving under the influence of alcohol, unquestionable offends against a strong and clearly articulated public policy. Moreover, the underlying conduct is also a crime. These factors are sufficient in our judgment to satisfy the requirements of survivability. There is no doubt that these

strong equitable considerations justify the survival of the punitive damages claim against the defendant's estate." *Penberthy*, 281 Ill.App.3d at 21.

The abuse and **neglect** of nursing home residents, albeit intentional or willful and wanton mistreatment of them, manifestly offends the strong and *28 clearly articulated public policy behind the Act. The cases cited above, reviewing the history of the Act and using the patient's bill of rights, demonstrate this policy of protecting the **elderly** residents of nursing homes. Those that require nursing home care are the weakest of this vulnerable population. The legislative history indicates that the enactment of this law occurred because of concerns over reports of "inadequate, improper and degrading treatment of patients in nursing homes." Senate Debates, 81st Ill.Gen.Assem., May 14, 1979, at 184 (statement of Senator Karl Berning). Moreover, as stated above in *Eads*, litigation was regarded as the engine of this reform. Litigation is encouraged by the Act, not discouraged as under the medical malpractice reform legislation. *Eads*, 204 Ill.2d at 103.

There can be no doubt that the intentional or willful and wanton abuse or **neglect** of nursing residents offends a clearly and strongly articulated public policy of Illinois in reforming the nursing home industry, in eradicating the mistreatment of nursing home residents, and in protecting their rights to live safely and securely. Litigation is encouraged to accomplish these goals. Actions for punitive damages based upon intentional or willful and wanton violations of the Act are part of the arsenal available to nursing home residents and their personal representatives in furthering the aims and goals of the Act. This reason alone supports the survivability of actions for punitive damages in these cases.

***29 B. WILLFUL AND WANTON VIOLATIONS OF THE ILLINOIS NURSING HOME CARE ACT CONSTITUTE CRIMINAL ACTS.**

Under 720 ILCS 5/12-19 and 12-21, it is a felony to abuse or to criminally **neglect** a resident of a nursing home (long term care facility) or to abuse or criminally **neglect** a disabled resident of a nursing home. Criminal **neglect** is defined by this statute as **neglect** which is "reckless." There is no question that these statutes make it a criminal offense to violate section 2-107 of the Act which prohibits abuse and **neglect** of nursing home residents.

As in *Penberthy*, the fact that the conduct which allows for the imposition of punitive damages constitutes a crime is strong justification for their survival. Under the standards of the statutes cited above which criminalize abuse (an intentional act) and **neglect** (defined in the statute in terms of recklessness), the nature of the conduct necessary for the imposition of punitive damages (intentional or willful and wanton) is the same for conviction of the crime.

The idea of nursing home residents and their personal representatives acting as private attorneys general implies the concept of their enforcement of the Act as a deterrent. That, after all, is the function of public attorneys general in enforcing the Act. If residents and their personal representatives are to act as these private attorneys general, then the availability and survivability of punitive damages as a deterrent against violations of the Act which are also crimes is strongly justified.

***30 C. ABSENT PUNITIVE DAMAGES, A PLAINTIFF WHO PREVAILS IN A CLAIM UNDER THE ILLINOIS NURSING HOME CARE ACT WOULD BE ENTITLED TO, AT MOST, A COMPARATIVELY SMALL RECOVERY.**

The appellate opinion below rejects the notion that punitive damages are specifically available under the Act because the remedy which would otherwise be available to a nursing home resident would be inadequate. However, the court in *Harris* well articulates the reason for punitive damages in a nursing home abuse or **neglect** case: "However, without the possibility of recovering treble damages and attorney fees, many residents would likely forego suing a licensee for violations of the Act. The legislature could reasonably assume that residents, either because of their advanced age, mental or physical infirmities or lack of financial resources are often unlikely to pursue costly and time-consuming litigation in the hope of receiving an uncertain or small recovery. As plaintiff observes, the expected time it would normally take to resolve the case frequently is longer than a

resident's life expectancy. A nursing home resident under such circumstances has little incentive to seek redress for violations of the Act. Moreover, many violations of the Act will yield little in the way of actual monetary damages," *Harris*, 111 Ill.2d at 369. The court goes on to say that the recovery of treble damages has the presumed effect of encouraging private enforcement as well as encouraging compliance with the Act. These observations about the function of the former treble damages provision of the Act are equally true about the function of punitive damages, of which treble *31 damages are but a species. And, as we have seen, the legislative history clearly articulates that the repeal of treble damages was in no way meant to impair the right of nursing home residents to pursue punitive damages for willful and wanton violations of the Act.

Factors which tend to increase monetary damages in personal injury actions are singularly absent in cases of **elderly** residents of nursing homes. Residents are not normally employed, so that lost income is rarely a factor in recovery. Their life expectancies are much shorter which weighs against monetary awards which are premised upon that factor. A large percentage of residents are widows or widowers and have no one dependent upon them for support. Many die of their injuries before running up large expenses for lengthy medical care and treatment. Also, some cases of egregious abuse or **neglect** do not necessarily result of serious physical injury of a type to yield a larger award. Therefore, without the threat of punitive damages, the goal of litigation to function as an engine of reform of the nursing home industry, to provide a deterrent effect against violations of the Act, and to punish those responsible for abusing and **neglecting** nursing home residents will not be fully realized. Punitive damages should survive under the strong equitable consideration that nursing home residents be afforded an adequate remedy for intentional or willful and wanton conduct which violates the Act.

***32 CONCLUSION**

WHEREFORE, for the reasons set forth herein, Plaintiff-Appellant, THOMAS VINCENT, as Legal Representative of the Estate of Marjorie Vincent, Deceased, prays that this court reverse the decision of the appellate court, Second District below which answered the trial court's certified question in the negative and to also reverse order of the circuit court for the 17th Judicial Circuit, Winnebago County, under appeal herein, and to thereupon remand this case to the trial court for further proceedings consistent with this court's opinion and order.

Appendix not available.