EAGLE™
INTERNATIONAL ASSOCIATES

Presents

BEATING BACK THE WINDY CITY BLUES:

Achieving Cheery Outcomes in the Defense of Claims

October 24, 2024

W Hotel City Center
Chicago

EAGLE INTERNATIONAL ASSOCIATES

MISSION STATEMENT

Eagle International Associates is an international network of independent law firms, adjusters and claims related service providers throughout the United States, Canada and Europe. Eagle members are dedicated to providing insurance companies and self-insureds with the highest quality legal and adjusting services for competitive and fair compensation. As members, we are committed to the highest ethical standards and act with professionalism and civility in all our endeavors. Eagle members exceed their clients' expectations for quality and service. At every opportunity, we promote the use of Eagle and its members and refer existing relationships through active participation in Eagle's meetings, programs and seminars.

DIVERSITY POLICY

Eagle International Associates, Inc. is of the strong belief that our organization is stronger, more valuable, and more effective through the inclusion of adjustors and attorneys of diverse gender, sexual orientation, racial, ethnic, cultural backgrounds, and all religious or non-religious affiliations. Eagle recognizes that the inclusion of such diversity is vital in order to achieve excellence and to serve its clientele effectively. Eagle is committed to a further understanding of its cultural filters and the absolute need to accept each person as a valued, talented, unique individual, which, when working with other Eagle members, will bring the organization and all its members genuine benefits and competitive advantage in the marketplace.

BEATING BACK THE WINDY CITY BLUES:
Achieving Cheery Outcomes in the Defense of Claims

October 24, 2024

PROGRAM

11:30 am **Registration and Lunch**

12:15 pm **Welcoming Remarks**
Matthew L. Schrader, Esq., Reminger Co.
Vice-Chair, Eagle International Associates

Program Introduction
Mitchell A. Orpett, Esq., Tribler Orpett & Meyer, P.C.
Program Chair

12:30 pm **Paying the Cost to Be the Boss (B.B. King):**
Successful Defense of Employment Practices Claims

Moderators:
Melvin J. Davis, Esq., Reminger Co., LPA
John A. Safarli, Esq., Macdonald Devin Madden Kenefick Harris

Panelists:
Paul M. Finamore, Esq., Pessin Katz Law Firm
Rae Lynn Kahle, Claims Specialist, Major Case Unit, West Bend Insurance
Sean M. Sturdivan, Esq., Sanders Warren & Russell, LLP

1:30 pm **Shame Shame Shame (Jimmy Reed): Defending the Indefensible Professional**

Moderators:
John E. Bordeau, Esq., Sanders Warren & Russell LLP
Jason J. Campbell, Esq., Gill Ragon & Owen, P.A.

Panelists:
Sonia K. Dhaliwal, JD, RPLU, Senior Claim Executive, Vice President, Claim Division
General Star
Lee A. Gross, Senior Complex Claims Analyst, Allianz Commercial - Financial Lines
Daniel J. Ryan, Senior Claim Manager, Intact Insurance Specialty Services

2:30 pm **BREAK**

2:45 pm **I'd Rather Go Blind (Etta James): Defending Conscious Pain and Suffering Claims**
Moderators:
Davis J. Reilly, Esq., Bledsoe Diestel Treppa & Crane LLP
Lindsey J. Woodrow, Esq., Waldeck & Woodrow P.A.

Panelists:
John P. Buckley, JD, CPCU, Senior Vice President – Claims, Western National Mutual Insurance Company
Vickie L. Story, JD, Claim Specialist, Arch Insurance – Soundview Claims

3:45 pm **That's Why I'm Crying (Koko Taylor): Ten Mistakes to Avoid in Negotiating Claims**
Moderators:
David A. Abrams, Esq., Strongin Rothman & Abrams
Mitchell A. Orpett, Esq., Tribler Orpett & Meyer, P.C.

Panelists:
Robert Danner, Liability Claims Supervisor, Everett Cash Mutual
Anthony D. Ingraffia, Senior Claims Attorney II, Company Adjuster, Executive Liability Division, Great American Insurance Company
Monica L. Logan, Esq., Chief Claims Officer – D&O and FI Claims, CapSpecialty
Melissa Mason, Claims Manager, Virginia Division of Risk Management

4:45 pm **Closing Remarks**

5:00 pm **Reception**

6:15 pm Depart Hotel for Blues Club
Buddy Guy's Legends
Cocktails, Dinner, Entertainment

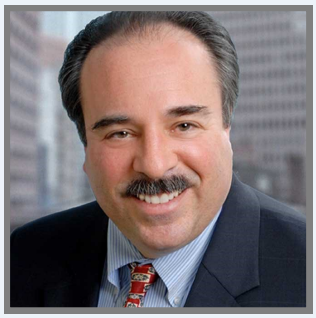
BEATING BACK THE WINDY CITY BLUES:
Achieving Cheery Outcomes in the Defense of Claims

TABLE OF CONTENTS

	Tab
Presenters	1
Paying the Costs to Be the Boss (B.B. King: Successful Defense of Employment Practices Claims) Melvin J. Davis, Esq. and John A. Safarli, Esq.	2
Eroding Limits Policies: Explanation and Considerations for Claims Handling Theodore J. Waldeck, Esq., With Special Credit to: Mitchell A. Orpett, Esq.	3
Damages Recovery for Decedents' Conscious Pain and Suffering: A 50 State Survey Lindsey J. Woodrow, Esq.	4
Guarding Against Mistakes, Misjudgment and Biases in Settlement Negotiations Mitchell A. Orpett, Esq.	5

CHICAGO 2024
PRESENTERS

David A. Abrams, Esq.
Strongin Rothman & Abrams
80 Pine Street, 10th Floor
New York NY 10005
212-931-8303
dabrams@sralawfirm.com
www.sralawfirm.com



David Abrams is a founding member of Strongin Rothman & Abrams, LLP with offices in Livingston, NJ and New York, NY. David has been admitted to practice law in New York since 1986 and in New Jersey since 1988 and is also admitted in the federal courts in those jurisdictions. Mr. Abrams has over thirty-five years of civil litigation experience, including significant trial experience in the State and Federal Courts of New York and New Jersey. Areas of concentration include religious institution liability, hospitality industry litigation, premises and premises security liability, sports and recreational injury litigation, insurance coverage and bad faith, first party property damage, construction site accidents, transportation/trucking, products liability, professional liability and commercial litigation. Since 1996, Mr. Abrams has served as national coordinating counsel for Club Mediterranee, S.A.'s insured litigation in the United States, a position he proposed, developed, and implemented. He is a former Chairman and a member of the Board of Directors of Eagle International Associates, Inc. Mr. Abrams is a contributing author to the legal treatise Products Liability in New York, Chapter 8, "Defending the Design Defect Case: Strategic Considerations," published by the New York State Bar Association in 1997. Additionally, Mr. Abrams has lectured on a variety of civil litigation topics at Bar Association seminars and before professional organizations. He received his Juris Doctor from Hofstra University School of Law in June 1985, where he graduated "with distinction" (top 10%). He graduated from the State University of New York at Binghamton with a BA in June 1979.

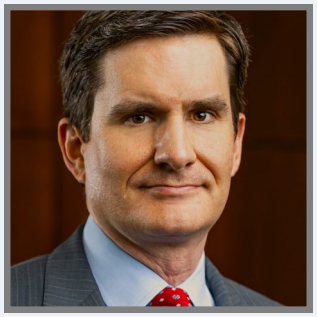
John E. Bordeau, Esq.
Sanders Warren & Russell, LLP
11225 College Blvd., Suite 450
Overland Park KS 66210
913-234-6115
j.bordeau@swrllp.com
www.swrllp.com

John Bordeau is a partner on the management committee at Sanders Warren & Russell and has been with the firm since its doors opened in 1999. John is licensed in state and federal courts in Kansas and Missouri. His law degree is from the University of Kansas. His undergraduate degree is from Sacred Heart University in Fairfield, Connecticut. John has 27 years of litigation and arbitration experience. His practice focuses on professional liability, construction litigation, products, and complex personal injury litigation. John is an active member of CLM and DRI. John has been named a Super Lawyer every year since 2013. He is a certified instructor with CLM's continuing education program and presents regularly on claims handling and legal topics.

John P. Buckley, J.D., CPCU
Senior Vice President - Claims
Western National Mutual Insurance Company
4700 West 77th Street
Edina, MN 55435
952-921-3156
john.buckley@wnins.com
www.wnins.com

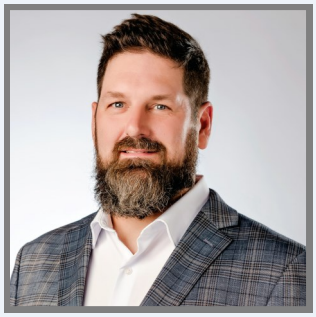
John Buckley is a graduate of Carleton College, Northfield, MN, and William Mitchell College of Law. He is admitted to practice in Minnesota and Wisconsin, U.S. District Court and the Eighth Circuit Court of Appeals. He practiced for five years with Bassford, Lockhart, Truesdell and Briggs, focusing on insurance agent E & O defense and insurance coverage work. In 1995 he joined Western National Insurance Group, a Super Regional Property and Casualty insurer comprised of seven companies doing business in 31 states. He now serves as Senior Vice President - Claims where he leads a team of attorneys and claim representatives handling property, casualty and workers compensation claims nationwide. In 2010, he earned his CPCU. His work involves advising the company in all areas of insurance matters, including underwriting, claims, reinsurance and insurance coverage issues. He teaches CPCU courses and has presented at DRI, CLE and at the PLRB conferences. He has represented Western National in legislative initiatives and is active in the Insurance Federation of Minnesota, NAMIC, Minnesota Defense Lawyers Association and the Defense Research Institute. His team partners with outside counsel across the country to provide Western National policyholders with exceptional legal representation.

Jason J. Campbell, Esq.
Gill, Ragon & Owen P.A.
425 W. Capitol Avenue, Ste. 3800
Little Rock, AR 72201
501-492-5972
jcampbell@gill-law.com
www.gill-law.com



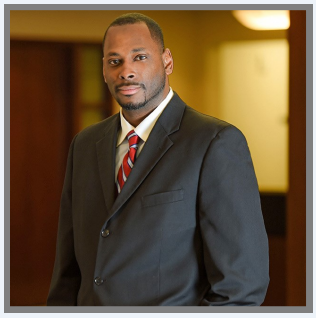
Jason Campbell is an attorney at Gill Ragon & Owen P.A. in Little Rock, Arkansas. His practice is primarily concentrated towards representation of professionals, premises owners and non-profits. Jason has been recognized by Best Lawyers in America since 2011 and Mid-South Super Lawyers. He earned his B.S.B.A at the University of Arkansas, Fayetteville in 1997 and his J.D. from the University of Arkansas, Fayetteville, Leflar Law Center in 2001. He is also a graduate of the Litigation Management Institute held at Columbia University; the IADC trial academy; and the ABA Construction Forum Trial Academy. He has completed 40 hours of mediation training through the Arkansas Alternative Dispute Resolution Commission. He has taken over 50 cases to jury verdict and arbitration decision. He has successfully resolved over 350 cases through mediation.

Robert Danner
Liability Claims Supervisor
Everett Cash Mutual
10591 Lincoln Highway
Everett PA 15537
814-494-4673
rdanner@everettcash.com
www.everettcash.com



Rob Danner is a Casualty Claim Supervisor with Everett Cash Mutual with 25 years of multi-line property and casualty claims experience, including litigation and mediation and specializing in agricultural, business owners and small contractor claims.

Melvin J. Davis, Esq.
Reminger Co., LPA
200 Civic Center Drive, Ste. 800
Columbus, OH 43215
614-232-2630
Mdavis@reminger.com
www.reminger.com



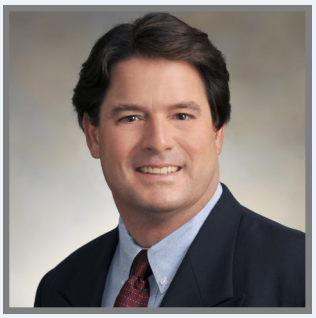
Melvin Davis is a shareholder at the law firm of Reminger Co. LPA., focusing his legal practice in several areas including, employment, government liability and professional negligence. Additionally, Melvin has extensive experience representing long-term care facilities including trial experience. Melvin has also developed an appellate practice representing clients before Appellate Courts throughout Ohio, the Ohio Supreme Court and the U.S. Sixth Circuit. Melvin was rated by Super Lawyers' as a Rising Star.

Melvin's talents go beyond the courtroom, as he previously served on the Executive Board as Legal Counsel for Kids Voting of Central Ohio, a non-profit organization dedicated to creating lifelong, informed voters among today's youth. He was also appointed by the Columbus City Council to the Columbus Records Commission. In addition, he currently serves on the Alumni Advisory Board of his alma matter, Capital University. Due to his accomplishments, Melvin was recognized in Who's Who in Black Columbus, which celebrates the accomplishments of African Americans in the community.

Sonia K. Dhaliwal, JD, RPLU
Senior Claim Executive
Vice President, Claim Division
GenStar Insurance Services, LLC
One North Wacker Drive, Suite 800
Chicago, IL, 60606
312-204-9455
Sonia.Dhaliwal@generalstar.com
www.generalstar.com

Sonia Dhaliwal is currently a Senior Claims Executive at GenStar Insurance Services, LLC ("General Star") in Chicago, Illinois. Sonia handles Lawyers, Accountants, Real Estate and Title Agents claims. Sonia began her career as a law clerk for the Hon. Judge Earl E. Strayhorn and went on to practice as an Insurance Defense attorney in Chicago. She obtained her undergraduate degrees in Broadcast Journalism and Political Science from the University of Southern California and her Juris Doctor from Loyola University Chicago School of Law. Sonia has earned her RPLU designation. Sonia also serves as an arbitrator for the Circuit Court of Cook County.

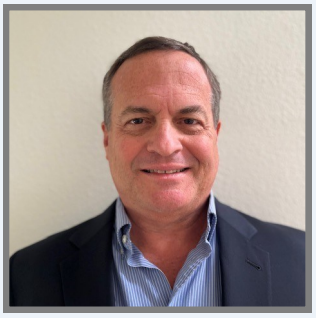
Paul M. Finamore, Esq.
Pessin Katz Law, P.A.
5950 Symphony Woods Road, Suite 510
Columbia, MD 21044
410-371-7880
pfinamore@pklaw.com
www.pklaw.com



Paul Finamore is a member of the Maryland firm, Pessin Katz Law, P.A. He is an experienced trial lawyer who has practiced in state and federal courts throughout Maryland and the District of Columbia for over 30 years. His experience includes litigation of general and professional liability matters, including first and third party claims, as well as employment law.

Mr. Finamore has been recognized in Best Lawyers in America in the areas of Insurance Law as well as in Litigation – Insurance. He has an AV- preeminent peer rating in Litigation, Insurance, and Labor and Employment. He has also been recognized as a top attorney by Maryland SuperLawyers magazine annually from 2008 through the present. He is a three-time recipient of the Golden Gavel Award from the Westfield Group of Insurance Companies. He is also a member of the Federation of Defense and Corporate Counsel.

Lee A. Gross
Senior Complex Claims Analyst
Allianz Commercial | Financial Lines
Remote | Irvine, CA
213-394-3140
Lee.gross@agcs.allianz.com
www.commercial.allianz.com



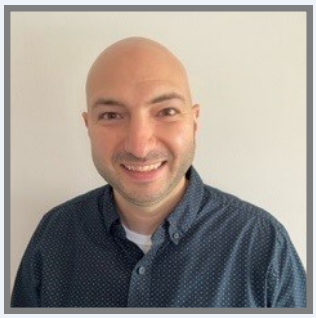
Lee Gross is a Senior Complex Claims Analyst for the North America Financial Lines claims team at Allianz Commercial. Based in Irvine, California, he specializes in Professional Liability matters with emphasis on Architects & Engineers as well as Insurance Agents' Errors & Omissions claims. Lee is also involved with the oversight of Lancer Claims, a TPA (Third-Party Administrator) located in California which handles claims for certain specialized Allianz programs.

Prior to joining Allianz, Lee worked for two other international carriers, Intact Insurance (formerly OneBeacon), and XL Insurance (now AXA XL), where he focused primarily on Architects & Engineers and

Financial Institutions claims. He also worked directly for Lancer Claims TPA where he first was introduced to Allianz E&O claims for insurance agents, as well as Financial Institutions and title insurance claims. His earliest claims experience was with Insurance Corporation of America (ICA) in Houston, Texas, where his focus was on medical malpractice claims. Lee practiced law in Texas and California, both in private practice as well as serving for seven years as in-house Division Counsel for a Tenet Healthcare subsidiary.

Lee is a graduate of the University of California, Los Angeles (UCLA), where he received a BA in Political Science; and the University of Houston Law Center where he received his JD.

Anthony D. Ingraffia
Senior Claims Attorney II
Company Adjuster
Executive Liability Division
Great American Insurance Company
1450 American Lane, Floor 8
Schaumburg, IL 60173
847-330-6770
Aingraffia@gaig.com
www.gaig.com



Anthony Ingraffia is a Senior Claims Attorney II at Great American Insurance Company's Executive Liability Division. Anthony's role at Great American focuses on the handling of Management Liability claims, including Employment Practice Liability claims. Prior to joining Great American, he was an attorney at a Chicago-area law firm specializing in insurance coverage litigation and insurance defense. Anthony holds a Bachelors Degree in Finance from Northern Illinois University and a J.D. from The University of Illinois at Chicago, where he served as a member of the executive editorial board of the law review. Anthony also holds an Insurance Adjusters' License in the state of Texas and holds a RPLU Designation.

Rae Lynn Kahle
Claims Specialist l Major Case Unit
West Bend Insurance
1900 S. 18th Ave.
West Bend, WI 53095
608-410-3661
rkahle@wbmi.com
www.wbmi.com

Rae Lynn Kahle is a Claims Specialist with the Major Case Unit for West Bend Insurance. She manages large exposure and specialty coverage claims. Rae Lynn has 29 years and counting of experience as an insurance professional which includes personal and commercial lines. Beginning with simple auto claims, liability disputes, total losses, subrogation to on-site catastrophe claims and commercial specialty claims. She has

managed catastrophe claims from the California wildfires, Midwest tornado and flooding to hurricanes in the southern and gulf states. She maintains strong ethics in evaluating her claims and strives for fair resolutions. She has been a claim trainer, peer mentor and a consultant. She was appointed to the division budget planning committee. She is active in her community and holds a seat on the finance council of the local college and has been a member of the local school board and is currently a board member of her home parish. Rae Lynn plays several instruments and recently began studying the violin. She enjoys spending time with her family and is an avid spectator in theater and sports activities of her grandchildren.

Monica L. Logan, Esq.
Chief Claims Officer – D&O and FI Claims
CapSpecialty
City Place I, Suite 1600
185 Asylum Street
Hartford, CT 06103
860-494-4958
860-830-3428 (mobile)
mlogan@CapSpecialty.com
www.capspecialty.com

Monica Logan joined CapSpecialty in 2022 with over 18 years of insurance experience. Monica currently leads the FI and D&O Claims unit, where she oversees a diverse array of matters involving Public and Private Company D&O, Insurance Company and Asset Manager D&O and E&O, Health Care D&O, EPL, and Managed Care claims. Monica practiced law in the Chicago area prior to beginning her insurance career at Chubb Insurance, where she worked for over 16 years. She quickly rose from Senior Claims Examiner to Assistant Vice President of Claims where she was the technical lead for several examiners and specialized in complex health care litigation primarily involving antitrust, M&A and regulatory matters. From 2019 to 2022, Monica worked at TDC Specialty as Assistant Vice President of Claims, until joining CapSpecialty in 2022. Monica graduated from De Paul University with a degree in Political Science and attended UIC John Marshall Law School in Chicago, where she earned her Juris Doctorate Degree. Monica is licensed to practice law in both Illinois and Connecticut and lives in Connecticut with her husband and two sons.

Melissa Mason
Claims Manager
VA Division of Risk Management
101 N. 14th Street
Richmond, VA 23219
804-786-6018
Melissa.mason@trs.virginia.gov
www.trs.virginia.gov

Melissa Mason is a Claims Manager for the Virginia Department of the Treasury's Division of Risk Management. In this role she manages civil litigation against constitutional officers and local government officials, and regularly negotiates settlements between plan members and opposing parties. Melissa has an

extensive background in insurance and risk management. She has been a claims examiner for one of the world's leading travel insurance companies, an underwriter for both personal and commercial lines of business for a privately owned insurance company, and an adjudicator for the federal government's social security program. Melissa is a graduate of Virginia Commonwealth University, with dual degrees in Social Work and Psychology, and is passionate about helping others. Outside of risk management, Melissa has co-founded an organization that focuses on building positive connections and relationships amongst women of color, with chapters in over 90 cities worldwide, and she is currently in the process of building her real estate business in order to help others realize their dream of homeownership.

Mitchell A. Orpett, Esq.
Tribler Orpett & Meyer, P.C.
225 West Washington St., Suite 2550
Chicago IL 60606
312-201-6413
maorpett@tribler.com
www.tribler.com

Mitch Orpett, is the attorney representative for the State of Illinois. He is a founding member and former managing director of Tribler Orpett & Meyer, P.C., a Chicago law firm serving the insurance and business communities. His practice is devoted to the defense of various professional and casualty claims and to the resolution of insurance and reinsurance disputes. He has been active in litigation, arbitration and other methods of alternative dispute resolution and has served both as advocate and arbitrator. He was awarded listings in Guide to the World's Leading Insurance and Reinsurance Lawyers and in Who's Who Legal, Insurance & Reinsurance. He has also been named as an Illinois "Super Lawyer" and to the Illinois Network of Leading Lawyers, in recognition of his work as an insurance and reinsurance lawyer.

Mitch has devoted more than 40 years of service to the profession, holding numerous leadership positions in the American Bar Association, among others. He was elected to the ABA's Board of Governors and served for many years on its policy-making body, the House of Delegates. He was the chair of the ABA's Section Officers Conference, in which capacity he represented the approximately 240,000 members of the sections and divisions of the American Bar Association. Previously, he was chair of the ABA's 30,000 member Tort Trial and Insurance Practice Section and of the ABA's Standing Committee on Continuing Education of the Bar. He was also vice chair of the ABA's Presidential Commission on the Unintended Consequences of the Billable Hour (United States Supreme Court Justice Stephen G. Breyer, honorary chair).

Mitch is a graduate of the University of Illinois, where he earned his bachelors and masters of arts degrees. He is a graduate of that institution's College of Law.

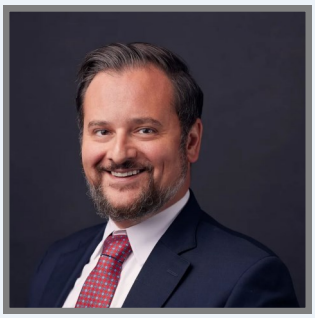
Davis J. Reilly, Esq.
Bledsoe Diestel Treppa & Crane
180 Sansome Street, 5th Floor
San Francisco CA 94108
415-981-5411
dreilly@bledsoelaw.com
www.bledsoelaw.com

Davis Reilly is the managing partner of Bledsoe, Diestel, Treppa & Crane, LLP in San Francisco, California. His practice focuses on tort litigation defense with particular emphasis on areas of landlord-tenant litigation, catastrophic personal injury and wrongful death. He has defended actions involving products liability, premises liability, preschool facilities, industrial accidents, real estate and neighbor disputes. He practices in both California and Nevada state and federal courts and has tried several cases to jury verdict. Davis graduated from California Polytechnic State University San Luis Obispo in 2007 and received his J.D. from Santa Clara University School of Law in 2010. He is a member of the California, Nevada, and Texas Bar Associations.

Daniel J. Ryan
Senior Claim Manager
Intact Insurance Specialty Services
605 Highway 169 North, Suite 800
Plymouth, MN 55441
952-852-0479
DRyan@intactinsurance.com
www.intactinsurance.com

Dan Ryan is the Claim Director for P&C Liability Claims at Intact Insurance Specialty Services in Plymouth, MN. In that role, he manages the company's GL/Auto Liability, Non-Trucking Liability, Public Entities, and Global Network Claims teams. Over the past 11+ years, he has also managed teams responsible for handling professional claims in the company's Financial Services, Management Liability, and Entertainment-Media business segments. Prior to joining Intact, Dan spent more than five years at a different insurer, handling Public Company D&O and other professional liability claims. Before that, he spent more than twelve years in private practice as a civil litigator, representing clients mainly in insurance defense, construction, and real estate litigation. Dan is a 1994 graduate of William Mitchell College of Law in St. Paul, MN, and a 1991 graduate of St. John's University in Collegeville, MN.

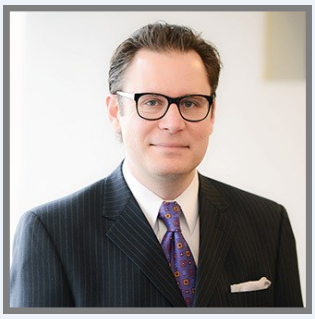
John A. Safarli, Esq.
Macdonald Devin Madden Kenefick Harris
12770 Coit Road, Suite 1100
Dallas, TX 75251
214-744-3308
jsafarli@macdonalddevin.com
www.macdonalddevin.com



John Safarli is senior counsel at the law firm of Macdonald Devin Madden Kenefick & Harris, P.C. in Dallas and has been in practice since 2012. He is licensed to practice in Texas and Washington state and admitted to practice in numerous federal courts across the country, including the United States Supreme Court. John received his BA from Seattle University and his JD from the Benjamin N. Cardozo School of Law in New York. His practice focuses on the defense of nonprofits, educational institutions, corporations, and individuals

against a variety of claims, including employment, products liability, sex abuse, catastrophic injuries, and commercial disputes. John has tried jury and non-jury cases to verdict in both state and federal court and has significant experience successfully defending those verdicts on appeal. Prior to joining Macdonald Devin in 2023, John practiced for 10 years in Washington state and was retained by the Washington State Administrative Office of the Courts to develop and to implement a program that provided legal research and analysis support to state court judges who did not have law clerks due to budgetary constraints.

Matthew L. Schrader, Esq.
Reminger Co., L.P.A.
200 Civic Center Drive, Suite 800
Columbus, OH 43215
614-232-2631
mschrader@reminger.com
www.reminger.com

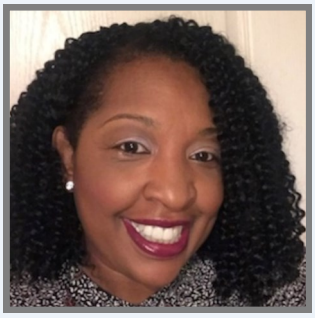


Matthew Schrader is a shareholder in Reminger Co., L.P.A.'s Columbus office. He has litigated and tried cases involving professional liability, medical malpractice, wrongful death, products liability and copyright infringement. Matthew has tried cases in both the state and federal courts throughout Ohio. He has also argued and briefed appeals in Ohio's appellate courts and the Fourth and Sixth Circuits. Matthew earned his B.A. from Xavier University, University Scholar in 1998 and his J.D. from the University of Dayton School of Law in 2001.

For nearly 10 years, Matthew served as the Coach of and Advisor to the Mock Trial Team of the Capital University School of Law, where he also served as Adjunct Professor teaching second and third year law students trial advocacy and evidence. Matthew has acted as general counsel to one of central-Ohio's largest non-profit organizations, a health, wellness and addiction treatment facility, and a large auto parts distributor. He has spoken to audiences throughout the country on issues dealing with trial practice, jury selection, premises liability, catastrophic injury cases, medical negligence, professional liability, claims management and employment issues.

He is Rated AV® Preeminent™: Very Highly Rated in Both Legal Ability and Ethical Standards by Martindale Hubbell Peer Review and has been recognized as a Rising Star by Ohio Super Lawyers Magazine in 2011, 2014 -2016 and as a Super Lawyer from 2017-2024. Matthew has also been selected as one of the Top Lawyers in Central Ohio by Columbus CEO Magazine between 2016-2024.

Vickie L. Story, JD
Litigation Specialist
Arch Insurance Company/
Soundview Claims Solutions Inc.
PO Box 542033
Omaha NE 68154
424-506-1977
vstory@soundviewclaims.com
www.soundviewclaims.com



Vickie Lynn Story is a litigation specialist with Arch Insurance Company/Soundview Claims Solutions Inc. She is a graduate of Jacksonville State University, where she received a BS in Criminal Justice/Social Work. After graduation, Vickie launched her career in Birmingham, Alabama, where she began working with a plaintiff firm specializing in auto accidents. That eventually led Vickie into attending Miles Law School where she graduated cum laude. Vickie is a silver star member of Alpha Kappa Alpha Sorority, Inc. Over the last 25 years she has dedicated her time to mentoring young at-risk kids with foster parents of Jefferson County, Alabama. She currently resides in Atlanta, Georgia.

Sean M. Sturdivan, Esq.
Sanders Warren & Russell LLP
11225 College Blvd., Suite 450
Overland Park, KS 66210
913-234-6137
s.sturdivan@swrllp.com
www.swrllp.com

Sean Sturdivan is a partner at Sanders Warren & Russell LLP, an insurance defense firm with offices in Kansas City, Missouri; Overland Park, Kansas; and Springfield, Missouri. Sean is licensed in the state and federal courts for Kansas, Missouri, Iowa, and California. He received his B.S. in International Business from Baker University, a small liberal arts college in Kansas, and his J.D. from the University of Oregon. Since graduating from law school, Sean has represented businesses and individuals in a wide variety of civil claims. His current practice focuses mainly on the defense of insureds in employment, professional liability, product liability, and personal injury claims. Sean is a member of CLM, Defense Research Institute, Missouri Organization of Defense Lawyers, and the state bar associations for Kansas and Missouri. Sean has been rated AV Preeminent by the Martindale Hubbell Law Directory and named as a Kansas Super Lawyers Rising Star (2011-2017), Super Lawyer (2020), and selected as one of the Best Lawyers in America (2024). Outside his practice, Sean enjoys spending time with his wife and 5 kids.

Lindsey J. Woodrow, Esq.
Waldeck & Woodrow P.A.
900 2nd Avenue South, Suite 1575
Minneapolis, MN 55402
612-375-1550
lwoodrow@waldeckpa.com
www.waldeckpa.com

Lindsey Woodrow of Waldeck & Woodrow P.A., located in Minneapolis, Minnesota, is licensed and practices law in Minnesota State and Federal Courts. She received her B.A. in 2004 from Gustavus Adolphus College and received her J.D. in 2008 from Hamline University School of Law. Prior to joining Waldeck Law Firm, she was a Judicial Law Clerk for the Honorable Chief Judge John H. Guthmann in Minnesota's Second Judicial District, Ramsey County, Minnesota. She is a member of the Hennepin County and Minnesota State Bar

Associations, the Minnesota Defense Lawyers Association (MDLA), the Minnesota State Bar Association (MSBA), and is admitted to practice law in the Tribal Court of the Shakopee Mdewakanton Sioux (Dakota) Community. She is also admitted to practice and is a member of the State Bar of Wisconsin and the State Bar Association of North Dakota. She is a member of Eagle International Associates, Inc., Twin Cities Claims Association and the Claims and Litigation Management Alliance. Lindsey practices exclusively in insurance defense matters, including construction law, product liability, insurance coverage, no-fault, UM/UIM, auto liability, SIU/EUO, professional liability, employment law and liquor liability. This includes all phases of litigation from pre-suit through trial and appeals.

PAYING THE COSTS TO BE THE BOSS

(B.B. King: Successful Defense of Employment Practices Claims)

Melvin J. Davis, Esq.
Reminger Co., LPA
Columbus, OH
614-232-2630
mdavis@reminger.com
www.reminger.com

John A. Safarli, Esq.
Macdonald Devin Madden
Kenefick Harris
Dallas, TX
214-651-3308
jsafarli@macdonalddevin.com
www.macdonalddeving.com

Paying the Costs to Be the Boss
(B.B. King: Successful Defense of Employment Practices Clams)

By: Melvin J. Davis, Reminger Co., L.P.A.

And

John A. Safarli, Macdonald Devin Madden Kenefick & Harris

Introduction

Are you ready to discover the key for employers to avoid ever having to defend a discrimination claim? Me too, let me know when you find it! The reality is that employment discrimination claims can be unavoidable. Employers are sometimes dumbfounded when they receive a Charge or complaint asserting an employment discrimination claim despite having the best intentions for their employees and a top-notch Human Resources Department that handles employees' concerns. Unfortunately, I have bad news – employment claims are on an uptick and are becoming even more prevalent.

As we know, the COVID-19 pandemic led to historic unemployment rates throughout the country. Even after jobs returned, employment remained down compared to pre-pandemic levels.[1] With record unemployment, came an influx of employment claims ranging from wage and hour and discrimination claims. In 2021, the U.S. Equal Employment Opportunity Commission ("EEOC") explored the impact of the COVID-19 pandemic on civil rights in the workplace during an all-virtual Commission hearing.

During the hearing, EEOC Chair Charlotte A. Burrows stated that the pandemic not only had a serious impact on public health and the economy, but it also created a civil rights crisis for many of America's workers. It was also discussed that job losses due to COVID-19 had a disproportionate impact on women and people of color in front-line retail and service jobs.[2] Given the historic job losses and the many ways in which COVID-19 has changed our lives in general, it is not at all surprising that employers are still dealing with the pandemic's aftermath 4 years later.

In this essay, we will address current trends impacting employment law issues and provide insight on how to analyze and defend such claims. So, if you have an employment matter on your desk, do not get the blues, help is on the way.

---

[1] See *The Employment Situation: April 2021,* USDL-21-0816 (U.S. Dept. of Labor, May 7, 2021), https://www.bls.gov\news.release\archives\empsit_05072021.htm.

[2] *EEOC Examines Connections Between COVID-19 and Civil Rights,* https://www.eeoc.gov\newroom\eeoc-examines-connections-between-covid-19-and-civil-rights.

The Americans with Disabilities Act: *Is Attendance an Essential Function?*

Prior to COVID-19, it was essentially a given that being present in the workplace was essential for performing job duties. But during the pandemic when many employees began working remotely, the importance of in-person attendance became less clear. That blurriness has become more prevalent when analyzing discrimination claims premised on a failure to accommodate an employee's disability.

To establish a prima facia case for a failure to accommodate claim, a claimant must prove: (1) she/he is disabled within the meaning of the ADA; (2) she/he is otherwise qualified for the position (with or without a reasonable accommodation); (3) the employer knew or had reason to know about her/his disability; (4) she/he requested an accommodation; and (5) the employer failed to provide the necessary accommodation. *See Barber v. Chestnut Land Co.,* 2016-Ohio-2926, ¶ 72. An employer must make a reasonable accommodation, unless the employer can demonstrate that such an accommodation would impose an undue hardship on the conduct of the employer's business. *Hartman v. Ohio DOT*, 2016-Ohio-5208, ¶ 26.

Before COVID-19, in 2015, the United States Sixth Circuit Court of Appeals held that regular and predictable on-site attendance was both an essential function and a prerequisite to perform other essential functions.[3] Following the pandemic, whether in-person attendance is essential is not nearly as clear. In *Dundee v. Geauga Medical Center,* the plaintiff, who was a third-shift clinical pharmacist at Geauga Medical Center, filed suit after his request to work remotely due to his hereditary, spastic paraplegia diagnosis was denied.[4]

The District Court granted summary judgment to the hospital and held that the plaintiff was not denied a reasonable accommodation for his spastic paraplegia. In support of its position, the hospital argued that state regulations required that institutional pharmacies be appropriately staffed, and that staffing must include a licensed pharmacist who is in "full and actual charge" of the pharmacy.[5] Thus, regardless of whether the plaintiff could perform his duties at home, the Court held that he was not denied a reasonable accommodation because his in-person attendance was an essential function of the job.

In *Peterie v. Leidos, Inc.,* the plaintiff in that case, who was a software test engineer, claimed that she was denied a reasonable accommodation to work remotely due to her

---

[3] *EEOC v. Ford Motor Co.,* 782 F.3d 753 (6th Cir. 2015).
[4] *Dundee v. Geauga Medical Center,* 2024-U.S. App. LEXIS 12932 (6th Cir., May 29, 2024)
[5] *Id.* at * 10, citing Ohio Rev. Code § 4729.27

eyesight and inability to drive at night or in the rain.[6] The employer cited the pre-pandemic case *EEOC v. Ford Motor Co.* to argue that on-site attendance was an essential job requirement. The Southern District determined that in addition to an accommodation needing to be reasonable, the request must also be related to the disability.

Therefore, even though the employer could not establish that the plaintiff's attendance was essential, the Court ultimately found that the plaintiff's request was not reasonable because it was unrelated to her medical condition and essential job function. Notably, the ADA does not require an employer to make accommodations just because they might be in an individual's interest – it requires employers to make reasonable accommodations that enable a disabled employee to perform the essential functions of a job he or she is otherwise qualified for.[7]

Despite the courts in *Dundee* and *Peterie* ruling in favor of the employers, it should not be presumed that a request to work remotely can be safely denied in all situations. In *Moncrief v. ISS Facility Services*, the EEOC filed suit arguing that ISS Facility Services' denial of an employee's reasonable accommodation request to work remotely part-time violated the ADA.[8] The plaintiff, Ronisha Moncrief, a former Health Safety & Environmental Quality Manager requested to work remotely due to her chronic obstructive lung disease and hypertension. After her diagnosis in March 2020, Moncrief's doctor recommended that she work from home and take frequent breaks.

Fortuitously, in the wake of the Covid-19 pandemic, ISS Facility Services placed staff on rotating schedules that required employees to work from home four days a week. However, in June 2020, ISS Facility Services required staff to return to in-person work five days per week. Moncrief renewed her request to work remotely and cited her heart conditions as increasing her Covid-19 risk. ISS Facility Services, nevertheless, denied her request to work remotely and subsequently terminated her employment for performance-related issues even though she was never informed of any performance issues. Ultimately, ISS Facility Services settled the claim and agreed to provide to train its employees on the ADA and to make changes to its employment policies.[9]

---

[6] *Peterie v. Leidos, Inc.*, 2022 U.S. Dist. LEXIS 178381 (S.D. Ohio Sept. 29, 2022)
[7] *Zaffino v. Metro Govt. of Nashville & Davison Cty., Tenn.,* 688 Fed. Appx. 356 (6th Cir. 2017)
[8] *Moncrief v. ISS Facility Services*, Civil Action No. 1:21-CV-3708-SCJ-RDC, (N.D. GA)
[9] *ISS Facility Services to Pay $47,500 to Settle Disability Discrimination Lawsuit*, www.eeoc.gov/newsroom/iss-facility-services-pay-47500-settle-disability-discrimination-lawsuit

The EEOC, in a press release, has advised that the ADA's reasonable accommodation obligation, which includes modifying workplace policies, might require an employer to waive certain eligibility requirements or otherwise modify its remote work program for someone with a disability who needs to work at home.[10] The EEOC uses as an example an employee who may generally require that employees work at least 1 year before they are eligible to participate in a remote work program. If a new employee needs to work at home because of a disability, and the job can be performed at home, then an employer may have to waive its 1-year rule for the individual.[11]

The EEOC further provides that permitting an employee to work at home may be a reasonable accommodation even if the employer does not offer a remote work program. The determination of whether someone may need to work at home must be made through a flexible interactive process between the employer and the employee.

Given the lack of a brightline rule, when analyzing and evaluating reasonable accommodation claims, you must take a nuanced look at all aspects of the job requirements. It is also important to determine whether the requested accommodation is related to the disability. For instance, an employee who contends that they require remote work due to increased pain from fibromyalgia must demonstrate how working remotely would help the individual perform their job. Indeed, the employee in that scenario would suffer from increased pain whether they were at the jobsite or at home.

Because the world of remote work is relatively new, a good resource is the EEOC's recommendations because the caselaw on the subject is continually developing. But the primary takeaway is that remote work, like any other reasonable accommodation, must be determined on a case-by-case basis.

Enforceability of Arbitration Clauses

To avoid the time and expense of litigation, employers may include arbitration provisions in employee handbooks and employment agreements. The U.S. Supreme Court has held that such provisions are enforceable.[12] Congress demonstrated its approval of arbitration by enacting the Federal Arbitration Act ("FAA") and courts have consistently found that claims arising under federal statutes may be the subject of arbitration agreements and are enforceable under the FAA.[13] Similarly, arbitration

---

[10] *Work at Home/Telework as a Reasonable Accommodation | U.S. Equal Employment Opportunity Commission (eeoc.gov)*, www.eeoc.gov/laws/guidance/work-hometelework-reasonable-accomodation

[11] *Work at Home/Telework as a Reasonable Accommodation,* www.eeoc.gov\laws\guidance\work-hometelework-reasonable-accommodation

[12] *Gilmer v. Interstate/Johnson Lane Corp.,* 500 U.S. 20 (1991); *Circuit City Stores, Inc. v. Adams,* 532 U.S. 105 (2001)

[13] *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.,* 473 U.S. 614 (1985)

agreements encompassing claims brought under federal employment discrimination statutes have also received near universal approval. Courts have also held that an employer may require an employee to agree to an arbitration provision as a condition of employment.[14] But there is a caveat.

On March 3, 2022, President Biden signed into law H.R. 4445, amending the FAA to end compelled arbitration of sexual assault and sexual harassment claims. This change was another attempt to afford protections and exemptions to claims premised on sexual harassment/assault. As stated above, historically, arbitration agreements have been favored as a natural extension of the principle that parties are free to contract on the terms of their choosing. Moreover, arbitration is viewed as an efficient way to adjudicate matters while also reducing over-extended court dockets. Thus, H.R. 4445 represents a departure from previous policy that favored mandatory arbitration.

The policy favoring arbitration, however, has largely remained intact as H.R. 4445 applies solely to sexual assault and sexual harassment claims. H.R. 4445 also only applies to pre-dispute arbitration agreements. Pre-dispute arbitration agreements are agreements to arbitrate a dispute or claim that has not yet arisen. Critically, H.R. 4445 does not invalidate or otherwise render unenforceable agreements compelling arbitration of sexual harassment claims that arise after an employee's claim accrues.

As a practical consideration, H.R. 4445 does not address compelled arbitration of multiple claims brought by an employee, where only one claim, i.e., sexual harassment, is within the scope of H.R. 4445. In other words, it remains to be seen whether courts will enforce arbitration agreements as to all claims except the sexual harassment claim. Likewise, it is undetermined whether employees will be forced to arbitrate all non-sexual assault/harassment claims while maintaining a lawsuit to pursue their sexual harassment claim. As such, if an employee asserts multiple cause of action but includes a claim for sexual harassment/assault, the efficiency of arbitration may be greatly diminished because it could force employers to litigate simultaneously in two separate venues.

Thus, when analyzing an employment matter, it is important to look at the employer's handbook and any employment agreement to determine whether there is an arbitration provision. If so, arbitration is advisable as arbitrators tend to be more reasonable when awarding damages than juries compromised of lay persons. Further, because arbitrators are not elected like judges in some jurisdictions, they may be more likely to award summary judgment unless concerned about denying a plaintiff their day in court. Arbitrators also have a more manageable docket that allows them to determine cases efficiently. The efficiency of arbitration is also important when defending Title VII

[14] *Weeks v. Harden Mfg. Corp.,* 291 F.3d 1307 (11th Cir. 2002)

claims that include fee-shifting provisions that allow a prevailing plaintiff to recover attorney fees.

The New Harm Standard for Title VII Discrimination Claims

For the most part, the prima facie elements of discrimination claims have remained unchanged. But that is no longer true following the U.S. Supreme Court's recent opinion in *Muldrow v City of St. Louis, Missouri, et al.* [15] In *Muldrow*, the Supreme Court held that an employee challenging an adverse action under a Title VII discrimination claim must show that the action brought about some harm with respect to an identifiable term or condition of employment, *but that harm need not be significant*. The *Muldrow* decision eliminates the prior requirement imposed by most federal courts that an employee must show an employment action caused "substantial," "material" or "significant" harm in order to maintain a Title VII discrimination claim.

In *Muldrow* the Supreme Court considered the issue of whether a police officer's transfer to a different position violated Title VII on the alleged basis of sex discrimination, even if the transfer did not "significantly" harm the employee. Answering that issue in the affirmative, the Supreme Court held that transferring an employee to a position with similar responsibilities and pay may violate Title VII if the transfer is discriminatory and causes "some harm." The Supreme Court's opinion stated that the threshold for showing "some harm" is lower than the "substantial harm" or "material adversity" standard previously relied upon by federal courts.

It is anticipated that more workplace discrimination actions will be asserted under Title VII and employers should be cautious to carefully document the reason for any employee transfer. The *Muldrow* decision also changes the way discrimination claims have been evaluated in the past. Indeed, the decision creates new risks when employees are transferred to a different position even if the transfer does not result in a reduction of pay. Because *Muldrow* was only recently decided, it remains unknown how federal courts will apply the decision, but it certainly makes an employees burden easier and shifts more risk to employers.

Defending Against Damages

Damages are a tricky subject to defend. Some attorneys believe that a defendant cannot spend any time on damages before the jury without tacitly admitting liability. In the infamous *Pennzoil v. Texaco* lawsuit from 1986 for intentional interference with contractual relations, Texaco's counsel deliberately did not spend any time on damages

[15] *Muldrow v City of St. Louis, et al.,* 601 U.S. 346 (2024)

for that reason. Pennzoil's outrageous damages claims went unrebutted at trial, resulting in an $11 billion verdict—about $31 billion in today's dollars! If your defense addresses damages, here are a few points to keep in mind.

Generally speaking, all plaintiffs may recover back pay. Of course, with a claim for back pay comes the failure-to-mitigate affirmative defense that must be pled in the employer's answer. Sufficient discovery should be conducted to determine job search efforts and any subsequent employment. The results can be very fruitful. On September 17, 2024, the Eighth Circuit Court of Appeals affirmed the dismissal of an in-house lawyer's retaliation lawsuit against her former employer.[16] The district court dismissed the lawsuit as a sanction after learning the plaintiff lied about her current job, which was paying nearly twice as much as the position she claimed she had. The dishonesty was revealed only after obtaining the plaintiff's W-2 shortly before trial.

It is also critical to identify the types of damages available to plaintiff under the specific causes of action. Depending on where your claim is located, different damages may be unavailable to the plaintiff. For example, a plaintiff alleging retaliation for raising age-discrimination claims under the Age Discrimination in Employment Act could recover compensatory and punitive damages in the Seventh Circuit but not the Fifth Circuit (and perhaps not the Tenth Circuit, either[17]).

At the outset of the claim, it is critical to identify what relief the plaintiff seeks under each cause of action and to determine whether the jurisdiction permits recovery of each form of relief.

Conclusion

Employment practice claims, as with most other types of claims, are on the rise. The legal landscape is evolving rapidly, with the COVID-19 pandemic continuing to pose new challenges to employers and courts alike. Careful individualized assessments of accommodation requests and staying current with ADA requirements and EEOC's guidance are more important than ever. Arbitration agreements are still largely upheld, but new limitations are continually being posed and call for a vigilant review process of employment agreements.

With the Supreme Court altering the harm threshold of Title VII discrimination claims in *Muldrow*, it remains essential to have a nuanced understanding of the available

---

[16] *Deering v. Martin*, No. 23-2853, 2024 WL 4208286, at *1 (8th Cir. Sept. 17, 2024).
[17] *Equal Emp. Opportunity Comm'n v. DolGenCorp, LLC*, No. 21-cv-295, 2024 WL 402921, at *2 (E.D. Okla. Feb. 2, 2024)

damages in the jurisdiction and a proactive approach to addressing those damages. With employment practice claims, the thrill has definitely not gone away.

ERODING LIMITS POLICIES:

Explanation and Considerations for Claims Handling

Theodore J. Waldeck, Esq.
Waldeck & Woodrow P.A.
Minneapolis, MN
612-375-1550
tjwaldeck@waldeckpa.com
www.waldeckpa.com
With Special Credit to: Mitchell A. Orpett, Esq.

A) Eroding Limits Policies: Explanation and Considerations for Claims Handling

I. What are Eroding or Diminishing Limits Policies

Eroding limits policies represent a fundamental shift in the nature of insurance purchased. Your own Errors and Omissions policy may include such a clause. Insurers commonly refer to these as "Defense Within Limits" policies, however, more descriptive labels include: "cannibalizing limits," "wasting limits," "burning limits," "reducing limits," "Pac-man," "self-consuming" and "self- liquidating" policies. The policies gained popularity in the 1980s and remain in use and common today.

Specifically, in 1986, the Insurance Services Office (ISO) proposed comprehensive general liability policies be offered on a "claims made" basis and include a "diminishing limits" clause. Under this clause claims expenses, including attorney fees incurred in defending a claim or lawsuit, reduce the limits of the policy otherwise available for indemnifying the insured. Around that time, the author, in an article published by the American Bar Association's Tort and Insurance Practice Section (TIPS),1 wrote:

> Because every defense dollar spent brings the insured closer to having his aggregate reduced, that inured would seem to have a clear financial interest in the costs of defense. Given [case law's] clear concern with the competing financial interests of insurer and insured, an argument can be made that, by applying defense costs so as to reduce an insured's available policy limits, insurance companies will completely forfeit the right to control the defense of that insured. . .This possibility is something which insurers should study carefully before blindly accepting the ISO defense cost provisions as a panacea for their legal expense dilemma. Adopting such provisions may cost them more in the short and long term than does any lawyer under the current system.[1]

During this same time period, diminishing limits policies were already being utilized in professional liability policies. The effort to expand their use into the CGL arena has not been as successful or well received as was likely anticipated by ISO, yet they are still frequently utilized to limit exposures of insurers in professional liability and other niche markets.

The issues raised and the conflicts created between insurers and insureds in the eroding limits arena brings with it concerns that a court, at any time, could interpret these policies and issue a ruling that would dramatically alter the landscape for how such policies are enforced. If, for instance, it were determined diminishing limits policies are against public policy or create an inherent conflict of interest that cannot be waived, the potential consequences for insurers and for the attorneys retained by insurers to represent insureds would be far reaching and profound.

---

[1] "Controlling the Defense: The Insurer's Hollow Crown" (1986). TIPS is now known as the Tort Trial and Insurance Practice Section

II. Eroding Limits Provisions & Public Policy

The "Hollow Crown" is not the only source to question whether policies with eroding limits create an inherent conflict of interest between insurer and insured and between insurer-retained defense counsel and insured. At least one commentator noted:

> There is an inherent conflict between the insured and the insurer in every case where payment of loss plus payment of defense costs could exceed the limits of liability, since every dollar spent on defense of the claim is a dollar that will not be available for settlement or satisfaction of judgment. This is no problem as long as the insured and insurer are fully agreed (and continue to agree) on the merits of settling versus defending including issues of timing and resources invested in the process.[2]

Courts have also addressed this same concern, some even going so far as to consider whether eroding limits policies might be against public policy altogether. The Supreme Court of Appeals of West Virginia considered the question. The decision was ultimately limited to policies issued pursuant to a statute specifically governing liability policies issued to municipalities.

In *Gibson v. Northfield Ins. Co.,* 219 W.Va. 40, 631 S.E.2d 598 (2005), the estate of someone killed by a city-owned vehicle brought a lawsuit against the insurer of the City after taking an assignment of the City's rights to coverage. The estate claimed that the insurance policy in question was void as against public policy to the extent that it held defense costs to be part of the limits of the policy. The court considered the provision in light of a governing statute and held it was contrary to the legislative intent. The court limited its ruling to policies of insurance issued to municipalities, stating:

> [O]n a more general note, we believe that the inclusion of a defense within limits provision in a governmental entity's insurance policy offends traditional notions of fairness. Governmental entities purchase liability insurance to protect their employees and to protect [public funds]. The quiet inclusion of a defense within limits provision into a governmental entity's liability policy subverts that intent by using the liability coverage to pay the insurance company's litigation expenses and attorney fees, rather than protecting the governmental entity and its employees and making injured third parties whole against their losses.

Despite the narrow scope of this particular decision, the court's analysis is not unique to municipal insureds and could easily be expanded to insureds under professional liability policies or even insureds generally.

---

[2] Munro, Defense within Limits: The Conflicts of "Wasting" or "Cannibalizing" Insurance Policies, 62 Mont.L.Rev. 131, 148 (2001).

In *Illinois Union Insurance Co. v. North County Ob-Gyn Medical Group,* S.D. California, 2010 U.S. Dist. Lexis 50095, at *6 (S.D. Cal. May 18, 2010), the court held policy language attempting to reduce coverage limits by defense expenses could not be enforced because the insured could not have known that its policy limits would be eroded by defense costs. There are, however, many policy provisions reducing coverage limits that have been upheld by various courts.[3]

One of the most instructive decisions on this issue came in the federal district court in *NIC Ins. Co. v. PFP Consulting, LLC*, CIV.A. 09-0877, 2010 WL 4181767 (E.D. Pa. Oct. 22, 2010), which held that the determination of whether an eroding limits clause in an insurance policy is against public policy is a matter better addressed and resolved by the Pennsylvania state courts and not the federal courts. Attorneys and insurers alike should remain cautious when making general and overly broad pronouncements about the enforceability of eroding limits in policies of insurance. Indeed, it appears a state specific analysis of the issue is required when examining the enforceability of these policies from a public policy standpoint.

III. Reservation of Rights Letters

Insurers should exercise extreme caution when communicating with their Insureds about the terms, conditions and effects of an eroding limits policy. As a lawsuit proceeds and coverage dollars erode, the timing of the reservation of rights letter is critical. In *Lexington Ins. Co. v. Swanson*, 2007 WL 1585099 (W.D.Wash. 2007), an insured sought to invalidate the insurer's coverage defenses based, in part, on the claim the insurer's control of the defense under an eroding limits policy created a conflict of interest. The argument presented was that a conflict arose because, while the insured would likely wish to settle the claim in order to avoid the potential excess and personal exposure, the insurer's interest would be to defend the lawsuit in order to avoid liability entirely, without having to face any exposure beyond its policy limits, thereby paying the same amount whether or not the settlement offer was accepted but saving money if settlement were rejected and the case successfully defended.

The district court agreed with argument and issues a ruling in favor of the moving party based on the fact that the insurer had controlled the defense of the litigation for nearly two years before issuing a reservation of rights. In the eyes of the court, this raised a presumption that the insured was prejudiced. The insurer was therefore precluded from asserting contract defenses to coverage. The court did, however, note that this ruling applied to coverage defenses, not to the limits themselves. Consequently, the insurer was

---

[3] See, e.g., Continental Ins. Co. v. Bangerter, 37 Cal. App. 4th 69 (Cal. App. 1995); California Dairies, Inc. v. RSUI Indemnity Co., 2010 U.S. Dist. Lexis 64049 (E.D. Cal., June 25, 2010) (Loss means damages, settlements, judgments, and defense expenses); Weber v. Indemnity Insurance Co. of North America, 345 F. Supp. 2d 1139 (D. Haw. 2004) (Defense expenses include the attorney's fees, legal costs, and expenses spent to defend the underlying suit).

barred from litigating its defenses to coverage, but could still rely on the policy's spend-down provision to dispute the applicable policy limit without a timely reservation of rights.

While the *Swanson* court was willing to enforce the policy's maximum limits as written, insurers face two essential roadblocks when litigating eroding limits clauses. First, they must combat the argument that the clause violates public policy, is ambiguous or otherwise unenforceable. Second, they must address the claim that the insurer, because of its conduct in the face of conflicts of interest created by the eroding nature of its policy, is or should be estopped from contesting coverage in any manner. In the face of these threats, a third possibility, rejected by *Swanson* but easily imagined, is because of the conflict of interest and the conduct of the insurer, the insurer will remain liable for defense fees and expenses in addition to indemnity limits. This is particularly foreseeable where an insured claims that it should be entitled to extra- contractual damages due to a failure to settle and/or an excess verdict.

IV. Settlement Demands and Responses

Public policy leans heavily in favor of resolving cases through settlement. Courts routinely grant motions to approve settlement agreements in cases involving burning limits policies. Cases in which a settlement is threatened or an insured is confronted with personal exposure due to a refusal of an insurer to settle, present a significant incentive for a court to issue a broad ruling against the enforceability of eroding limits clauses generally. These cases would also severely restrict the control an eroding limits insurer may exercise in defending a lawsuit. Moreover, it is just these kinds of claims that make for tempting targets for extra-contractual claims and extra-contractual rulings. Thus, in a decision upholding the Depositors Economic Protection Corporation Act against an equal protection challenge, the Rhode Island Supreme Court noted the likely impact that "defense within limits" policies would have in the absence of settlement given the alternative would allow the policies to deplete by payment of attorney's fees and litigation expenses, thereby leaving no limits left to satisfy a judgment. *Rhode Island Depositors Economic Protection Corp. v. Brown*, 659 A.2d 95 (1995).

A similar decision was reached in a case approving the settlement of a class action alleging fraud, where the court expressly considered the fact that the applicable insurance policy was "self-consuming" and, therefore, defense costs and expenses would continue to reduce the amount of coverage available to satisfy any judgment. *Scholes v. Stone, McGuire & Benjamin*, 839 F. Supp. 1314 (N.D. Ill. 1993). These issues are legitimately seen as real and not merely vague and horrible hypotheticals. Courts recognize that, when an insurer believes that a claim has little merit, it may wish to defend the claim through trial and, in doing so, the insured's coverage limits will be completely or significantly eroded. The courts further recognize that, in contrast, the insured will want its insurer to make a substantial and early offer to a claimant in order to obtain a dismissal and protected them from an uninsured excess verdict liability.

In *Biomass One, L.P. v. Imperial Casualty & Indemnity Co*., 968 F.2d 1220 (9th Cir.

1992), an insurer paid $1.9 million in legal fees and costs defending a professional liability claim under a $2 million policy. In that case the court found the policy language of an eroding limits policy to be ambiguous and therefore the legal fees did not erode the available indemnity limits. The decision, however, would not appear to be a significant threat to well-written eroding limits policies. As the *Biomass One* court noted, the policy in question did not contain any single and unambiguous statement that the limits of coverage were subject to defense fees and expenses. The lesson of the decision is that any eroding limits policy must be carefully and precisely drafted to avoid any potential for ambiguity upon review.

IV. Defense Counsel Considerations

All defense lawyers representing insureds will remember that they represent and owe a duty of utmost loyalty to that insured. Accordingly, there are a number of challenges that defense counsel face when presented with an eroding limits policy.

For instance, while defense counsel cannot get involved in a coverage dispute with the insurer they must nevertheless remain attentive to the existence and implications of an eroding limits policy on the defense of their client. An eroding limits policy puts the burden on defense counsel to make certain they communicate early and often with the insured regarding specifically the cost of defense and the impact on the available insurance limits. These issues are readily apparent in cases involving policies where the insured has the right to consent to any settlement. Early and thorough communication should include developing a budget and comprehensive case evaluation at the onset.

Discovery disclosure issues also present unique challenges for defense counsel in the eroding policy limits arena. For example, when preparing answers to interrogatories and initial case disclosures pertaining to applicable insurance, defense counsel must determine how to handle disclosure of available insurance and the potential impact such a disclosure could have on the posturing of the defense.

Furthermore, defense counsel should be aware that governing rules of professional responsibility might require them to continue representing an insured even after the exhaustion of liability insurance limits. In most states, when an attorney seeks to terminate the representation of a client in litigation, that attorney may only do so after taking reasonable steps to avoid foreseeable prejudice to the client. Further, an attorney, after having appeared for a client in court, may only withdraw from such representation in compliance with the applicable rules of that particular court. These ethical obligations apply regardless of who was paying for the defense prior to exhaustion of the policy limits. As such, when the insurance company retaining the defense counsel claims that its policy limits have been exhausted under an eroding limits provision and stops paying for the insured's defense, the defense counsel may find themselves unwittingly providing pro bono services to the insured.

Defense counsel must also consider the inherent conflict of interest that could be found between the attorney and the insured when it comes to the financial self-interest of the

attorney. Specifically, an attorney may desire to be paid as much as possible for representation of the insured, while the insured will likely desire maximum insurance protection at all times. Not disclosing this potential conflict and discussing it with the insured from the outset of a claim can put defense counsel at risk.

V. Issues for the Insurer

Insurers issuing eroding limits policies should be careful to make sure their insured are fully appraised of the existence of such provisions and their effect. Identifying the risk as a potential conflict of interest is likely the clearest way to avoid a problem later on. It is important to remember that the duty of the insurer to address this issue is separate and distinct from the obligation of the attorney and therefore the insurer cannot depend on the attorney to explain this potential conflict.
In addition, insurers should communicate with the insured regarding the potential for an excess verdict and the impact that will have on the insured. Because every defense dollar diminishes the insured's protection, the insurer issuing eroding limits policies should make certain that a system is in place both to control litigation costs and the costs incurred by attorneys representing their insureds. Such policies further emphasize the need to keep the insured current on up to date defense costs and the amount of remaining coverage.

B) Consent-to- Settlement Clauses

I. What is the Purpose of a Consent-to- Settlement Clause

A consent- to- settlement clause is a provision found in many professional liability and E&O insurance policies that require an insurer to seek an insured's approval prior to settling a claim. Consent- to- settlement clauses stem from a recognition of the potential harm to the insured professional's reputation in the event of a settlement payment. Professionals may be required to disclose settled claims to professional licensing boards or data banks. Medical Malpractice insurers, hospitals and self- insured health care providers for example must report medical malpractice claim settlements to the National Practitioner Data Bank (NPDB) in accordance with Title IV and Section 60.7(d) of the NPDB regulations.

Consent to settlement clauses have generally been

While some professional liability policies contain consent-to-settle provisions carrying no repercussions for the insured in the event settlement consent is withheld, many policies contain variations of a "hammer clause" with significant impact to the insured.

II. Examples of Consent-to- Settlement Clauses

A traditional consent provision may read as follows: "[Insurer] will not settle any claim without your written consent, which shall not be unreasonably withheld." A "full

hammer" clause however may provide that in the event the insured refuses to consent to a settlement endorsed by the insurer, the insurer's liability for the cost of defense and indemnity is capped at the amount of the endorsed settlement. The insured is then responsible for any attorney's fees and judgment in excess of the endorsed settlement amount. A typical "full hammer" provision may read as follows:

> "[Insurer] shall … not settle any claim without the written consent of the named insured, which consent shall not be unreasonably withheld. If, however, the named insured refuses to consent to a settlement recommended by the [Insurer] and elects to contest the claim or continue legal proceedings in connection with such claim, the [Insurer's] liability for the claim shall not exceed the amount for which the claim could have been settled, including claims expenses up to the date of such refusal, or the applicable limits of liability, whichever is less."

Similarly, certain policies may contain a modified-hammer provision, which operates similar to the classic hammer provision, yet the insured is liable only for a percentage of any judgment in excess of the endorsed settlement.

Theodore J. Waldeck, Esq.
Waldeck & Woodrow P.A.
tjwaldeck@waldeckpa.com

Damages Recovery for Decedents' Conscious Pain and Suffering:

A 50 State Survey

Lindsey J. Woodrow, Esq.
Waldeck & Woodrow P.A.
Minneapolis, MN
612-375-1550
lwoodrow@waldeckpa.com
www.waldeckpa.com

Damages Recovery for Decedents' Conscious Pain and Suffering: A 50 State Survey

OCTOBER 2024

LINDSEY J. WOODROW

WALDECK & WOODROW
900 2ND AVENUE S, SUITE 1575
MINNEAPOLIS, MN 55402
612.375.1550
www.waldeckpa.com

WALDECK & WOODROW P.A.

Table of Contents

I. Alabama 4
II. Alaska 5
III. Arizona 7
IV. Arkansas 9
V. California 11
VI. Colorado 14
VII. Connecticut 15
VIII. Delaware 17
IX. District of Columbia 19
X. Florida 21
XI. Georgia 23
XII. Hawaii 25
XIII. Idaho 27
XIV. Illinois 28
XV. Indiana 30
XVI. Iowa 32
XVII. Kansas 34
XVIII. Kentucky 36
XIX. Louisiana 38
XX. Maine 40
XXI. Maryland 41
XXII. Massachusetts 43
XXIII. Michigan 45
XXIV. Minnesota 47
XXV. Mississippi 48
XXVI. Missouri 50
XXVII. Montana 52
XXVIII. Nebraska 53
XXIX. Nevada 55
XXX. New Hampshire 57
XXXI. New Jersey 59

XXXII. New Mexico 61
XXXIII. New York 63
XXXIV. North Carolina 65
XXXV. North Dakota 67
XXXVI. Ohio 68
XXXVII. Oklahoma 70
XXXVIII. Oregon 72
XXXIX. Pennsylvania 73
XL. Rhode Island 75
XLI. South Carolina 77
XLII. South Dakota 79
XLIII. Tennessee 81
XLIV. Texas 83
XLV. Utah 85
XLVI. Vermont 86
XLVII. Virginia 87
XLVIII. Washington 89
XLIX. West Virginia 92
L. Wisconsin 94
LI. Wyoming 96

I. Alabama

Statute: Ala. Code § 6-5-462

Summary:

Alabama does not have an express conscious pain and suffering provision in its survival statute. However, the statute states: "all claims on which an action has been filed. . . survive in favor of. . . the personal representative." Ala. Code § 6-5-462. This includes personal injury actions for pain and suffering, also known as hedonic damages, experienced by the decedent between the time of injury and death. The statute does limit recovery by the personal representative of the decedent to only tort actions that had already been filed at the time of the decedent's death. Alabama courts have also stipulated that there must be some "perceptible length of time" between the decedent's injury and death.

Case Law:

The Supreme Court of Alabama held that, should the case go to trial, the personal representative of a decedent, who died from complications associated with injury induced quadriplegia, could recover damages for the decedent's pain and suffering. Eight and a half months prior to the decedent's death, he dove into his property's swimming pool from a diving board and sustained "a broken neck and permanent quadriplegia." The personal representative of the decedent continued the decedent's personal injury action following his death, against the trade association that approved the design of the swimming pool. *King v. Nat'l. Spa and Pool Inst., Inc.*, 607 So.2d 1241 (Ala. 1992).

The Supreme Court of Alabama held that the widows of two workers killed in a fire while repairing a fiberglass tank seeking to recover damages for the decedents' pain and suffering shall survive a JNOV motion provided a jury could have a "just and reasonable inference" that the decedents lived for a "perceptible duration of time after the injury." Witnesses stated that they heard one decedent scream "go, go," and the other scream "Oh, God." The Court held that the jury could infer that both decedents lived for a sufficient amount of time to experience conscious pain and suffering as a result of their injuries. This was contrary to the Defendant's contention that one decedent's death was nearly "instantaneous," and therefore under Alabama law the widow should not recover for decedent's pain and suffering. *Industrial Chemical & Fiberglass Corp. v. Chandler*, 547 So.2d 812 (Ala. 1998).

II. Alaska

Statute: Alaska Stat. § 09.55.570

Summary:

Alaska does not have an express conscious pain and suffering provision in its survival statute. However, the statute states: "All causes of action by one person against another. . . survive to the personal representative of the [decedent]." Alaska Stat. § 09.55.570. The expansive language includes survival actions by personal representatives of decedents for the pain and suffering experienced between the decedent's injury and subsequent death. Alaska also allows personal representatives, on behalf of a decedent, to bring a suit of wrongful death in addition to any survival actions the personal representative may be entitled to bring. Alaska Stat. § 09.55.580. However, recovery in wrongful death actions is limited to surviving spouses, children, and other dependents, who can recover damages "which are the natural and proximate consequence" of another party's negligence, including the decedent's pain and suffering. *Id*. If the decedent has no surviving spouses, children, or other dependents, then only pecuniary damages may be recovered by the personal representative. *Id*.

Case Law:

The Supreme Court of Alaska held that in a survival action to recover for the pain and suffering of a decedent, there cannot be recovery if the "pain and suffering [was] substantially contemporaneous with death or mere incident to it." This stipulation on recovery should be submitted to the jury in survival actions for the pain and suffering of decedents. *Northern Lights Motel, Inc. v. Sweaney*, 561 P.2d 1176, 1190-1 (Alaska 1977).

The United States District Court of Alaska, held that the personal representative of a decedent could not survive a summary judgement motion dismissing her survival action for the decedent's pain and suffering because she had "not provided any evidence to controvert the testimony of [Defendant's] expert" who stated that the decedent's death was "instantaneous." *Millo v. Delius*, 872 F.Supp.2d 867, 875 (D. Alaska 2012) (applying Alaska state law).

The Supreme Court of Alaska held that in a wrongful death action by personal representatives of the decedents, the question of whether decedents experienced pain and suffering between their injuries and deaths may be submitted to the jury if a court determines that the jury could plausibly find for either party. The Court reasoned that expert testimony that the decedents "died within seconds or minutes of the accident" showed "at least a reasonable possibility that the decedents suffered before dying." *Sowinski v. Walker*, 198 P.3d 1134, 1165-6 (Alaska 2008).

The Supreme Court of Alaska held that the mother of a decedent who, while driving his snow machine on the ice, fell into a hole created by the municipality and died as a result was entitled to recover for the decedent's pre-death pain and suffering. The jury awarded the mother of the decedent damages of $400,000 for the decedent's pain and suffering experienced between his injury and subsequent death. *North Slope Borough v. Brower*, 215 P.3d 308, 312 (Alaska 2009).

III. Arizona

Statute: Ariz. Rev. Stat. § 14-3110

Summary:

Arizona is one of the few states where the survival statute contains a provision expressly precluding recovery by a personal representative for a decedent's pain and suffering. Ariz. Rev. Stat. § 14-3110. Arizona courts have interpreted this language plainly, and dismiss actions brought by personal representatives of decedents for failing to include any means of recovery outside of the decedent's pain and suffering experienced between the injury and death. However, there are limited exceptions to this rule, such as the Arizona elder abuse statute, that will enable a personal representative of a decedent to recover damages for the decedent's pain and suffering, based upon a public policy rationale.

Case Law:

The Arizona Court of Appeals held that the provision in A.R.S. § 14-3110 precluding recovery by personal representatives for decedent's "pain and suffering" experienced between their injury and death was constitutional under Arizona law. The Court speculated as to the legislative intent of the statute: "The legislature apparently contemplated that once an injured person is dead he cannot benefit from an award for his pain and suffering." *Harrington v. Flanders*, 407 P.2d 946, 948 (Ariz. App. 1965).

The Arizona Court of Appeals held that allowing a personal representative of a decedent to "pursue damages for loss of enjoyment of life when the statute excludes damages for the decedent's 'pain and suffering' would be contrary to the Legislature's intent." The Court also held that punitive damages were not precluded by the survival statute. *Quintero v. Rogers*, 212 P.3d 874, 877-8 (Ariz. App. 1st Div. 2009).

The Supreme Court of Arizona held that despite the survival statute's explicit exclusion of recovery of damages for the "decedent's pain and suffering," personal representatives pursuing an action under the Arizona elder abuse statute, A.R.S. § 46-455, on behalf of a decedent could recover damages for the decedent's pain and suffering experienced between the decedent's injury and subsequent death. The Court placed special emphasis on preserving the right of action for a large, vulnerable population, who otherwise may have little means of recovery, given the limited personal medical costs, and limited economic productivity of elderly populations subject to A.R.S. § 46-455. *Matter of Guardianship/Conservatorship of Denton*, 945 P.2d 1283, 1286 (Ariz. 1997).

The Arizona Court of Appeals held that when a personal representative of a decedent who died from causes unrelated to her federal § 1983 claim sought to recover damages for the decedent's pain and suffering during the acts described in the § 1983 claim, the personal

representative could not recover. The claim was precluded by the survival statute "inasmuch as [the decedent's] death did not result from Defendants' alleged use of excessive force." *Badia v. City of Casa Grande*, 988 P.2d 134, 140-1 (Ariz. App. 2nd Div. 1999).

IV. Arkansas

Statute: Ark. Code § 16-62-101

Summary:

Arkansas does not have an express pain and suffering provision in its survival statute. However, it does allow a personal representative of a decedent to recover "For wrongs done to the person or property" of the decedent. Ark. Code § 16-62-101(a)(1). The Courts have determined that this provision includes damages for the decedent's pre-death conscious pain and suffering.

The Arkansas survival statute also contains a provision entitling a personal representative of a decedent to recover "loss-of-life" damages for decedent's death, independent of other elements of damages. Ark. Code § 16-62-101(b). The Courts have interpreted this to encompass monetary damages representative of the value the decedent placed in their own life, as determined by the benefits of life, such as college attendance, career opportunities, and starting a family, that the decedent would have reasonably been likely to receive had the injury not caused death. The Courts themselves admit that creating an objective rationale for the calculation of loss-of-life damages is highly challenging if not impossible.

Case Law:

The Supreme Court of Arkansas held that where a decedent suffered "such a terrible head injury as to preclude the possibility of consciousness from the moment of impact to death," the personal representative of the decedent could not recover damages for the decedent's conscious pain and suffering. The Court stated that the jury verdict granting damages "based on speculation and conjecture, was without any substantial evidence to support it," and therefore could not be upheld. *Brundrett v. Hargrove*, 161 S.W.2d 762, 764 (Ark. 1942).

The Supreme Court of Arkansas held that personal representatives of decedents could recover "loss-of-life" damages, even if the decedent died instantly from their injuries, precluding "pain and suffering" damages. The Court reasoned that the legislature "[sought] to compensate a decedent for the loss of value that the decedent would have placed on his or her own life." *Durham v. Marberry*, 156 S.W.3d 242, 248-9 (Ark. 2004).

The Federal District court for the Eastern District of Arkansas, applying Arkansas state law for a medical malpractice survival action, found that the personal representatives of a child-decedent were entitled to $10,000 in damages for the child-decedent's pre-death pain and suffering, that occurred over a six-day period before the child-decedent lost consciousness, during which he "probably suffered no more than a child with severe flu symptoms." The Court also ruled that the personal representatives were entitled to $600,000 in "loss-of-life damages," per the survival statute provision, because the Court determined that to be the

monetary value the child-decedent would have reasonably placed in his own life. The Court based this award on benefits the decedent would have likely experienced in his life, had he lived. These included continuing his "educational development," "express[ing] and utiliz[ing] his natural talents," pursuing "employment opportunities," and "experience[ing] the joys of married life and parenthood." *McMullin v. U.S.*, 515 F.Supp.2d 914, 919-28 (E.D. Ark. 2007).

V. California

Statute: Cal. Civ. Pro. Code § 377.34

Summary:

The California state survival statute expressly prohibits recovery of damages for a decedent's pre-death pain and suffering by a personal representative. Cal. Civ. Pro. Code § 377.34 (a). However, the statute was recently revised to permit recovery for a decedent's pre-death pain and suffering. Provided the action was filed before January 1, 2022 and granted a preference per Section 36[1] or was filed on or after January 1, 2022, and before January 1, 2026, damages for the decedent's pre-death pain and suffering may be recovered by the personal representative. *Id.* at (b). The revised statute also contains the requirement that any awards made through these exceptions are reported to the state legislature. *Id.* at (c). This revision is in effect until January 1, 2026, when it will either need to be renewed or recovery for pre-death pain and suffering under the survival statute will no longer be permitted. As of now, there are not many cases interpreting this revised version of the statute, although it seems as though it will be similar in construction to other states' survival statutes that do permit recovery for a decedent's pre-death pain and suffering. Below there are a selection of cases resolved both under the revised statute and under the original statute that precluded pre-death pain and suffering damages; as of now the revision to the statute is temporary until January 1, 2026 so it is important to understand how both versions of the statute are interpreted.

Case Law:

The California Court of Appeals held that when a decedent died during an appeal, his personal representatives were still entitled to recover the damages for the decedent's past pain and suffering from his injuries as well as the damages for the decedent's future pain and suffering he could be expected to experience had he continued to live. The Court reasoned that because the decedent lived to see a judgement entered from the trial court, all these damages, for his past and future pain and suffering, became a part of his estate; the damage awards were not appealed by the Defendant until after the decedent was dead and the damage awards had already become a part of his estate. Therefore, the Court permitted the decedent's personal representatives to maintain their recovery of $2,000,000 for the decedent's past pain and suffering in connection with the injury, and their recovery of $12,000,000 for the decedent's future pain and suffering had he continued to live, although

[1] Cal. R. Civ. Pro. § 36 states that a preference can be given to two categories of plaintiffs: (1) a plaintiff who is over 70 years old, who has a substantial interest in the action as a whole, and who's health is such that a preference is necessary to prevent prejudicing the party's interest in the litigation; and (2) a plaintiff who is under 14 years old and has a substantial interest in the action as a whole. The effect of the granting of a preference is that the court will bring the action to trial not sooner than six months but not later than nine months from the granting of the preference.

the decedent himself had died. *Rodas v. Dpt. of Transportation*, No. D078583, 2023 WL 9017479 (Cal. App. 4th Dist. Dec. 29, 2023) (unpublished opinion).

The California Court of Appeals held that when a proceeding was granted a preference per Cal. R. Civ. Pro. § 36 before January 1, 2022, the decedent's personal representatives could recover damages for the decedent's pre-death pain and suffering. The Court reasoned that because the Plaintiff's proceeding was granted a preference before January 1, 2022, and the decedent experienced past pain and suffering and would have experienced future pain and suffering, the damage awards, $3.5 million and $6.5 million respectively, could be recovered by decedent's personal representatives. *Bader v. Johnson & Johnson*, 86 Cal.App.5th 1094 (Cal. App. 1st Dist. 2022).

The California Court of Appeals held that the personal representative of a decedent can recover damages for the decedent's pre-death pain and suffering under the California Elder Abuse statute, while recovery of these damages by personal representatives would usually be barred by the California survival statute. In this case, a hospital that chronically and knowingly understaffed its facilities was found to have acted negligently, which led to the decedent's pain and suffering and his personal representatives' means of recovery. *Fenimore v. Regents of the Univ. of Cal.*, 245 Cal.App.4th 1339, 1352 (Cal. App. 2d Dist. 2016).

The Supreme Court of California held that both the trial and appellate courts erred in their failure to apply the California survival statute to a federal § 1983 claim brought in California state court. The Court reasoned that when the decedent's death is separate from the conduct described in their § 1983 claim, then recovery for the decedent's pre-death pain and suffering by a personal representative is precluded. Here, the decedent died in an unrelated car accident while her § 1983 claim was pending, and therefore her personal representative was barred from recovering for the decedent's pain and suffering. The Court placed special consideration in the fact that this claim was brought in the state court and not the federal court. This case would likely be resolved in the alternative had it been brought under the recently revised statute permitting recovery for pe-death pain and suffering damages. *Cnty. of L.A. v. Superior Court*, 981 P.2d 68, 78 (Cal. 1999).

The Federal Court of Appeals for the Ninth Circuit, applying the California state survival statute, held that when a decedent's death was caused by conduct serving as the basis for his federal § 1983 claim, recovery damages for his pre-death pain and suffering by his personal representative were not precluded by the California survival statute. Here, the decedent was shot and killed by police following the officers asking for identification. *Chaudry v. City of L.A.*, 751 F.3d 1096, 1105 (9th Cir. 2014).

The Federal District Court for the Northern District of California, applying the California state survival statute, held that even when the decedent died from causes unrelated to her federal § 1983 claim, her personal representative could still recover damages for the decedent's pre-death pain and suffering. The Court reasoned that if pre-death pain and suffering damages

were precluded under the state survival statute, the federal purpose behind § 1983 would be undermined, and therefore the survival statute should not preclude recovery for the decedent's personal representative in this case. *Williams v. City of Oakland*, 915 F.Supp. 1074, 1079 (N.D. Cal. 1996).

The California Court of Appeals held that a decedent's personal representative could not recover damages for decedent's pre-death pain and suffering under their federal § 1983 claim. The Court reasoned that recovery was precluded by the state survival statute because the legislature reasonably judged "that, once deceased, the decedent cannot in any way be compensated for his injuries or pain and suffering, or be made whole." This case would likely be resolved in the alternative had it been brought under the recently revised statute permitting recovery for pe-death pain and suffering damages. *Garcia v. Superior Court*, 42 Cal.App.4th 177, 186 (Cal. App. 2d Dist. 1996).

VI. Colorado

Statute: Colo. Rev. Stat. § 13-20-101

Summary:

Colorado is one of the few states that expressly precludes recovery for conscious pain and suffering of a decedent in its' survival statute. Colo. Rev. Stat. § 13-20-101 (1). The statute states that the damages recoverable by the personal representative of a decedent "shall not include damages for pain, suffering, or disfigurement, nor prospective profits or earnings after the date of death. *Id*. There is not a wealth of case law interpreting the survival statute in light of pre-death pain and suffering damages; the courts generally interpret the statute plainly and strictly, leading to the dismissal of any actions for pre-death pain and suffering damages.

Case Law:

The Colorado Court of Appeals held that when a decedent died after the district court's decision to permit recovery for the decedent's pre-death pain and suffering, but before the reversal of this same decision on remand following a separate appeal, the decedent's personal representative could not recover damages for the decedent's pre-death pain and suffering. The Court reasoned that because a reversal of a ruling functions as if the original ruling was void, the survival statute precludes recovery of non-economic and punitive damages for a decedent's pre-death pain and suffering, because they are no longer alive to seek these damages themselves. *Sharon v. SCC Pueblo Belmont Operating Co., LLC*, 467 P.3d 1245 (Colo. App. 2019).

The Colorado Court of Appeals held that because the state's survival statute is "in derogation of the common law," it "thus must be strictly construed." The Court reasoned that because the language of the survival statute expressly states that recovery is precluded for "pain, suffering, or disfigurement, [and] prospective profits after the date of death," all claims by the decedent's estate or personal representatives for "exemplary damages" in this case also abated upon the decedent's death. *Burron's Est. v. Edwards*, 594 P.2d 1064 (Colo. App. 1979).

VII. Connecticut

Statute: Conn. Gen. Stat. § 52-599

Summary:

The Connecticut state survival statute does not have an express provision allowing for pre-death pain and suffering damages for personal representatives of decedents. However, the statute does state generally that causes of action "shall survive in favor of. . . the executor or administrator of the diseased person." Conn. Gen. Stat. § 52-599. The courts have interpreted this language to include recovery of pre-death pain and suffering damages by personal representatives of decedents. Additionally, the courts place an important emphasis on only permitting recovery when there is evidence showing that the decedent consciously experienced pain and suffering, as opposed to being unconscious during the time between the injury and subsequent death.

Case Law:

The Appellate Court of Connecticut held that a jury verdict awarding roughly $54,500 to for the decedent's loss of enjoyment of life and her pre-death pain and suffering was inadequate and disproportionately low. The twenty-two-year-old decedent was run over by a parade float, causing massive damage to her pelvis and internal organs, and lived for twenty five days before dying from her injuries. The decedent was admittedly drunk at the time of the injury, leading the jury to find the decedent 45% negligent under a comparative fault framework. *Zarrelli v. Barnum Festival Soc., Inc.*, 505 A.2d 25 (Conn. App. 1986).

The Supreme Court of Connecticut held that a jury verdict awarding a $20,000 per year annuity to the personal representatives of the decedent for her pre-death pain and suffering, who died due to medical malpractice during her childbirth, was "liberal" but not excessive. The Court agreed with the defendant that the award was excessive when only taking into account the decedent's prospective wage earnings of approximately $125 plus tips per week, but that damages for decedent's pre-death pain and suffering resulting from the defendants' malpractice must also be taken into account. The Court reasoned that because the decedent was conscious for multiple hours, although in shock, before entering a coma induced by blood loss, a jury could reasonably infer that she suffered mental anguish and pain during this timespan. *Katsetos v. Nolan*, 368 A.2d 172 (Conn. 1976).

The Superior Court of Connecticut held that a jury verdict awarding $800,000 to the personal representative of the decedent for her pre-death pain and suffering was excessive, and did not take into account the decedent's comparative negligence, and thus should be reduced to $42,000. The Court reasoned that the original damages award was excessive because the decedent experienced pain and suffering for two hours before succumbing to hypothermia, with the only other injuries being abrasions and contusions from her fall. The Court reduced

the decedent's damages a further 30% due to her failure to use her life alert device to call for help following her fall. *Est. of Marshall v. Naugatuck Housing Auth.*, No. UWYCV116011642, 2015 WL 2025136 (Conn. Super. Mar. 31, 2015).

The Superior Court of Connecticut held that the personal representative of the decedent could not recover damages for the decedent's pre-death pain and suffering, as decedent was unconscious from the time of his injury until his death. Decedent had a stroke from ingesting opioids provided to him by the defendant, and the court record was "devoid of any evidence of conscious pain and suffering." The Court did however award the decedent's personal representatives $1,000,000 for "loss of [the decedent's] life resulting from the lethal dose of narcotics provided to him by the defendant," separate from the determination of pre-death pain and suffering damages. *Goody v. Bedard*, No. KNL-CV6030244-S, 2023 WL 5364875 (Conn. Super. Aug. 16, 2023).

The Supreme Court of Connecticut held that when the decedent was not conscious between the time of his injury until his death, the decedent's personal representatives cannot recover damages for pre-death pain and suffering. Here the Court also held that because there was no evidence that the decedent experienced any conscious pain and suffering between his injury and subsequent death, because the decedent was unconscious, and therefore any instructions to the jury regarding awards of damages for pre-death pain and suffering were made in error. *Intelisano v. Greenwell*, 232 A.2d 490 (Conn. 1967).

VIII. Delaware

Statute: Del. Code tit. 10 § 3701

Summary:

Delaware does not have an express conscious pain and suffering provision in its survival statute. Del. Code tit. 10 § 3701. However, the statute does provide that "[a]ll causes of action . . . shall survive to . . . the executors or administrators of the person to . . . whom[ ] the cause of action accrued." *Id*. The courts have interpreted this language to include recovery by personal representatives of decedents for the decedent's conscious pre-death pain and suffering. The courts do place emphasis on the requirement that the decedent consciously experience pre-death pain and suffering to permit recovery by the decedent's personal representative. The courts have not established any clear lower limit for the amount of time that the decedent must consciously suffer to permit recovery by a personal representative, just that there must be evidence that the decedent did consciously experience pain and suffering prior to death.

Case Law:

The Superior Court of Delaware held that when the personal representative of the decedent did not provide "sufficient factual basis for consideration of pain and suffering as a separate element of damages under the survival statute," damages for pre-death pain and suffering were not appropriate. The Court reasoned that there was not a "sufficient factual basis" because the decedent "appeared lifeless at all times from the happening of the [car] accident until she was officially pronounced dead on arrival at the hospital." This account of the accident and the decedent's subsequent death did not show sufficient evidence to permit recovery by the personal representative for pain and suffering damages. *Magee v. Rose*, 405 A.2d 143 (Del. Super. 1979).

The Superior Court of Delaware held that when a decedent was conscious between his injury and subsequent death, his personal representative could recover for his pre-death pain and suffering experienced during that timeframe. The Court reasoned that the Plaintiff showed the decedent was conscious through testimony that the decedent "was alive and breathing, had a pulse, attempted to make sounds and had his eyes open for approximately [five] to [seven] minutes after the witnesses arrived on the scene." The Court thus denied the Defendant's motion for summary judgment on the claim of damages for the decedent's pre-death pain and suffering. *Fall v. Evans*, No. C.A. 85C-FE-30, 1989 WL 31558 (Del. Super. Mar. 28, 1989).

The Superior Court of Delaware held that the personal representatives of decedent could recover for the decedent's pre-death pain and suffering where the decedent suffered for no more than 15 minutes prior to his death. The Court reasoned that although the decedent only

suffered for a short while, the decedent's suffering was severe; the conscious decedent was hit in the head with a blunt object, shot in the back, and bled to death. Thus, the Court awarded his estate $45,000 for the decedent's pre-death pain and suffering. *Daniels v. Daniels*, No. C.A. 83C-FE-110, 1990 WL 74338 (Del. Super. May 16, 1990).

IX. District of Columbia

Statute: D.C. Code § 12-101

Summary:

The District of Columbia does not have an express conscious pain and suffering provision in its survival statute. D.C. Code § 12-101. However, the statute does state that "[o]n the death of a person in whose favor . . . a right of action has accrued for any cause prior to his death, the right of action . . . survives in favor of . . . the legal representative of the diseased." *Id*. The courts allow conscious pain and suffering to be inferred from the circumstances surrounding a decedent's death and that so long as it can be shown that the decedent consciously experienced pain and suffering prior to death damages may be awarded to the decedent's personal representative.

Case Law:

The Court of Appeals for the District of Columbia held that "the existence of pain and suffering [can] be inferred from the circumstances surrounding the decedent's death." The Court reasoned that there was pre-death pain and suffering experienced by the decedent to permit recovery by his personal representative because "[t]hree family members testified about [the decedent's] breathing difficulties, his concern over his condition, and his attempts to resort to a useless oxygen mask during the 45-minute period after the oxygen was turned off." The Court upheld the award of $100,000 for the decedent's pre-death pain and suffering. *Capitol Hill Hosp. v. Jones*, 532 A.2d 89 (D.C. App. 1987).

The Court of Appeals for the District of Columbia held that when damage awards for decedents' pre-death pain and suffering, following a remittitur, do not "shock the conscience or exceed the limits within which the jury could operate," then the damage awards should not be reduced further on appeal. Here, the decedents' personal representatives were awarded $500,000 and $350,000 respectively for the decedents' pre-death pain and suffering following a car accident. Expert and witness testimony established that the second decedent, after being ejected from the vehicle in the crash remained conscious and alive long enough to experience conscious pain and suffering, although for a timeframe shorter than the other decedent, and that the other decedent remained in the car and was "moaning and in pain." *D.C. v. Hawkins*, 782 A.2d 293 (D.C. App. 2001).

The Court of Appeals for the District of Columbia held that when a decedent's personal representatives introduced circumstantial evidence sufficient to allow a jury to draw reasonable inferences of pain and suffering, then recovery by the decedent's personal representatives for the decedent's pre-death pain and suffering is appropriate. The Court reasoned that evidence showing that the decedent was conscious following the accident, and died from internal injuries and burns after the vehicle's gas tank ignited was sufficient to

show that the decedent experienced conscious pain and suffering to permit recovery. The Court upheld a damage award of $200,000 for the decedent's personal representatives. *Doe v. Binker*, 492 A.2d 857 (D.C. App. 1985).

The Court of Appeals for the District of Columbia held that even when a decedent was "unconscious" and "unarousable" after being hit by a car, the personal representatives could still recover damages for the decedent's pre-death pain and suffering. The Court upheld the pre-death pain and suffering damage award of $275,000 even though his treating physician at the hospital stated that the decedent "was unconscious from the moment he arrived at the hospital until he died." A witness at the scene of the accident immediately following the collision described the decedent as "bleeding, unconscious, and unarousable, though breathing and with a pulse." Despite this evidence, the Court still upheld the award of conscious pre-death pain and suffering damages. *Asal v. Mina*, 247 A.3d 260 (D.C. App. 2021).

The Court of Appeals for the District of Columbia held that an award of damages for a decedent's conscious pre-death pain and suffering of $1,600,000 was excessive. The Court reasoned it was excessive because there was only one medical expert whose testimony supported the finding that the decedent experienced conscious pain and suffering as a result of his doctor's malpractice before his death, and the Court found this testimony to be "unsupported conjecture." The doctor administered too great a dose of antipsychotic medication to the decedent, causing him to develop deadly neuroleptic malignant syndrome, which other medical experts testified was "unlikely" to cause the decedent to consciously experience pain. Therefore, the trial court did not abuse its discretion in granting the defendant's motion for a new trial. *Faggins v. Fischer*, 853 A.2d 132 (D.C. App. 2004).

X. Florida

Statutes: Fla. Stat. § 46.021; Fla. Stat. § 768.20

Summary:

Florida does not have an express conscious pain and suffering provision in its survival statute. Fla. Stat. § 46.021. The statute states that "[n]o cause of action dies with the person. All causes of action survive . . ." *Id*. While this statute appears to resemble one which would permit a personal representative's recovery of damages for a decedent's conscious pre-death pain and suffering, given its expansive phrasing and language, this is actually not permitted. When the wrongful death statute is applied, damages for the conscious pre-death pain and suffering of the decedent are expressly prohibited. Fla. Stat. § 768.20. The wrongful death statute stipulates that all personal injury claims resulting in death are automatically transformed into a wrongful death claim. *Id*. Under the wrongful death statute, damages are only available for the decedent's survivors' conscious pain and suffering, and not the decedent's own conscious pain and suffering experienced prior to death. *Id*. Florida courts have interpreted this unique interplay to reflect the legislature's intent that once a decedent has died, it is the pain and suffering experienced by the survivors themselves, and not by the decedent that should be compensated. However, the courts do allow for a survival action to recover damages for a decedent's conscious pre-death pain and suffering when the injury in question did not actually cause the decedent's death; this will not trigger the application of the wrongful death statute.

Case Law:

The Supreme Court of Florida held that it was improper for the trial court to not instruct the jury of the personal representative's burden to prove that the decedent consciously experienced pain and suffering prior to his death. The Court reasoned that the jury must understand that recovery can only be permitted for the decedent's conscious pain and suffering when the personal representative can show that the decedent actually experienced pain and suffering; the pathologist in this case testified that "it cannot be so determined" that the decedent suffered pain prior to death from the decedent's autopsy alone. Thus, it was improper to deny the jury instruction as to the personal representative's burden. *Dobbs v. Griffith*, 70 So.2d 317, 318-9 (Fla. 1954).

The Florida Court of Appeals held that if a personal representative of a decedent can show that the decedent consciously experienced pre-death pain and suffering, unrelated to the negligent act that caused her death, damages may be awarded. The Court reasoned that the Florida wrongful death statute eliminated recovery for a decedent's conscious pre-death pain and suffering, while allowing decedents' family members to recover for their own personal pain and suffering resulting from the death, and barred recovery under the survival statute for the conscious pre-death pain and suffering stemming from the same wrongful act

as the wrongful death action. However, this does not bar recovery for other instances of pre-death pain and suffering that did not stem from the wrongful act precipitating a wrongful death. *Williams v. Bay Hosp., Inc.*, 471 So.2d 626 (Fla. 1st Dist. App. 1985).

The Florida Court of appeals held that although a wrongful death claim cannot permit a decedent's personal representative to recover for the decedent's pre-death conscious pain and suffering, this does not preclude the personal representative from recovering pre-death conscious pain and suffering damages from injuries not related to the decedent's death. The Court specifically emphasized that "the survival statute is still applicable to preserve other actions which the decedent may have brought or was bringing prior to his death," thus, refuting the appellee's claim that the wrongful death statute's language impliedly abolished the survival statute. *Smith v. Lusk*, 356 So.2d 1309 (Fla. 2d Dist. App. 1978).

The Supreme Court of Florida held that when a decedent's injuries caused her death, her personal representative cannot recover damages for the decedent's conscious pre-death pain and suffering. The court interpreted the interplay between the survival statute and the wrongful death statute and determined that the wrongful death statute, given its specificity to what damages were available to survivors and personal representatives, took precedence over the survival statute. The Court stated that the legislature's intent behind the wrongful death act was to shift the emphasis away from compensation for the decedent's own conscious pain and suffering experienced prior to death, and instead sought to compensate the survivors for their own personal pain and suffering resulting from their loved one's death. To reflect this intent, the Court interpreted the wrongful death statute as precluding recovery of pre-death conscious pain and suffering damages by personal representatives in cases where the injury in question caused the decedent's death. *Martin v. United Sec. Servs., Inc.*, 314 So.2d 765 (Fla. 1975).

XI. Georgia

Statute: Ga. Code § 9-2-40

Summary:

Georgia does not have an express conscious pain and suffering provision in its survival statute. Ga. Code § 9-2-40. However, the statute states that "[n]o action shall abate by the death of either party . . . the cause of action shall in any case survive to or against the legal representatives of the diseased." *Id*. The courts have interpreted this language expansively, and thus allow the recovery of damages for a decedent's conscious pre-death pain and suffering by the decedent's personal representative. Georgia courts have often granted damages for the mental pain and suffering a decedent may experience when they have knowledge of their impending death, even when that death was instantaneous and the decedent experienced no conscious pain. In auto accident cases, the courts place a special emphasis on whether the decedent swerved or tried to avoid the collision before it occurred, and will allow the jury to consider this evidence when determining whether the decedent consciously experienced pain or suffering, even if the crash killed the decedent instantly.

Case Law:

The Georgia Court of Appeals held that when a decedent suffered "a fracture of the nose and face . . . a possible brain contusion, fractures of both arms and legs, a dislocated hip, and a fracture of the ribs, on both sides," a jury award of $17,000 for the decedent's pre-death pain and suffering was not excessive. The decedent was "under heavy sedation" for much of the four days between injury and death, but the Court emphasized the "broad discretion" granted to the jury to determine what award of damages for the decedent's conscious pre-death pain and suffering is appropriate. *Hill v. Rosser*, 117 S.E.2d 889, 890 (Ga. App. 1960).

The Georgia Court of Appeals held that there was "no requirement that the physical injury precede the mental pain and suffering," to promote recovery by a personal representative for a decedent's pre-death conscious pain and suffering. Here, the Court reasoned that a jury could determine, from evidence of the decedent's vehicle veering before the collision with the defendant's vehicle, that the decedent could have experienced "fright, shock, and mental suffering" from the knowledge of his impending injury or death, such that his personal representative could recover damages for pre-death conscious pain and suffering. *Monk v. Dial*, 441 S.E.2d 857, 859 (Ga. App. 1994).

The Georgia Court of Appeals held that when the decedent died instantly and there was no sign of consciousness of pain or suffering, recovery by his personal representatives for his conscious pre-death pain and suffering was barred. Here, the decedent suffered a heart attack after inhaling turpentine fumes, but there was no evidence to permit a jury to infer that the decedent's death was not instantaneous or that the decedent experienced mental

anguish from the knowledge of his impending death. *Grant v. Ga. Pac. Co.*, 521 S.E.2d 868 (Ga. App. 1999).

The Georgia Court of Appeals held that when the evidence showed that the decedent swerved to avoid the deadly collision and experienced pain and suffering for approximately two minutes before losing consciousness, the jury's damage award for the pre-death conscious pain and suffering of the decedent was justified. The decedent suffered broken ribs and a collapsed lung in the collision, and could be heard choking on his own blood for the two minutes he remained conscious following the collision. The jury awarded the decedent's personal representative $2,582,306.14 for the decedent's conscious pre-death pain and suffering, and the Court of Appeals determined that this award should stand, as it was not "so flagrantly excessive or inadequate . . . as to create a clear implication of bias, prejudice, or gross mistake." *Beam v. Kingsley*, 566 S.E.2d 437 (Ga. App. 2002).

XII. Hawaii

Statute: Haw. Rev Stat. § 663-7

Summary:

Hawaii does not have an express provision regarding conscious pain and suffering in its survival statute. Haw. Rev. Stat. § 663-7. However, the statute does state that "[a] cause of action arising out of a wrongful act [or] neglect . . . shall not be extinguished by reason of the death of the injured person . . . any damages recovered shall form part of the estate of the diseased." *Id*. The courts have interpreted this to include damage awards for any conscious pre-death pain and suffering experienced by the decedent, to be recoverable by their personal representative. Even if there is only a short period of conscious pain on the part of a decedent, the courts grant a large degree of deference to jury damage awards if there is evidence that could allow a reasonable juror to believe that the decedent consciously experienced pain or suffering prior to their death. However, there does need to be some evidence to show that the decedent was or could have been conscious to experience such pain or suffering to permit recovery by a personal representative.

Case Law:

The Court of Appeals of Hawaii held that although a decedent "lost consciousness almost instantly," the personal representative could still recover for the decedent's conscious pre-death pain and suffering. The Court reasoned that although the decedent was less than two years-old, he could still "experience the fright, pain, emotional duress and distress . . . that resulted from being physically attacked by his father." The decedent died as a result of head trauma, which likely meant he experienced conscious pain and suffering for a very short time before losing consciousness. *Polm v. Dept. Human Servs.*, 339 P.3d 1106, *20 (Haw. App. 2014).

The Court of Appeals of Hawaii held that the trial court erred in refusing the decedent's personal representative's request to instruct the jury on damages for conscious pre-death mental anguish and distress. The decedent was murdered in her apartment by her romantic partner, and the personal representative sought to recover damages for her mental anguish and distress experienced prior to her murder by asphyxiation. The Court reasoned that the survival statute would permit recovery for these damages by the decedent had she lived, and therefore her personal representative is entitled to attempt to recover these same damages for her estate. *Ozaki v. Ass'n of Apartment Owners of Discovery Bay*, 954 P.2d 652, 669-70 (Haw. App. 1998).

The Supreme Court of Hawaii held that a decedent's personal representative could not recover damages for the decedent's conscious pre-death pain and suffering if the decedent did not consciously experience pain or suffering. The decedent was "found unconscious at

the scene of the accident and remained so until her death" after her car was backed over by a front-end-loader. The Court reasoned that because "the jury could have concluded that the decedent's unconsciousness was simultaneous with the impact of the loader" that hit the decedent, that "no award was merited." *Brown v. Clark Equipment Co.*, 618 P.2d 267, 271-2 (Haw. 1980).

XIII. Idaho

Statute: Idaho Code § 5-327

Summary:

The Idaho survival statute expressly limits the damages recoverable for personal injury survival actions to "(i) medical expenses actually incurred, (ii) other out-of-pocket expenses actually incurred, and (iii) loss of earnings actually suffered, prior to the death of such injured person and as a result of the wrongful act or negligence." Idaho Code § 5-327. This express limitation has led the courts to exclude damage awards for a decedent's conscious pre-death pain and suffering from the damages recoverable in a survival action. The courts' reasoning frequently reflects the legislature's intent that this method of recovery be barred because an injured party who is dead can no longer benefit from an award of damages for his own pain and suffering, and therefore these damages should be precluded from recovery.

Case Law:

The Supreme Court of Idaho held that a personal representative could not recover for the decedent's conscious pre-death pain and suffering because pain and suffering damages are expressly precluded by the survival statute. The Court reasoned that although the decedent lived for several hours following a car accident, before he died as a result of injuries sustained therein, the statute's express language and the understanding that "an injured person who is dead cannot benefit from an award for [his] pain and suffering," recovery of damages on this basis was precluded. *Vulk v. Haley*, 736 P.2d 1309 (Idaho 1987).

The Supreme Court of Idaho held that the decedent's husband could not recover damages for her alleged conscious pre-death pain and suffering, because damages for conscious pain and suffering are personal to the injured party and are not the communal property of two spouses. The decedent's husband argued that he was entitled to any award of damages, including that for his wife's pre-death pain and suffering, because it would have become community property with each holding an equal claim. However, the court ruled that the authority relied upon by the decedent's husband had been overruled by a subsequent case which expressly stated that damages for a spouse's pain and suffering are their own and not community property. Aside from this bar against the husband's recovery, the Court also held that there was not sufficient evidence to permit a jury to award damages for decedent's pain and suffering had she lived, due to a lack of causation between the alleged wrongful acts and the alleged injuries suffered. Thus, the Court held firmly that there can be no recovery by a decedent's personal representative for the decedent's conscious pre-death pain and suffering, because "an injured person who is dead cannot benefit from an award for [his] pain and suffering." *Evans v. Twin Falls Cnty.*, 796 P.2d 210, 214-5 (Idaho 1990).

XIV. Illinois

Statute: 755 Ill. Comp. Stat. § 5/27-6

Summary:

Illinois has a provision in its survival statute expressly preserving rights of action for "personal injury" for personal representatives of decedents. 755 Ill. Comp. Stat. § 5/27-6. The courts have interpreted this as permitting recovery of damages for a decedent's conscious pre-death pain and suffering resulting from personal injury. *Id*. Much like other states which have a similar survival statutes, evidence must be introduced to show that the decedent consciously experienced pain or suffering caused by the negligent or wrongful act. However, even when the suffering is relatively brief in duration, recovery of damages for conscious pain and suffering by the decedent's personal representative will likely be permitted, especially if the pain or suffering was severe.

Case Law:

The Supreme Court of Illinois held that the personal representative of a decedent could recover damages for the decedent's pre-death pain and suffering when the evidence presented could lead a reasonable juror to believe the decedent experienced pain and suffering prior to death. The decedent was a passenger on a catamaran sailboat when the boat collided with an electric transmission line, with testimony establishing "electrical sparks 'shower[ed]' down on the boat," leading the frightened decedent to panic, and jump into the water, where she was "electrocuted and burned." The Court reasoned that this evidence was sufficient to support the jury's award of $5,000 for the decedent's conscious pre-death pain and suffering to the decedent's personal representative. *Ballweg v. City of Springfield*, 499 N.E.2d 1373, 1377 (Ill. 1986).

The Illinois Court of Appeals held that when there was not sufficient evidence presented establishing that the decedent consciously experienced pre-death pain and suffering as a result of his Doctor's malpractice or negligence, recovery of damages for pain and suffering could not be permitted. Here the decedent was admitted to the hospital with medical conditions already present that were known to cause pain, and the decedent's wife's testimony that his breathing "wasn't like it was before" and that he was "fighting something" did not establish that the decedent would have been entitled to damages for pain and suffering had he lived. Thus the Court reasoned that his wife, as the decedent's personal representative, was also not entitled to recover conscious pain and suffering damages. *Chrysler v. Darnall*, 606 N.E.2d 553 (Ill. App. 1st Dist. 1992).

The Illinois Court of Appeals held that where the decedent suffered "truly horrific injuries" for at most "three to four minutes" before losing consciousness until his death, the jury damage award of $1 million for the decedent's conscious pain and suffering was not

excessive. Here the decedent was run over by a dump truck while working at a construction site. The Court reasoned that in light of the evidence demonstrating the extent of the decedent's suffering, the difference between the requested pain and suffering damage award of $3 million and the actual award of $1 million, and the failure of the defendant to persuade the Court by listing other cases with increased timeframes of pain and suffering and lower damage amounts, the award to decedent's personal representative for $1 million was not excessive and did not warrant a remittitur. *Colella v. JMS Trucking Co. of Ill., Inc.*, 932 N.E.2d 1163, 1177-8 (Ill. App. 1st Dist. 2010).

The Illinois Court of Appeals held that recovery of damages for a decedent's conscious pre-death pain and suffering was permitted when an eyewitness to the scene immediately following the accident described the decedent as moaning in pain. The decedent fell through a plate glass window, sustaining severe and fatal lacerations and was audibly moaning in pain, although he was wearing sunglasses that obscured his eyes and did not respond to any questions asked by first responders. The trial court awarded the decedent's estate $1 million for his pain and suffering experienced in the "few minutes from the time of the accident through the period which [the witness] has testified to observing [the decedent]." The Court reasoned that the eyewitness testimony of the decedent's moaning prior to death, although the decedent was unconscious once first responders arrived, was sufficient to uphold the trial court's award of damages for the decedent's conscious pre-death pain and suffering. *Racky v. Belfor USA Group, Inc.*, 83 N.E.3d 440 (Ill. App. 1st Dist. 2017).

The Illinois Court of Appeals held that even when the decedent slipped into a conscious state of shock, he still experienced conscious pain and suffering from an auto accident from which his personal representatives were entitled to recover damages. The decedent was involved in an auto accident that trapped decedent in the wreckage of his vehicle for 26 minutes before paramedics arrived. When the paramedics arrived, they heard the decedent "pleading for help . . . over and over again," and observed that "the decedent's lips and fingernails were turning blue" because he was "pinned in his vehicle ass though his body was in a vice." The Court reasoned that this evidence as well as medical expert testimony sufficiently justified the jury's award of $750,000 for the decedent's conscious pre-death pain and suffering, despite the fact that the decedent eventually went into a state of conscious shock and did not display a large degree of visible pain.

XV. Indiana

Statutes: Ind. Code § 34-9-3-1; Ind. Code § 34-23-1-1

Summary:

Indiana does not have an express provision regarding conscious pain and suffering in its survival statute. Ind. Code § 34-9-3-1. The statute provides that "[i]f an individual who is entitled to . . . a cause of action dies, the cause of action survives." *Id*. However, if the decedent dies as a result of personal injuries for which their personal representative seeks recovery, the wrongful death statute, and not the survival statute will apply. *See Id*. at § 34-23-1-1. Under the Indiana wrongful death statute, damage awards for a decedent's conscious pre-death pain and suffering are precluded, although evidence may be admitted to show decedent's pain and suffering if it is disputed whether the wrongful or negligent act caused the decedent's death, and thus whether the wrongful death or survival statute would apply. *Id*.

Case Law:

The Indiana Court of Appeals held that when a decedent died not as a result of her negligently inflicted injuries, her personal representatives were entitled to recover damages for her conscious pre-death pain and suffering, and that the $1 million damage award was not excessive. The decedent was a resident at a long-term inpatient care facility when, due to the negligence of the facility failing to dress her in her adult brief, she slipped in her own urine, hitting her head and breaking her hip. The decedent developed numerous stage IV pressure ulcers which required numerous debridement surgeries. The Court reasoned that this evidence showed that the decedent was entitled to pre-death pain and suffering damages to be recovered by her personal representative, and that the $1 million damage award was not excessive, especially in light of the fact that the trial court had already reduced the award by $500,000. *Atterholt v. Robinson*, 872 N.E.2d 633 (Ind. App. 2007).

The Indiana Court of Appeals held that if a decedent made the conscious decision to commit suicide, he thus did not die as a result of the defendant's negligence that led to the decedent becoming addicted to paid medication, and therefore any recovery would be improper under the wrongful death statute. The Court reasoned that the survival statute, which permits recovery for a decedent's conscious pre-death pain and suffering, applies when the negligent act causing injury does not cause death and would apply to the facts of the decedent's death in this case, instead of the wrongful death statute which precludes damages for the decedent's conscious pre-death pain and suffering. *Best Homes, Inc. v. Rainwater*, 714 N.E.2d 702 (Ind. App. 1999).

The Supreme Court of Indiana held that where the evidence at the outset of trial could support either a wrongful death claim or a survival claim, evidence of the decedent's pain

and suffering could still be admitted, even if the decedent's personal representatives only eventually succeeded on the wrongful death claim. The Court reasoned that because it was disputed whether the decedent died as a result of the defendant's malpractice or some other cause, the decedent's personal representative could introduce evidence of the decedent's pre-death pain and suffering in case the malpractice was determined to not have been the cause of death. Therefore, because the decedent's conscious pre-death pain and suffering was a recoverable element of damages under the survival statute, if the survival statute could be applied, then admission of evidence of decedent's pain and suffering was justified. *Cahoon v. Cummings*, 734 N.E.2d 535 (Ind. 2000).

XVI. Iowa

Statute: Iowa Code § 611.20

Summary:

Iowa does not have an express conscious pain and suffering provision in its survival statute. Iowa code § 611.20. However, the statute states that "[a]ll causes of action shall survive and may be brought notwithstanding the death of the person entitled . . . to the same." *Id*. The courts have interpreted this language as permitting the survival of personal injury claims and recovery of damages for a decedent's pre-death pain and suffering. To recover for a decedent's pre-death pain and suffering, there must be substantial evidence that the decedent consciously experienced pain and suffering, caused by the wrongful or negligent act of a defendant, for some appreciable amount of time. Iowa courts have reduced damage awards via remittitur where the original award amount was out of proportion with the actual conscious pain and suffering experienced by the decedent. Likewise, damages may be completely barred if the evidence shows the decedent was rendered immediately unconscious by the injury, and remained so until death.

Case Law:

The Supreme Court of Iowa held that where there was evidence that the decedent suffered extreme pain for a significant amount of time, it was not error for the lower court to dismiss a request for a new trial or a remittitur of pre-death pain and suffering damages. The decedent's home exploded due to the defendant's negligence. The explosion and subsequent housefire caused the death of the decedent's wife, burned off all of decedent's hair, and burned eighty-three percent of the decedent's body's surface. Multiple witnesses observed the decedent as being "keenly aware of his surroundings." The decedent lived for approximately seventeen hours between the explosion and his death. The Court reasoned that in light of the evidence, the damage award of $1.5 million for the decedent's conscious pre-death pain and suffering was not "excessively flagrant" so as to warrant a new trial or remittitur. *Est. of Pearson ex. rel. Latta v. Interstate Power and Light Co.*, 700 N.W.2d 333, 347 (Iowa 2005).

The Supreme Court of Iowa held that when the jury's damage award was excessive, an entry for a new trial or a remittitur of the damage award for the decedent's pre-death pain and suffering was not an abuse of discretion. The decedent was working on a highway when he was struck by the defendant's vehicle and "suffered severe pain during the time he was conscious;" the decedent suffered "abrasions on his head and neck, fractured ribs, bruised and hemorrhaged lungs [and kidneys], [and] nearly complete amputation of his right pelvis and leg." The decedent was conscious following the collision for approximately twelve minutes. The Court held that the decedent was "spared the pain from these injuries for an extended time," and therefore the remittitur of damages from the original award of $582,000

to $300,000 was not an abuse of the trial court's discretion. *Kuta v. Newberg*, 600 N.W.2d 280, 283-4 (Iowa 1999).

The Supreme Court of Iowa held that when a decedent's death and loss of consciousness is instantaneous following the injury, recovery of damages for the decedent's conscious pre-death pain and suffering shall not be permitted. The decedent was shot in the head by her husband which likely resulted in "immediate incapacitation" and "immediate unconsciousness." Thus, the Court reasoned that because the decedent was likely rendered immediately unconscious, recovery of damages for her conscious pre-death pain and suffering was precluded by the facts. *Est. of Long ex rel. Smith v. Broadlawns Medical Center*, 656 N.W.2d 71, 85-6 (Iowa 2002).

The Supreme Court of Iowa held that when the evidence of a decedent's conscious pre-death pain and suffering is not "substantial," recovery of damages for pain and suffering shall not be permitted. The decedent "was unconscious but did respond to some extent to painful stimulus." However, the medical expert in this case could not say for sure whether "this was a reflex action or a conscious response," and therefore the Court reasoned that this evidence of conscious pain and suffering was not substantial enough to promote recovery of damages. *Schlichte v. Franklin Troy Trucks*, 265 N.W.2d 725 (Iowa 1978).

XVII. Kansas

Statute: Kan. Stat. § 60-1801

Summary:

Kansas does not have an express conscious pain and suffering provision in its survival statute. Kan. Stat § 60-1801. However, the statute provides that "[i]n addition to the causes of action that survive at common law, causes of action . . . for an injury to the person . . . shall also survive; and the action may be brought notwithstanding the death of the person entitled to . . . the same." *Id*. Kansas courts have interpreted this language as permitting recovery by personal representatives for a decedent's conscious pre-death pain and suffering caused by another's wrongful or negligent conduct. To recover under the survival statute, there must be evidence to show that the decedent was conscious following the injury, and while conscious, experienced pain or suffering as a result of their injury. Recovery for pre-impact mental anguish will only be permitted when the decedent also experienced conscious pain or suffering caused by the impact. If the evidence shows that the decedent lost consciousness or died instantly following the injury, recovery of damages for the decedent's conscious pre-death pain and suffering is precluded.

Case Law:

The Supreme Court of Kansas held that when there was evidence to show that the decedent consciously experienced pre-death pain and suffering, recovery of damages by his personal representative was permitted. The decedent was electrocuted, fell twenty feet to the ground, and suffered head and neck injuries that caused his death ten days later. The evidence showed that a witness on the scene asked the decedent to "squeeze her hand if he understood her" and the decedent squeezed her hand. The hospital staff also noted that the decedent was "very responsive to pain stimuli." Therefore, the Court reasoned that there was sufficient evidence to show that the award of $2,000 for the decedent's conscious pre-death pain and suffering from his injuries was permitted. *Pape v. Kansas Power and Light Co.*, 647 P.2d 320, 325 (Kan. 1982).

The Supreme Court of Kansas held that when there was not evidence that a decedent was conscious following a vehicle collision, and when there was not sufficient evidence to show that the decedent suffered mental anguish in the moments leading to the collision, damages for the decedent's conscious pre-death pain and suffering could not be recovered. The evidence showed that the decedent had a pulse immediately following the collision, although this did not outweigh evidence that the decedent was unconscious from the moment of the collision until her death. The Court also reasoned that the sixty-foot yaw marks made by the decedent's vehicle as she tried to stop prior to the collision could not on their own support a damage award for mental anguish and suffering. Therefore, recovery by the decedent's personal representative was barred due to lack of evidence to show that the

decedent consciously experienced pre-death pain and suffering either prior to or immediately following the collision. *St. Clair v. Denny*, 781 P.2d 1043, 1048-9 (Kan. 1989).

The United States District Court of Kansas, applying the Kansas state survival statute, held that when the evidence showed that the decedent died instantly, the personal representatives could not recover damages for the decedent's pre-death pain and suffering. The decedent was hit by a semi-truck while walking along a highway, and two medical experts testified repeatedly that the decedent suffered an internal separation of his spinal cord just below the skull and died instantly. The personal representatives of the decedent did not put forth any significant evidence to show that the decedent consciously experienced pre-death pain and suffering as a result of the accident, and therefore the Court reasoned that recovery of these damages was improper. *Fanning v. Sitton Motor Lines, Inc.*, 695 F.Supp.2d 1156, 1159-60 (D. Kan. 2010).

XVIII. Kentucky

Statute: Ky. Rev. Stat. § 411.140

Summary:

Kentucky does not have an express conscious pain and suffering provision in its survival statute. Ky. Rev. Stat. § 411.140. However, the statute does expressly preserve rights of action for "personal injury" claims. *Id*. The courts have interpreted this as permitting the recovery of damages for a decedent's conscious pre-death pain and suffering in actions pursued under the survival statute. The courts have also emphasized the requirement that there be "substantial evidence" to show that the decedent was conscious prior to death, such that the decedent could experience compensable pain and suffering. The courts have also held that when there is not evidence introduced to contradict or refute evidence that the decedent was conscious and experienced pre-death pain and suffering, damages for the decedent's conscious pre-death pain and suffering are justified.

Case Law:

The Kentucky Court of Appeals held that when evidence was introduced by a medical expert's testimony as to the pain and suffering likely experienced by the decedent while he drowned in a hotel pool, without any evidence to contradict this theory, the trial court's failure to grant the personal representative's JNOV motion was error, as recovery for the decedent's conscious pre-death pain and suffering was likely permitted. The decedent was conscious upon falling into the pool and was underwater for approximately twelve minutes, becoming unconscious, before being removed from the water, and transported to a hospital where he remained unconscious until he died. The Court reasoned that because the defendant did not introduce any evidence to contradict the testimony of the decedent's medical expert as to the decedent's conscious pre-death pain and suffering, the jury verdict awarding no damages for pain and suffering was improper. *Louisville SW Hotel, LLC v. Lindsey*, No. 2017-CA-000856-MR, 2019 WL 2147355 (Ky. App. 2019).

The Supreme Court of Kentucky held that when the facts show a decedent was "partly conscious" for a period of time between death and injury, damages may be awarded for the decedent's conscious pre-death pain and suffering. The decedent was hospitalized and had multiple necessary operations, although with a different surgeon than the one approved by her son who held her medical power of attorney. Her personal representative then sued the parties for battery, due to this discrepancy. The Court reasoned that because there was evidence that showed the decedent was "treated for pain, [was] observed to be in pain, moved her extremities and flinched her eyes in response to her name," that a jury could find that she was entitled to damages for her conscious pre-death pain and suffering if the jury found that the defendants had acted tortiously. *Vitale v. Henchey*, 24 S.W.3d 651 (Ky. 2000).

The Kentucky Court of Appeals held that when there is not "substantial evidence establishing that pain and suffering actually occurred," an award of damages for a decedent's conscious pre-death pain and suffering will be precluded. The decedent likely died instantly after his vehicle collided with the rear corner of a large commercial truck. The Court reasoned that because there was no evidence shown that indicated that the decedent did not die immediately on impact, he did not experience pain and suffering, and therefore recovery under that theory was precluded. *Worldwide Equipment, Inc. v. Mullins*, 11 S.W.3d 50 (Ky. App. 1999).

XIX. Louisiana

Statute: La. Civ. Code art. 2315.1

Summary:

Louisiana does not have an express conscious pain and suffering provision in its survival statute. La. Civ. Code art. 2315.1. However, the statute states that "[i]f a person injured by an offense or quasi offense dies, the right to recover all damages for injury to the person . . . caused by the offense or quasi offense, shall survive for a period of one year from the death of the diseased." *Id.* at subd. A. Louisiana courts have frequently discussed when damage awards for a decedent's conscious pre-death pain and suffering are permitted, with special emphasis placed upon requiring substantial evidence that the decedent was conscious for some time between the injury and death. However, the courts have also emphasized that recovery will not always be precluded if there is substantial evidence that the decedent experienced pre-impact fear and suffering as a result of knowing that their death is immanent, even when the decedent dies instantly in the subsequent impact.

Case Law:

The Louisiana Court of Appeals held that where there was evidence to show that the decedent experienced conscious pre-death pain and suffering the trial court erred in failing to grant damages in the personal representative's survival action. The Court reasoned that because the evidence showed the decedent likely experienced conscious pain and suffering as a result of internal bleeding following a surgical procedure, which ultimately resulted in the decedent's death from cardiac arrest, a damage award of $25,000 for the decedent's spouse's survival action was appropriate. *Cahanin v. La. Med. Mut. Ins. Co.*, 235 So.3d 1250, 1261 (La. App. 5th Cir. 2017).

The Louisiana Court of Appeals held that when a decedent's condition substantially worsened upon admittance to the defendant nursing care facility, and the evidence showed that he likely experienced conscious pre-death pain and suffering, recovery of damages under the survival statute was warranted. The decedent's pressure sores increased in severity, he experienced severe weight loss which was not communicated to his primary physician as was requested in his patient profile, and the defendant failed to ensure that he was regularly repositioned and cleaned. Testimony of the decedent's visitors also established that the decedent was in pain from his lack of care. Thus, the Court reasoned that the decedent's personal representative was entitled to damages for the decedent's conscious pre-death pain and suffering. *King v. Brown Dev., Inc.*, 4 So.3d 231, 236-8 (La. App. 2d Cir. 2009).

The Louisiana Court of Appeals held that where there was substantial evidence that the decedent experienced conscious pre-death pain and suffering as a result of mesothelioma

caused by exposure to asbestos, an award of general damages of $3.8 million was not excessive. The general damages award included damages for the decedent's conscious pain and suffering resulting from the mesothelioma. The decedent experienced breathing problems in the years preceding his diagnosis of mesothelioma, and following his diagnosis his "level of activity dropped off." While in hospice care, the decedent experienced fluid retention in his lungs, abdomen, and lower extremities, severe weight loss, tumors, mental confusion and other painful and traumatic symptoms before death. Therefore, the Court reasoned that although the general damages award was "arguably on the high end of the general damage spectrum," it was justified by substantial evidence of the decedent's conscious pre-death pain and suffering. *White v. Entergy Gulf States La., LLC*, 167 So.3d 764, 769-72 (La. App. 1st Cir. 2014).

The Louisiana Court of Appeals held that where there was not substantial evidence that the decedent was conscious for any amount of time following a multi-vehicle accident, the trial jury's decision to not grant conscious pain and suffering damages in the personal representative's survival action was proper. The decedent's death certificate stated that his death was "instant." The only evidence suggesting the decedent was conscious was testimony of another driver involved in the accident stating that they may have heard the decedent moan. Therefore, the Court reasoned that a reasonable juror could have found that the decedent was not conscious following the accident and therefore the failure to award damages for the decedent's conscious pre-death pain and suffering was not reversable error. *Odom v. Johnson*, 704 So.2d 1254, 1265 (La. App. 3d Cir. 1997).

The Louisiana Court of Appeals held that where evidence showed the decedent quickly attempted to brake his vehicle prior to a collision in which he died instantly was sufficient to show pre-death fear and mental anguish, permitting recovery of damages for the decedent. The Court reasoned that the eyewitness testimony of the decedent's hard braking of his vehicle led the jury to reasonably infer "an instant of terror as [the decedent's] pickup skidded across the interstate before its fatal impact." Therefore, the Court upheld the trial damage award of $7,500 for the decedent's pre-death conscious fear. *Reid v. State Through Dept. of Transp. and Dev.*, 637 So.2d 618, 628-9 (La. App. 2d Cir. 1994).

XX. Maine

Statute: Me. Rev. Stat. tit. 18-C, § 3-817

Summary:

Maine does not have an express pain and suffering provision in its survival statute. Me. Rev. Stat. tit. 18-C, § 3-817. However, the statute does state that "[n]o . . . action is lost by the death of either party, but the same survives for . . . the personal representative of the diseased." *Id.* at subd. 1. Maine courts have not frequently interpreted cases involving damages for the conscious pain and suffering of a decedent, but, when they have, they have emphasized the challenge of accurately quantifying damages for the subjective pain of a person who is no longer able to describe their experience for themselves. For this reason, the courts look to the jury to decide on an acceptable award for the decedent's conscious pain and suffering, and will likely not overturn such an award so long as it does not demonstrate prejudice for or against the recovering party in light of the evidence.

Case Law:

The Supreme Court of Maine held that where the elderly decedent was hit by the defendant's vehicle and suffered several fractures, a large wound, and severe shock, all contributing towards her death hours after the collision, recovery of $1,900 for the decedent's conscious pre-death pain and suffering was not excessive. The Court emphasized the difficulty of determining an exact level of compensation for a decedent's pain and suffering, and rested their decision on the desire not to overturn a jury's award unless it shows "passion, prejudice, or corrupt motive." *Baston v. Thombs*, 143 A. 63 (Me. 1928).

The Superior Court of Maine held that a damage award of $50,000 for a decedent's conscious pre-death pain and suffering was not excessive where the decedent was killed by a motor-vehicle collision caused by the negligence of the defendant. The Court reasoned that recovery was expressly permitted by the legislature when it otherwise would be precluded at common law, and therefore the $50,000 award to the personal representative of the decedent should not be reduced or dismissed. *Greenvall v. Me. Mut. Fire Ins. Co.*, No. Civ.A. CV-97-070, 2001 WL 1715979 (Me. Super. Jun. 6, 2001).

XXI. Maryland

Statute: Md. Cts. & Jud. Proc. Code § 6-401

Summary:

Maryland does not have an express conscious pain and suffering provision in its survival statute. Md. Cts. & Jud. Proc. Code § 6-401. However, the statute does state that "a cause of action, whether real, personal, or mixed, survives the death of either party." *Id.* at subd. a. Maryland courts place emphasis on whether or not a reasonable jury could interpret the evidence to find that a decedent was both conscious, and experiencing pain for some period of time between the injury and death in deciding whether pre-death pain and suffering damages are permitted. The courts have also awarded damages for pre-impact fear even when the decedent dies instantly following the impact; if there is substantial evidence to show that the decedent experienced pre-impact fear before their instantaneous death, recovery may not be precluded.

Case Law:

The Maryland Court of Appeals held that where there is substantial evidence that the decedent suffered "pre-impact fright," his personal representative could recover damages for the decedent's conscious pain and suffering caused by this fright prior to his death, even when the decedent died instantly after the motor-vehicle collision. The decedent was driving on a highway and did not see the truck with which he collided until it was too late to stop. Nevertheless, the decedent attempted to stop his vehicle, as shown by the seventy-two feet of tire marks at the collision scene, but failed in doing so; medical investigation established that the decedent died on impact. The Court held that a jury could have "reasonably inferred from the evidence that the decedent was aware of his impending peril," and therefore his personal representative could recover damages for the decedent's "pre-impact fear." *Beynon v. Montgomery Cablevision Ltd. P'ship*, 718 A.2d 1161 (Md. 1998).

The Maryland Court of Appeals Held that where there was circumstantial evidence and expert medical testimony to suggest that the decedent experienced conscious pre-death pain and suffering while drowning, the question of damages for pre-death pain and suffering should have been submitted to the jury. The decedent was a five-year-old who did not know how to swim and was likely conscious when he went into the pool. Medical testimony suggested that the decedent likely experienced extreme pain during the one to two minutes he likely remained conscious while drowning, as his lungs filled with water with each attempt to breath. Therefore, the Court reasoned that, in light of the evidence and medical testimony, a reasonable juror could find that the decedent experienced compensable conscious pre-death pain and suffering. *DRD Pool Serv. v. Freed*, 5 A.3d 45 (Md. 2010).

The Maryland Court of Special Appeals held that even when the decedent was breathing after the scene of the accident, a first responder testified that the decedent was conscious, and the decedent had a weak pulse immediately following the accident, this evidence was not substantial enough to permit recovery of damages for the decedent's conscious pre-death pain and suffering. The decedent was pinned in his car following a motor-vehicle collision, and had a "'tear-type' wound to the right side of his face," and that his eyes were open on the way to the hospital, although he "made no movements and did not respond orally . . . at any time." The Court reasoned that based upon this evidence, the lower court's granting of a new trial on the issue of damages for the decedent's conscious pre-death pain and suffering was not error, and should be upheld; there was no substantial evidence to permit a reasonable jury to award damages for conscious pain and suffering. *Ory v. Libersky*, 389 A.2d 922 (Md. Spec. App. 1978).

The Maryland Court of Appeals held that even when there is a short period of time in which the a reasonable jury could find that the decedent consciously experienced pain, damages for pre-death pain and suffering will not be precluded. The decedent was hit by a bus while getting onto his bike, and immediately taken to the doctor. The doctor administered morphine, believing that the decedent suffered a skull fracture and likely brain bruises and contusions, before the doctor told the witness driving to bring the decedent to the hospital. The doctor and eyewitnesses testified that before the administration of morphine, the decedent was "moaning and groaning," more intensely when they maneuvered his body into and out of the vehicle, although he did not respond orally to any questions. The Court reasoned that although not definitive, this evidence could permit a reasonable jury to find that the decedent consciously experienced pain related to his pre-death injuries, and therefore recovery of damages should not be precluded. *Tri-State Poultry Co-op. v. Carey*, 57 A.2d 812 (Md. 1948).

XXII. Massachusetts

Statutes: Mass. Gen. Laws ch. 230 § 1; Mass. Gen. Laws ch. 229, § 6

Summary:

Massachusetts does not have an express conscious pain and suffering provision in its survival statute. Mass. Gen. Laws ch. 230 § 1. However, the statute states that "[a]n action which would have survived if commenced by . . . the original party in his lifetime may be commenced and prosecuted by . . . his executor or administrator." *Id*. Massachusetts courts have interpreted the survival statute as permitting damage awards for a decedent's conscious pre-death pain and suffering. Additionally, the Massachusetts wrongful death statute expressly permits recovery for a decedent's pre-death pain and suffering, provided that "any sum so recovered . . . be held and disposed of by the executors or administrators as assets of the estate of the deceased." Mass. Gen. Laws ch. 229, § 6. This is unique from most states because the Massachusetts wrongful death statute allows a means of recovery that is not aimed at compensating the family of the decedent for their own pain and suffering. Massachusetts courts also emphasize the requirement that there be substantial evidence showing that the decedent was actually conscious to permit recovery of damages for pre-death pain and suffering.

Case Law:

The Superior Court of Massachusetts held that where the decedent experienced mild pain for thirty minutes before entering a coma until her death, an award of $1,425,000 for the decedent's conscious pre-death pain and suffering was excessive and warranted either a new trial or a remittitur. The decedent fell while being helped into an ambulance, hit her head, and sustained lacerations to the exterior and bleeding to the interior of her head. The medical staff who were assisting the decedent testified that she was not experiencing extreme pain, although she did say that her head hurt and that she felt nauseous. However, after approximately thirty minutes, while en route to the hospital, the decedent became unresponsive and remained technically brain dead until her death four days later. The Court reasoned that due to the overwhelming lack of evidence of pain and suffering during the thirty minutes before the decedent lost consciousness, the absolute highest damage award that could be allowed was $425,000. *Zacarelli v. American Med. Response of Mass., Inc.*, No. MICV201104424H, 2015 WL 4113273 (Mass. Super. Jun. 11, 2015).

The Supreme Court of Massachusetts held that when a decedent's suicide was proximately caused by the negligence of a driver who hit the decedent with his car, the recovery of damages for the decedent's conscious pre-death pain and suffering will be allowed. The decedent had been hospitalized four times for psychosis and paranoia. The decedent had been in remission from her mental illness for six years at the time of the accident, after which she exhibited extreme psychosis, requiring physical restraint. The decedent was on

an indefinite visit home when, as the court determined, she had an "irresistible impulse" to take her life. The Court reasoned that because the defendant's negligence was the proximate cause of the decedent's psychotic break, the decedent's personal representative was entitled to $5,000 for the decedent's conscious pre-death pain and suffering. *Freyermuth v. Lutfy*, 382 N.E.2d 1059 (Mass. 1978).

The Massachusetts Court of Appeals held that when there is no evidence, aside from "unsupported surmise," to show that the decedent was conscious following injury, recovery for conscious pre-death pain and suffering will be precluded. The decedent was a young girl who was strangled and assaulted by a neighbor, before she was found in a vacant apartment; she did not verbally respond and the only noises she made were very quiet. She was taken to a hospital, but her condition quickly deteriorated and she became brain dead. The Court reasoned that outside of speculation into the time between the assault and when the decedent was found, there was not sufficient evidence to permit a jury to award damages for conscious pre-death pain and suffering. *Or v. Edwards*, 818 N.E.2d 163 (Mass. App. 2004).

XXIII. Michigan

Statutes: Mich. Comp. Laws § 600.2921; Mich. Comp. Laws § 600.2922

Summary:

Michigan does not have an express conscious pain and suffering provision in its survival statute. Mich. Comp. Laws § 600.2921. However, the statute states that "[a]ll actions and claims survive death." *Id.* Michigan courts have interpreted this language as permitting the survival of claims for which conscious pre-death pain and suffering can be awarded. Additionally, the Michigan wrongful death statute expressly permits recovery of conscious pre-death pain and suffering damages when the death is caused by the wrongful or negligent act of another party. *Id.* at § 600.2922 (6). This is contrary to many other states which only allow the family of a decedent to recover for their own conscious pain and suffering resulting from the decedent's injury and death. Under the wrongful death statute, a personal representative of a decedent still must either show evidence of the decedent's conscious pain and suffering or evidence that would allow a reasonable juror to infer that the decedent experienced conscious pre-death pain and suffering in order to permit recovery of damages.

Case Law:

The Federal District Court for the Eastern District of Michigan held, applying Michigan state law, that if there is not evidence that a decedent was conscious for any amount of time between the injury and death, recovery of damages for conscious pre-death pain and suffering will be precluded. The decedent was shot by an off-duty sheriff's deputy and was pronounced dead on arrival at the hospital. The decedent's mother "admitted that she had no personal knowledge of 'conscious pain and suffering' on the part of her son between the time of the shooting and his death." Thus, the Court reasoned that damages for the decedent's conscious pre-death pain and suffering should be precluded. *Blair v. Harris*, 993 F.Supp.2d 721 (E.D. Mich. 2014).

The Michigan Court of appeals held that when a decedent was conscious, aware, and fearful for four hours following his deadly injury in a motor-vehicle collision, a damage award of $4 million for conscious pre-death pain and suffering will not be deemed excessive as to justify a remittitur. The decedent was a quadriplegic, but still could feel pain and sensation in his limbs, and eyewitness testimony established that the decedent was conscious and fearful following his injury from the collision. The decedent suffered several injuries in the accident, most notably a ninety-degree fracture to one leg and severe internal bleeding. The Court reasoned that this evidence supported the jury award of damages for the decedent's conscious pre-death pain and suffering, in addition to stating that damage awards cannot be compared because each decedent and injury are unique and require trust to be given to the jury to determine an adequate damage award, so long

as it does not show undue prejudice or sympathy. *Freed v. Salas*, 780 N.W.2d 844 (Mich. App. 2009).

The Michigan Court of Appeals held that conscious pain and suffering damages are recoverable under the Michigan wrongful death statute, and these damages are appropriate when a jury could infer that the decedent experienced conscious pre-death pain and suffering, even if there is insufficient direct evidence of conscious pain and suffering. The decedent was involved in a motor-vehicle collision in which her vehicle rolled several times before coming to a stop. Expert testimony established that the brain injury which caused the decedent to lose consciousness likely occurred just before the vehicle came to a stop. Therefore, the Court reasoned that a jury could infer that the decedent's other injuries immediately prior to losing consciousness caused pain and suffering, thus justifying the damage award of $100,000. *Klinke v. Mitsubishi Motors Corp.*, 556 N.W.2d 528, 536 (Mich. App. 1996).

The Michigan Court of Appeals held that when a reasonable jury could differ in deciding whether or not the decedent experienced conscious pre-death pain and suffering, damages may be awarded as such depending on the jurors' inferences. The decedent was a young boy who was playing in a junkyard sandpit when a boulder rolled on top of him, causing suffocation and death. The pathologist testified that the decedent's breathing passages were obstructed by sand, and once his oxygen supply was cut off he likely only remained conscious for "minutes." The Court reasoned that a reasonable juror could infer from the circumstances surrounding the decedent's death that he experienced conscious pre-death pain and suffering such that the damage award of $90,000 was justified. *Byrne v. Schneider's Iron & Metal, Inc.*, 475 N.W.2d 854 (Mich. App. 1991).

XXIV. Minnesota

Statutes: Minn. Stat. § 573.01; Minn. Stat. § 573.02

Summary:

Minnesota does not have an express conscious pain and suffering provision in its survival statute. Minn. Stat. § 573.01. However, the statute states that "[a]n action arising out of an injury to the person survives the death of any party in accordance with section 573.02" (wrongful death statute). *Id.* Under the wrongful death statute there are two kinds of claims: (1) a death action where the decedent dies as a result of the wrongful or negligent injury; and (2) an injury action where the decedent dies as a result of a cause unrelated to their personal injury claim. *Id.* at § 573.02, subd. 1–2. In a death action, recovery includes "the amount the jury deems fair and just for all damages suffered by the decedent resulting from the injury prior to death . . . and shall be for the exclusive benefit of the surviving spouse and next of kin." *Id.* at subd. 1. In an injury action, recovery includes "all damages arising out of such injury if the decedent might have maintained and action." *Id.* at subd. 2.

Due to the recent adoption of these revised statutes, it is yet to be determined precisely how Minnesota courts will elect to interpret damage awards for conscious pain and suffering. However, based upon the language of the statutes, it appears that damages for a decedent's conscious pre-death pain and suffering will likely be recoverable where they were previously barred by the survival and wrongful death statutes. The construction of these statutes are very similar to most other states that permit recovery of conscious pre-death pain and suffering, and therefore viewing Minnesota fact patterns through the lens of other similar states' statutes may prove useful for predicting damage awards for conscious pre-death pain and suffering.

Case Law:

There are currently no published cases interpreting the revised Minnesota survival or wrongful death statutes.

XXV. Mississippi

Statute: Miss. Code § 91-7-233

Summary:

Mississippi does not have an express conscious pain and suffering provision in its survival statute. Miss. Code § 91-7-233. However, the statute states that "[e]xecutors, administrators, and temporary administrators may commence and prosecute any personal action whatever, at law or in equity, which the testator or intestate might have commenced and prosecuted." *Id*. Mississippi courts have interpreted this language to permit the recovery of damages for a decedent's conscious pre-death pain and suffering by a personal representative. Mississippi, like other states, does emphasize that the decedent must have been conscious for some amount of time between the injury and death, but nevertheless has permitted recovery even when medical testimony established that the decedent was "deeply comatose," so the courts are far from consistent in terms of what they determine to be 'conscious' pain and suffering.

Case Law:

The Supreme Court of Mississippi held that when there are "discrepancies as to how much suffering [the decedent] experienced" following the injury, these discrepancies were not so overwhelming to disturb the trial jury's award of damages. The decedent was injured in a motor-vehicle collision such that she became comatose immediately following the collision, and remained so until her death. There was conflicting testimony as to her level of consciousness and ability to experience pain. Eyewitnesses at the hospital stated that she moaned, opened one eye, shed a tear, and wiggled her extremities at various points of her hospitalization. Direct medical testimony "noted that those who are deeply comatose are not aware nor conscious of pain." However, due to the conflict between the medical testimony and the eyewitness accounts of the decedent's hospitalization, the Court reasoned that the $370,000 damage award for the decedent's conscious pre-death pain and suffering should not be disturbed. *U.S. Fidelity & Guar. Co. v. Est. of Francis ex rel. Francis*, 80 So.2d 38 (Miss. 2002).

The Supreme Court of Mississipi held that when there are multiple eyewitness accounts of a decedent inside a vehicle following a collision calling for help, prior to the vehicle exploding into flames, the failure of the jury to award any damages for conscious pre-death pain and suffering was error. The decedent was sleeping in the cab of an "[eighteen]-wheeler" when its driver drove off the road and hit a tree. The driver was ejected and the decedent remained in the crashed vehicle. Three eyewitness testified that they heard someone calling for help from the vehicle immediately before it caught fire, burning the decedent "beyond recognition." Therefore, the Court reasoned that it was error for the jury

to fail to grant damages for the decedent's conscious pre-death pain and suffering. *Jones v. Shaffer*, 573 So.2d 740 (Miss. 1990).

XXVI. Missouri

Statutes: Mo. Rev. Stat. § 537.080; Mo. Rev. Stat. § 537.090

Summary:

Missouri does not have an express conscious pain and suffering provision in its survival statute. Mo. Rev. Stat. § 537.080. However, the statute states that "[w]henever the death of any person results from any act . . . if death had not ensued, would have entitled such person to recover damages in respect thereof . . . damages may be sued for" by the decedent's surviving spouse, children, siblings, parents, or if not them, a personal representative. *Id.* Under the damages statute, damages may be awarded for "such damages . . . the deceased may have suffered between the time of injury and the time of death . . . of which the deceased might have maintained an action had death not ensued." *Id.* at § 537.090. Missouri courts have interpreted this section as expressly permitting the recovery of damages for a decedent's conscious pre-death pain and suffering. Additionally, Missouri courts have permitted the recovery of damages for a decedent's "pre-impact terror" or "awareness of impending disaster" even if the decedent died immediately following the impact.

Case Law:

The Missouri Court of Appeals held that pre-death pain and suffering damages could be awarded for a decedent's "pre-impact awareness of the impending disaster." The decedent was piloting a plane when the engine failed due to a manufacturing defect, causing a fatal crash. The Court reasoned that the statute regarding what recovery may be permitted should be interpreted broadly, and therefore could not be interpreted so as to preclude recovery "merely because [the] pain and suffering occurred prior to the impact of the crash. *Delacroix v. Doncasters, Inc.*, 407 S.W.3d 13, 23-4 (Mo. App. E. Dist. 2013).

The Missouri Court of Appeals held that where a decedent suffered burns to the majority of his body from a home explosion and lived for eighty days between his injury and death, a general damage award in a wrongful death action for $4.5 million was not excessive. The twenty-year-old decedent was inside his family's home when a faulty gas line caused a leak, and subsequent explosion. Between his injury and death the decedent suffered sepsis, massive organ failure, and multiple painful debridement surgeries. The Court reasoned that although large, a remittitur was not warranted or necessary, due to the severity of the decedent's suffering, among other injuries compensated in the award. *Coggins v. Laclede Gas Co.*, 37 S.W.3d 335, 342-4 (Mo. App. E. Dist. 2000).

The Missouri Court of Appeals held that where a jury did award medical expense damages but did not award damages for pre-death pain and suffering, a new trial is not required unless the verdict was considered "inadequate." The Court reasoned that if the jury did not

believe the decedent consciously experienced pre-death pain and suffering, they were not obligated to award damages as such under the survival action damages statute, which is permissively worded. Even though the jury awarded medical expense damages, it was not an abuse of discretion to not award damages for pre-death pain and suffering. *Wolf v. Midwest Nephrology Consultants, P.C.*, 484 S.W.3d 78 (Mo. App. W. Dist. 2016).

The Missouri Court of Appeals held that an award of over $10 million for non-economic damages, including those for conscious pre-death pain and suffering was not excessive because "there is no bright-line rule that non-economic damages cannot exceed economic damages by any certain multiplier." The decedent was in a motor-vehicle collision that caused the decedent to suffer extreme blunt force trauma to multiple areas of the body, fracture of several vertebrae, an open compound fracture of the humorous, and multiple lacerations and abrasions; he survived for four hours following the accident. Thus the Court reasoned that the decedent likely experienced conscious pre-death pain and suffering to an extent where the award was not excessive. *Hawley v. Tseona*, 453 S.W.3d 837 (Mo. App. W. Dist. 2014).

XXVII. Montana

Statute: Mont. Code § 27-1-501

Summary:

Montana does not have an express conscious pain and suffering provision in its survival statute. Mont. Code § 27-1-501. However, the statute states that "[a]n action . . . does not abate because of the death or disability of a party or the transfer of any interest in the action . . . the action or defense survives and may be maintained by the party's representatives or successors in interest." *Id.* Montana courts have interpreted this language to permit recovery of damages for a decedents conscious pre-death pain and suffering. Montana courts place emphasis on whether the decedent was conscious for some amount of time between the injury and death, and if there is no evidence to show the decedent was conscious will not award damages for the decedent's pre-death pain and suffering.

Case Law:

The Federal District Court of Montana held, applying Montana state law, that when there is no evidence to contradict facts that show that the decedent died instantly, damages for the decedent's conscious pre-death pain and suffering shall not be awarded. The decedent was "disemboweled and dismembered" when she was hit by a one-ton pickup truck at seventy miles-per-hour. The decedent's personal representative put forth no acceptable evidence to contradict a State Trooper's testimony that the decedent died instantly and that a reasonable person would find that the decedent died instantly. *Est. of DeCrane through DeCrane v. Tenke*, 646 F.Supp.3d 1296, 1303-4 (D. Mont. 2022).

The Supreme Court of Montana held that when there is evidence to suggest that the decedent did not die instantly, damages for conscious pre-death pain and suffering should not be precluded. The decedent was shot and eyewitness testimony established that the decedent was making gurgling noises and trying to breath. The Court reasoned that this evidence could permit the survival action to be put in front of the jury, because the decedent's death was not instantaneous and she "survived more than a few seconds." *Starkenburg v. State*, 934 P.2d 1018, 1031 (Mont. 1997).

XXVIII. Nebraska

Statute: Neb. Rev. Stat. § 25-1401

Summary:

Nebraska does not have an express conscious pain and suffering provision in its survival statute. Neb. Rev. Stat. § 25-1401. However, the statute states that "causes of action for . . . an injury to real or personal estate . . . shall also survive, and the action may be brought, notwithstanding the death of the person entitled . . . to the same." *Id*. Nebraska courts have interpreted this language as permitting recovery of damages for a decedent's conscious pre-death pain and suffering. To permit recovery, evidence must show that the decedent was conscious for some amount of time between the injury and death, and that they experienced pain and suffering. Nebraska courts also may permit the recovery of damages for "pre-impact fright" and mental anguish if a reasonable juror could infer such fright or mental suffering on the part of the decedent from the facts provided.

Case Law:

The Supreme Court of Nebraska held that where a decedent suffered severe emotional distress prior to their death, damages for conscious pre-death pain and suffering were appropriate. The decedent was raped by two men and subsequently stalked and murdered by them less than a week later, along with two of her friends. The court reasoned that the facts supported recovery of $80,000 in damages for the decedent's conscious pre-death pain and suffering. *Brandon ex rel. Est. of Brandon v. Cnty. of Richardson*, 624 N.W.2d 604 (Neb. 2001).

The Supreme Court of Nebraska held that where a reasonable juror could find that the decedent experienced "pre-impact fright" from the evidence, the court's failure to put the question in front of the jury was error. The decedent was riding a motorcycle at a high rate of speed while the defendant chased him in a vehicle, eventually coming within one to two feet of the motorcycle and the decedent, until the vehicle collided with the motorcycle and the decedent. The motorcycle became lodged and attached to the vehicle, and the Court reasoned that although the decedent died "instantly" when the two vehicles hit an obstacle, a reasonable juror could infer that the decedent experienced "pre-impact fright" during the period prior to impact where the two vehicles were about to collide or actively colliding. Thus the decision to leave this determination out of the jury's hands was error. *Nelson v. Dolan*, 434 N.W.2d 25 (Neb. 1989).

The Nebraska Court of Appeals held that where the evidence shows that the decedent consciously suffered "a painful, long death," damages may be awarded for the decedent's conscious pre-death pain and suffering. The decedent had mesothelioma and underwent painful treatment for over a year before his death. The Court reasoned that due to the

severity of the decedent's pain, the majority of the damage award should go to the survival claim rather than the pecuniary damages in the wrongful death claim. *In re Est. of McConnell*, 943 N.W.2d 722 (Neb. App. 2020).

XXIX. Nevada

Statutes: Nev. Rev. Stat. § 41.100; Nev. Rev. Stat. § 41.085

Summary:

Nevada does have an express conscious pre-death pain and suffering provision in its survival statute. Nev. Rev. Stat. § 41.100. The statute states that "no cause of action is lost by reason of the death of any person" and that "the damages recoverable by the decedent's executor or administrator include . . . damages for pain, suffering, or disfigurement." *Id.* at subd. (1),(3). The stipulation that pre-death pain and suffering damages are recoverable "does not apply to the cause of action . . . for the decedent's wrongful death." *Id.* at subd. (3). However, when the death is caused by the wrongful act giving rise to a cause of action under the survival statute, the wrongful death statute becomes the appropriate vehicle to continue the action. *See* Nev. Rev. Stat. § 41.085, subd. (2). The wrongful death statute states that "the court or jury may award each person . . . damages for pain, suffering, or disfigurement of the decedent." *Id.* at subd. (4). However, the wrongful death statute then states that "the damages recoverable by the personal representatives of a decedent on behalf of the decedent's estate . . . do not include damages for pain, suffering, or disfigurement of the decedent." *Id.* at subd. (5).

Nevada's statutory framework creates a complicated and confusing manner for determining whether recovery will be permitted for the conscious pre-death pain and suffering of a decedent. Additionally, although recovery for these damages is expressly permitted by the wrongful death statute for the decedent's next of kin, Nevada courts have declined to permit recovery, reasoning that the wrongful death statute is aimed at compensating the next of kin for their own losses and suffering connected to the decedent's death, and not the pain and suffering of the decedent. Nevada courts have also granted little clarity on the issue by reason that there are few cases that discuss the issue of when it may or may not be appropriate to award damages for a decedent's conscious pre-death pain and suffering. Overall, recovery for a decedent's own conscious pre-death pain and suffering will be more likely in a survival action than in a wrongful death action, despite the express allowance of recovery under both statutes, given the courts' more conservative application of the damages provisions under the wrongful death statute. However, due to the lack of published case law, much of Nevada's interpretation of these statutes is still unclear.

Case Law:

The Federal District Court of Nevada, applying Nevada law, held that a plaintiff in a wrongful death action may not recover damages for the decedent's conscious pre-death pain and suffering. The Court reasoned that wrongful death actions under Nevada law limited recovery of to pecuniary damages suffered by the family of the decedent, and did

not include the pain and suffering experienced by the decedent prior to their death. *Borrego v. Stauffer Chemical Co.*, 315 F.Supp. 980, 985-6 (D. Nev. 1970).

The Supreme Court of Nevada held that the wrongful death statute and the survival statute represent two separate causes of action, even though they may have similar elements of recoverable damages. Although both statutes permit the recovery for the conscious pre-death pain and suffering of the decedent, the wrongful death statute is separate and primarily aimed at compensating the decedent's next of kin for their pecuniary loss stemming from the decedent's death, whereas the survival statute benefits the decedent's estate in the same manner as had they survived themselves. The Court ruled here that the damages for the decedent's estate were subject to an arbitration clause given that the decedent himself had signed the agreement with the Defendant, but the claims under the wrongful death statute for the benefit of the decedent's next of kin were not derivative claims of the survival action and were thus not subject to the arbitration clause. However, the Court did little to expressly clarify whether a plaintiff in either a wrongful death or survival action is permitted to recover damages for the decedent's conscious pre-death pain and suffering. Nevertheless, based upon the Court's reasoning, recovery of pre-death pain and suffering damages is more likely under the survival statute compared to the wrongful death statute, given that the latter is usually framed as compensating the next of kin for their own losses and not those personal to the decedent, despite statutory language to the contrary. *El Jen Med. Hosp., Inc. v. Tyler*, 535 P.3d 660, 668-9 (Nev. 2023).

XXX. New Hampshire

Statutes: N.H. Rev. Stat. § 556:9; N.H. Rev. Stat. § 556:12

Summary:

New Hampshire does not have an express conscious pain and suffering provision in its survival statute. N.H. Rev. Stat. § 556:7. However, the statute states that "[a]ctions of tort for physical injuries to the person . . . and the causes of such actions, shall survive . . .." *Id*. New Hampshire courts have interpreted this language as permitting the recovery of damages for a decedent's conscious pre-death pain and suffering. If the wrongful injuries of a decedent caused their death, a wrongful death action is the appropriate vehicle for the decedent's claims. N.H. Rev. Stat. § 556:12. The statute states that in a wrongful death action, "[i]f the administrator of the deceased party is plaintiff, and the death of such party was caused by the injury complained of in the action, the mental and physical pain suffered by the deceased in consequence of the injury . . . may be considered as [an element] of damage." *Id.* at subd. I. New Hampshire courts have interpreted this language as expressly permitting the recovery of conscious pre-death pain and suffering damages by a decedent's personal representative.

Additionally, New Hampshire courts have a history of permitting recovery for decedents' pre-impact mental anguish and fright as well as allowing recovery of pain and suffering damages so long as the facts could permit a jury to infer that the decedent experienced conscious pre-death pain and suffering, even absent eyewitness testimony or other substantial evidence.

Case Law:

The Supreme Court of New Hampshire held that where a decedent's personal representative does not claim any conscious pre-death pain and suffering on the part of the decedent, the jury may not award any damages for the decedent's pre-death pain and suffering. The decedent was a young boy hit in the head by a metal soccer goal when it was tipped over by his classmate, causing the decedent to sustain injuries, which resulted in his death. The court reasoned that although evidence may give the jury cause to sympathize with the decedent and infer that he experienced pain and suffering, the jury should not award damages because there was no pre-death pain, suffering, or mental anguish claimed on the part of the decedent, so awarding damages as such would be inappropriate. *Marcotte v. Timberlane/Hampstead School Dist.*, 733 A.2d 394, 406 (N.H. 1999).

The Supreme Court of New Hampshire held that damages could be awarded for a decedent's pre-impact mental anguish as a form of damages for conscious pre-death pain and suffering. The decedent was in a motor-vehicle collision that resulted in her

instantaneous death, and evidence showed that she experienced pre-impact mental anguish due to knowledge of the impending collision. The Court reasoned that New Hampshire has a long history of permitting recovery of damages for conscious pre-death pain and suffering under the wrongful death statute in circumstances such as those experienced by the decedent, and therefore damages for the decedent's pre-impact mental anguish were permitted and justified. However, the Court remanded the decedent's action for a remittitur after it determined that the award of $1.5 million, considering the decedent's modest economic damages, was excessive in light of the "seconds" of mental anguish she endured prior to her instant death in the collision. *Thibeault v. Campbell*, 622 A.2d 212, 215-6 (N.H. 1993).

The Supreme Court of New Hampshire held that when a decedent's conscious pre-death pain and suffering was "clearly apparent from the manner in which he was killed," pain and suffering damages could be recovered. The decedent was hit by a train, and thrown under the wheels of another oncoming train by the collision, causing his head to be severed from his body. The Court reasoned that the manner of death itself permitted a jury to infer that the decedent suffered mental anguish and physical pain before his death, and therefore his personal representative was entitled to damages. *Welch v. Boston & M. R. R.*, 99 A. 296 (N.H. 1916).

The Supreme Court of New Hampshire held that where a decedent died by drowning, conscious pre-death pain and suffering could be inferred from the circumstances of his death, absent eyewitness testimony or other evidence. The decedent was a three-year-old boy who drowned in "stagnant, muddy, and slimy water." The Court reasoned that it is "[the jury's] province to draw inferences from [these] facts" and that a reasonable juror could infer that the decedent experienced conscious pre-death pain and suffering due to the circumstances of his death. *Clark v. Manchester*, 13 A. 867 (N.H. 1888).

XXXI. New Jersey

Statute: N.J. Stat. § 2A:15-3

Summary:

New Jersey does not have an express conscious pain and suffering provision in its survival statute. N.J. Stat. § 2A:15-3. However, the statute states that "[e]xecutors . . . may have an action for any trespass done to the person . . . of their testator or intestate against the trespasser, and recover their damages as the testator or intestate would have had if he was living." *Id*. at subd. (a)(1). New Jersey Courts have interpreted this language as permitting recovery of damages for a decedents conscious pre-death pain and suffering, although they have emphasized the need for evidence to show that the decedent was conscious and in pain for at least some amount of time between the injury and death, even if the period of consciousness is very brief. Inferences drawn by a jury will be permitted so long as they are not "merely speculative."

Case Law:

The Superior Court of New Jersey held that where a decedent was "conscious and in pain" between her injury and subsequent death, recovery of damages for conscious pre-death pain and suffering was appropriate. The decedent was in a motor-vehicle collision and eyewitness testimony established that following the collision she was "calling for help, and moaning." The decedent suffered mild blunt trauma to her head, multiple fractures of the ribs and vertebrae, and a "partial transection of the aorta." The Court reasoned that because the decedent was conscious and suffered such injuries, the damage award of $325,000 for her conscious pre-death pain and suffering was appropriate. *Jablonowska v. Suther*, 915 A.2d 617 (N.J. Super. App. Div. 2007).

The Superior Court of New Jersey held that where there is no evidence to support an argument that the "decedent survived the collision, even for a short time, or that he experienced any conscious pain and suffering" an award of damages for conscious pre-death pain and suffering was rightfully precluded. The decedent was struck by a vehicle and it was determined that he lost consciousness instantly upon his head hitting the windshield; the Plaintiff argued that, by inference, the decedent experienced pain in the moment between being struck by the vehicle and his head hitting the windshield of that same vehicle. The court reasoned that a jury could not award damages for conscious pre-death pain and suffering based upon this inference because it would "be purely speculative." *Lerakis v. Aluotto*, No. A–5578–14T4, 2017 WL 382937 (N.J. Super. App. Div. Jan. 27, 2017).

The Supreme Court of New Jersey held that when a decedent died instantly, recovery for conscious pre-death pain and suffering was precluded. The decedent died as a result of a

motor-vehicle collision where an oil truck "overtopped" her Lincoln town car. A state trooper who arrived within five minutes of the accident stated that upon his arrival the decedent "appeared to be unconscious," and there was no other evidence introduced to establish that the decedent did not die instantly. The Court reasoned that because there was no evidence to show that the decedent "survived her injuries, however briefly," that damages for conscious pre-death pain and suffering were precluded. *Smith v. Whitaker*, 734 A.2d 243 (N.J. 1999).

The Superior Court of New Jersey held that where there was at least some evidence that the decedent was conscious for some time between the injury and death, a reasonable juror could infer that the decedent experienced conscious pre-death pain and suffering and damages could be awarded as such. The decedent "died practically instantly after [a] truck crushed his chest," but there was eyewitness testimony admitted that the decedent "raised his head before he died." The Court reasoned that the jury could infer that the decedent experienced conscious pain and suffering in this brief moment immediately preceding his death, and that the award of damages of $50,000 was not precluded. *Tirrell v. Navistar Intern., Inc.*, 591 A.2d 643 (N.J. Super. App. Div. 1991).

XXXII. New Mexico

Statutes: N.M. Stat. § 37-2-1; N.M. Stat. § 41-2-1

Summary:

New Mexico does not have an express conscious pain and suffering provision in its survival statute. N.M. Stat. § 37-2-1. However, the statute states that "causes of action for . . . an injury to real or personal estate . . . may be brought, notwithstanding the death of the person entitled . . . to the same." *Id.* New Mexico courts have interpreted this language as permitting the recovery of damages for a decedent's conscious pre-death pain and suffering in survival actions, although somewhat inconsistently. In some contexts, federal courts applying New Mexico law have declined to permit the survival of personal injury actions under either the survival statute or the wrongful death statute, despite many New Mexico state courts expressly holding that claims of personal injury do survive a decedent's death, whether or not it is stated or implied in statute.

The wrongful death statute neither expressly permits or denies damages for a decedent's conscious pre-death pain and suffering, despite the fact that wrongful death actions are usually aimed at promoting compensation for the decedent's survivors' own damages instead of those personal to the decedent. N.M. Stat. § 41-2-1. However, many New Mexico courts have permitted recovery of damages for a decedent's conscious pre-death pain and suffering in wrongful death actions, demonstrating judicial discretion on this issue. Even if there is not an express award specifically for the decedent's conscious pre-death pain and suffering, some New Mexico courts will allow the jury to factor a decedent's pain into their non-economic damage award. Overall, the New Mexico case law regarding whether or not damages may be awarded for a decedent's conscious pre-death pain and suffering is inconsistent.

Case Law:

The New Mexico Court of Appeals held that where a decedent dies prior to a final judgement in a personal injury suit, his personal injury claim survives his death. The decedent was involved in a motor-vehicle collision which caused him injuries, and then subsequently died from causes unrelated to the collision. The Court reasoned that under the New Mexico survival statute, the decedent's claim survived his death and could be pursued by his widow. *Martinez v. Segovia*, 62 P.3d 331, 335 (N.M. App. 2002).

The New Mexico Court of Appeals held that although a claim of personal injuries would normally not survive at common law and was not specifically preserved in the survival statute, a claim by a decedent for personal injuries does survive and damages may be recovered on the decedent's behalf. The Court reasoned that the common law rule of non-survival was outdated and should be replaced with a "new rule" that allowed the survival of

personal injury actions where the decedent died before they could bring their claim. *Rodgers v. Ferguson*, 556 P.2d 844 (N.M. App. 1976).

The Court of Appeals for the Tenth Circuit, applying New Mexico law, held that a decedent's intentional tort claims did not survive the decedent's death, despite the holding in *Rogers*. The decedent died of causes unrelated to his intentional tort claims against two police officers who fired their guns, allegedly on accident, and hit the decedent. The Court reasoned that because the New Mexico survival statute does not expressly permit the survival of a plaintiff's personal injury claims, the decedent's claims in this case were not permitted. This ruling is somewhat inconsistent with many other interpretations of the New Mexico survival statute which have permitted not only the survival of personal injury actions but the recovery of damages for the decedent's conscious pre-death pain and suffering. *Oliveros v. Mitchell*, 449 F.3d 1091 (10th Cir. 2006).

The Supreme Court of New Mexico held that a personal representative of a decedent may recover damages for the "decedent's pain and suffering," under the state wrongful death act, even where there is no statutory beneficiary and there is no pecuniary loss to the personal representative. *Stang v. Hertz Corp.*, 467 P.2d 14 (N.M. 1970).

The New Mexico Court of Appeals held that even when there is uncontradicted evidence that the decedent experienced conscious pre-death pain and suffering, the jury may still decide to not award pain and suffering damages. The Court reasoned that although the jury has the right to award damages for a decedent's conscious pre-death pain and suffering in a wrongful death action, there is "no standard fixed by law for measuring the value of pain and suffering," and that "the amount to be awarded is left to the jury's judgment. *Strickland v. Roosevelt Cnty. Rural Elec. Co-op.*, 657 P.2d 1184, 1189-90 (N.M. App. 1982).

The Federal District Court of New Mexico, applying New Mexico law, held that a decedent's conscious pre-death pain and suffering can be considered as an element of damages in a wrongful death action. The decedent died from a stroke when she was negligently removed from her anticoagulant medication by her physician. The decedent complained of a headache and chest pain, and upon suffering the stroke but prior to her death she could not open her eyes or speak. The Court reasoned that the decedent thus consciously suffered following her injury and prior to her death, and therefore her conscious pre-death pain and suffering could justify part of the $600,000 damage award. *Nez v. U.S.*, 367 F.Supp.3d 1245, 1271 (D. N.M. 2019).

XXXIII. New York

Statute: N.Y. Est. Powers & Trusts Law § 11-3.2

Summary:

New York does not have an express conscious pain and suffering provision in its survival statute. N.Y. Est. Powers & Trusts § 11-3.2. However, the statute states that "[n]o cause of action for injury to person or property is lost because of the death of the person in whose favor the cause of action existed." *Id.* at subd. (b). New York courts have interpreted this statute as permitting the recovery of damages for a decedent's conscious pre-death pain and suffering. The New York courts have emphasized the requirement that there at least be some evidence to permit an inference that the decedent experienced some conscious pain and suffering before they died or lost consciousness in order to allow recovery of damages. Generally, New York granted relatively large damage awards when it did find that the decedent experienced conscious pre-death pain and suffering when compared to other states.

Case Law:

The New York Court of Appeals held that where there was "sufficient circumstantial evidence to support the conclusion that [the] decedent was conscious when most of [her] injuries were inflicted" that damages could be awarded for the decedent's conscious pre-death pain and suffering in a survival action. The decedent was bound, gagged, beaten, and asphyxiated to death in her apartment. The Court reasoned that the evidence suggested that the decedent was conscious because otherwise it would have been unnecessary for her murderer to bind and gag her. Thus, the court held that the $350,000 damage award for the decedent's conscious pre-death pain and suffering was proper. *Gonzalez v. N.Y. City Housing Auth.*, 572 N.E.2d 598 (N.Y. App. 1991).

The Federal District Court for the Eastern District of New York, applying New York law, held that where a decedent consciously suffered for approximately two days before becoming comatose until her death, she was entitled to damages for her conscious pre-death pain and suffering. The decedent was in a deadly bus crash, and suffered extreme injuries. She remained "responsive to verbal stimuli" for hours after the accident and continued to "cry, withdraw from touch and spontaneously open her eyes." Even after being "chemically paralyzed" the decedent continued to respond to questions by blinking. Thus, the court reasoned that the decedent was entitled to the damage award of $1.8 million for her conscious pre-death pain and suffering. *Nat'l. Cont'l. Ins. Co. v. Abdymadiyeva*, 387 F.Supp.3d 245 (E.D.N.Y. 2017).

The Supreme Court of New York held that when a decedent suffered pain for over three days as a result of medical malpractice prior to his death, he was entitled to damages for

his conscious pre-death pain and suffering. The decedent was admitted to an inpatient hospital for the removal of his gall bladder, which had gall stones and was at risk of infection. The surgery never occurred however, and for three days the decedent experienced sharp pain, increasing anxiety, and growing discomfort from ongoing fasting in preparation for the surgery. He also endured an unsedated intubation when he went into cardiac arrest caused by systemic sepsis. Thus, the Court reasoned that the damage award of $3.7 million for the decedent's conscious pre-death pain and suffering was not excessive. *Hyung Kee Lee v. N.Y. Hosp. Queens*, 978 N.Y.S.2d 436 (N.Y. App. Div. 2d Dept. 2014).

XXXIV. North Carolina

Statutes: N.C. Gen. Stat. § 28A-18-1; N.C. Gen. Stat. § 28A-18-2

Summary:

North Carolina does not have an express conscious pain and suffering provision in its survival statute. N.C. Gen. Stat. § 28A-18-1. However, the statute states that "[u]pon the death of any person, all demands whatsoever, and rights to prosecute . . . any action . . . existing in favor of . . . such person . . . shall survive to . . . the personal representative of the estate. *Id.* at subd. (a). North Carolina Courts have interpreted this language as permitting the recovery of damages for a decedent's conscious pre-death pain and suffering. North Carolina's wrongful death statute expressly permits awards of damages as "[c]ompensation for the pain and suffering of the decedent." N.C. Gen. Stat. § 28A-18-2, subd. (b)(2). This stands in contrast to many other states' wrongful death statutes that preclude damages personal to the decedent, such as those for their own pain and suffering, in favor of compensating the family of the decedent for their personal damages associated with the decedent's death. When pain and suffering damages are considered in a decedent's wrongful death or survival claim, North Carolina courts emphasize the requirement that the decedent be conscious for some amount of time between the injury and death, and that pain and suffering can be "reasonably established."

Case Law:

The North Carolina Court of Appeals held that where a negligent act caused a decedent to experience conscious pre-death pain and suffering, and that negligent act also is the cause of the decedent's death, recovery of damages for pain and suffering are precluded under the survival statute and should be brought instead under the wrongful death statute. The decedent was the victim of a motorcycle crash and died on the scene of the accident. The Court reasoned that because the negligence of the defendant, who hit the decedent, was unquestionably the cause of the death, damages for the decedent's conscious pre-death pain and suffering, if there was any, was only appropriate under the wrongful death statute. *State Auto Ins. Co. v. Blind*, 650 S.E.2d 25 (N.C. App. 2007).

The Supreme Court of North Carolina held that where there cannot be any award of damages for a decedent's conscious pre-death pain and suffering where there was "no interval between [the] decedent's injury and death and thus no pain and suffering." The decedent was determined to be dead upon the arrival of first responders to the scene of the motor-vehicle accident in which he was involved. There was also no additional testimony establishing that the decedent was not dead immediately following the accident. Therefore, the Court reasoned that recovery of damages for the decedent's conscious pre-death pain and suffering was precluded. *Brown v. Moore*, 213 S.E.2d 342 (N.C. 1975).

The Supreme Court of North Carolina held that when a decedent's conscious pre-death pain and suffering "can be reasonably established," damages may be awarded. The decedent was a stillborn fetus. The Court reasoned that although in this case it could not be "reasonably established" that the decedent experienced conscious pre-death pain and suffering, but if "advancements in medical technology" emerged in the future, the Court did not want to "foreclose the possibility as a matter of law" of damages ever being awarded to the estate of a stillborn fetus for pain and suffering. *DiDonato v. Wortman*, 358 S.E.2d 489 (N.C. 1987).

The North Carolina Court of Appeals held that where there was evidence that the decedent "suffered greatly," a damage award of over $3 million that included compensation for the decedent's conscious pre-death pain and suffering was justified. The decedent was punched in the face, causing him to fall to the ground, upon which the back of his head "split open." Eyewitnesses described the decedent as repeatedly complaining of head pain, bleeding profusely, and moaning; a medical expert established that a head injury such as the one suffered by the decedent would cause someone a lot of pain and suffering. Thus, the Court reasoned that including compensation for the decedent's conscious pre-death pain and suffering in the damage award was justified based on the evidence. *Massengill v. Bailey*, No. COA16-1084, 2017 WL 3027593 (N.C. App. 2017).

XXXV. North Dakota

Statutes: N.D. Cent. Code § 28-1-26.1; N.D. Cent. Code §§ 32-03.2-04, 32-21-01

Summary:

North Dakota does not have an express conscious pain and suffering provision in its survival statute. N.D. Cent. Code § 28-1-26.1. However, the statute does state that "[n]o action or claim for relief . . . abates by the death of a party or of a person who might have been a party had such death not occurred." *Id*. There is little case law interpreting the survival statute in light of damage awards for a decedent's conscious pre-death pain and suffering, however, there is nothing in the language of the statute that would preclude awards of damages for a decedent's conscious pain and suffering. If the opportunity arises, North Dakota courts would likely permit recovery of damages for a decedent's conscious pain and suffering under the survival statute.

North Dakota expressly permits recovery for non-economic damages such as "pain, suffering . . . disfigurement, [and] mental anguish" in its wrongful death statute. N.D. Cent. Code § 32-03.2-04, subd. (2). There is little case law interpreting the North Dakota wrongful death statute in light of damage awards for a decedent's conscious pre-death pain and suffering. However, the statute's language likely does not preclude the recovery for a decedent's conscious pre-death pain and suffering, given that it permits recovery for "disfigurement," which is an injury personal to the decedent themselves. Most states only permit damage awards in wrongful death actions aimed at compensating the decedent's survivors for their own pain and suffering, and not that personal to the decedent, but, the language in the North Dakota wrongful death statute and the lack of case law leaves it a somewhat open question whether a decedent's own conscious pre-death pain and suffering is compensable in a wrongful death damage award.

Case Law:

No applicable case law at this time.

XXXVI. Ohio

Statute: Ohio Rev. Code § 2305.21

Summary:

Ohio does not have an express conscious pain and suffering provision in its survival statute. Ohio Rev. Code § 2305.21. However, the statute states that "causes of action for . . . injuries to the person . . . shall survive, and such actions may be brought notwithstanding the death of the person entitled . . . thereto." *Id.* Ohio courts have interpreted this language as permitting recovery of damages for a decedent's conscious pre-death pain and suffering.

Ohio Courts have also determined that a claim under the survival act is distinct from a claim under the wrongful death act. The wrongful death act does not expressly enumerate the decedent's conscious pain and suffering as one of the categories of compensatory damages recoverable in a wrongful death action. Ohio Re. Code § 2125.02, subd. (D)(1)-(5). Ohio courts have reasoned that this reflects the legislature's intent that wrongful death actions be brought to compensate the next of kin of the decedent for their own personal pain and suffering, and not that personal to the decedent. Thus, damages for a decedent's conscious pre-death pain and suffering are likely not valid damages in a wrongful death claim.

Case Law:

The Supreme Court of Ohio held that where direct evidence showed that the decedent was conscious for some period between his injury and death, damages could be awarded for the decedent's conscious pre-death pain and suffering. The decedent was involved in a motor-vehicle collision from which caused severe injuries that led to his death ten hours later. The Court reasoned that although the decedent could not speak, eyewitness accounts stating that they heard the decedent moaning and saw him respond to painful stimuli could lead a reasonable juror to infer that the decedent was conscious for at least some period of time before death, thus the pain and suffering damage award of $7,500 was justified. *Flory v. N.Y. Cent. R. Co.*, 163 N.E.2d 902 (Ohio 1959).

The Ohio Court of Appeals held that when reasonable minds could "reach different conclusions" regarding the consciousness or unconsciousness of a decedent following their injury, a motion for a directed verdict should be denied, and a damage award for the decedent's conscious pre-death pain and suffering may be allowed to stand. The decedent suffered cardiac arrest as a result of a negligent overdose of anesthetic gas during a surgical procedure, and died weeks later. The Court reasoned that the defendant's motion for a directed verdict was properly disposed of and the damage award of $125,000 for the decedent's conscious pre-death pain and suffering was not error, because "there was

testimony at bar regarding [the decedent's] movements, and reasonable minds might reach different conclusions as to whether [the decedent] was unconscious. *Laverick v. Children's Hosp. Med. Ctr. of Akron, Inc.*, 540 N.E.2d 305, 307-8 (Ohio App. 9th Dist. 1988).

The Ohio Court of Appeals held that a personal injury survival action to recover damages for a decedent's conscious pain and suffering is a distinct claim of action from a wrongful death claim, thus upholding the damage award. The decedent was shot by a co-worker, died as a result, and was granted a damage award of $975,000 for his conscious pre-death pain and suffering in his survival action. *Dickerson v. Thompson*, 624 N.E.2d 784 (Ohio App. 8th Dist. 1993).

The Court of Common Pleas of Ohio held that where the evidence is unclear whether a decedent was conscious for any period of time between injury and death, summary judgment shall be precluded on the issue of whether the decedent experienced conscious pre-death pain and suffering. The decedent was likely unconscious for most if not all of the period between his injury and death, but medical records show that while being treated for his injuries, the decedent was both on and off of anesthesia, and boxes were marked with an "X" next to "conscious" on his chart during these periods. Despite there being text stating "Error" next to these boxes, the Court reasoned that it was too unclear from the conflicts of evidence whether the decedent was actually unconscious and therefore could not experience pain and suffering, and thus should not be granted summary judgement prior to a jury trial. *McGill v. Newark Surgery Ctr.*, 756 N.E.2d 762, 777-8 (Ohio Com. Pl. 2001).

XXXVII. Oklahoma

Statute: Okla. Stat. tit. 12, § 1051

Summary:

Oklahoma does not have an express conscious pain and suffering provision in its survival statute. Okla. Stat. tit. 12, § 1051. However, the statute states that "causes of action for . . . an injury to the person . . . shall also survive; and the action may be brought, notwithstanding the death of the person entitled . . . to the same. *Id*. Oklahoma courts have interpreted this language as permitting recovery of damages for a decedent's conscious pre-death pain and suffering in a survival action. Damages for a decedent's personal pain and suffering are not available in a wrongful death action, as it is intended to compensate the decedent's next of kin for their own pain and suffering experienced as a result of the death. Oklahoma courts have emphasized the requirement that there be evidence to establish that the decedent actually experienced conscious pain and suffering, and if there is no evidence then recovery of damages should be precluded.

Case Law:

The Oklahoma Court of Appeals held that although damages for a decedent's conscious pre-death pain and suffering are improper in a wrongful death action, they may be instead recovered in a survival action. The decedent was beaten to death inside the defendant's restaurant, and the decedent's personal representative brought a wrongful death claim, seeking damages for the decedent's conscious pre-death pain and suffering. The Court reasoned that there could be no recovery of damages for a decedent's pain and suffering under a wrongful death action, and it must instead come in the form of a survival action, thus barring the decedent's claim in this case, because the survival action had a shorter statute of limitations. *Kimberly v. DeWitt*, 606 P.2d 612 (Okla. App. Div. 1 1980).

The Supreme Court of Oklahoma held that where there was "no evidence that [the] decedent was in pain, other than the pain attendant on his condition and caused by [his] heart condition," recovery for the decedent's conscious pre-death pain and suffering would be improper. The decedent was a patient at a hospital for the treatment of a painful heart condition, and died as the result of his condition, although his death was contemporaneous with complications of changing an oxygen tank by his care team. The Court reasoned that because the only evidence that the decedent experienced pain and suffering outside of that associated with his heart condition was that he became "scared" when the oxygen gauge pressure reading decreased, and was anxious during the changing of oxygen tanks, recovery for conscious pain and suffering was improper. Instead, the decedent would only have been able to recover for mental anguish, which requires physical harm to be inflicted as well, which was also not supported by the evidence. *Jines v. City of Norman*, 351 P.2d 1048 (Okla. 1960).

The Supreme Court of Oklahoma held that when there is sufficient evidence to show that the decedent was conscious and in pain between his injury and death, a jury's damage award for conscious pain and suffering will not be disturbed. The decedent was working in a creek bed when one bank of the creek collapsed. The decedent was buried alive, and pinned against a large bulldozer. Medical testimony was admitted that the decedent was conscious and in pain for much of the four days between the injury and his death. The Court reasoned that because decisions regarding damages are "unquestionably . . . a question of fact for the jury," the award of $10,000 for the decedent's conscious pre-death pain and suffering was proper and not excessive. *Okla. Nat. Gas Co. v. Walker*, 269 P.2d 327 (Okla. 1953).

XXXVIII. Oregon

Statutes: Or. Rev. Stat. §§ 30.020, 30.075

Summary:

Oregon has an express conscious pain and suffering provision in its survival statute. Or. Rev. Stat. § 30.075. The statute expressly states that if a decedent dies from injuries resulting from a wrongful act or omission of another party, damages for pre-death pain, suffering, and disfigurement can only be recovered in a wrongful death action. *Id.* at subd. (3). However, Oregon courts have also interpreted the survival statute's language as permitting recovery of damages for a decedent's conscious pain and suffering when death resulted from a cause other than the injury caused by a wrongful act or omission. Thus, depending on the facts, recovery for a decedent's conscious pain and suffering can be proper under either the survival statute or the wrongful death statute. *See* Or. Rev. Stat. § 30.020.

Oregon does not have a large amount of relevant case law interpreting either the survival statute or wrongful death statute in light of a personal representative seeking to recover damages for a decedent's own conscious pre-death pain and suffering. However, Oregon courts will likely place similar emphasis on requiring evidence to show that the decedent was conscious for some time between injury and death, and permitting a jury to judge the facts to determine the appropriate amount of compensation for the defendant based upon the severity and duration of their pain and suffering.

Case Law:

The Oregon Court of Appeals held that if a decedent leaves some beneficiary or heir to receive benefits of a wrongful death action, then damages for the decedent's conscious pre-death pain and suffering could be awarded. The decedent was a woman who died from a brain infection which should have been treated earlier than when the medical provider scheduled the surgical intervention. The Court reasoned that because she did not have any heirs to whom a damage award from a wrongful death action for conscious pre-death pain and suffering, recovery could be rightfully precluded. *Mendez v. State*, 669 P.2d 364 (Or. App. 1983).

XXXIX. Pennsylvania

Statute: 42 Pa. Stat. and Consol. Stat. § 8302

Summary:

Pennsylvania does not have an express conscious pain and suffering provision in its survival statute. 42 Pa. Stat. and Consol. Stat. § 8302. However, the statute states that "all causes of action or proceedings, real or personal, shall survive the death of the plaintiff . . .." *Id.* Pennsylvania courts have interpreted this language as permitting the recovery of damages for a decedent's conscious pre-death pain and suffering. However, it is required that there be evidence to permit a reasonable trier of fact to infer that the decedent actually was conscious for some period of time to experience pre-death pain and suffering. Pennsylvania courts have also emphasized the need for expert medical testimony to establish pain and suffering on behalf of the decedent, such as when a decedent was in a "persistent vegetative state" following their injury. Much like other states, Pennsylvania will be unlikely to permit a remittitur of a jury award for a decedent's conscious pre-death pain and suffering absent an award so excessively large so as to "shock the conscience."

Case Law:

The Superior Court of Pennsylvania held that when there is no evidence that the decedents were conscious for any period of time between the injury and death, recovery of damages for the decedents' conscious pre-death pain and suffering shall not be allowed. The decedents were involved in a motor-vehicle collision but their personal representative submitted no evidence that the decedents were ever conscious following the collision. The personal representative attempted to argue that damages could instead be awarded for the decedents' "pre-impact fright," but the Court reasoned that this was not a valid means of recovery under Pennsylvania law. Therefore, any jury instruction pertaining to an award of conscious pre-death pain and suffering damages was error. *Nye v. Com., Dept. of Transp.*, 480 A.2d 318 (Pa. Super. 1984).

The Federal District Court for Eastern Pennsylvania, applying Pennsylvania law, held that a the statute of limitations for a survival action to recover damages for a decedent's conscious pre-death pain and suffering begins to toll when the injury occurs. The decedent's personal injury that precipitated the survival action occurred outside the statute of limitations of two years for her claim, and thus the Court reasoned that there could be no recovery of damages for the decedent's conscious pre-death pain and suffering in the survival action. *Massey v. Fair Acres Geriatric Ctr.*, 881 F.Supp.2d 663 (E.D. Pa. 2012).

The Superior Court of Pennsylvania held that where a damage award for a decedent's conscious pre-death pain and suffering did not "shock the conscience," a remittitur was

not required. The decedent suffered multiple episodes of cardiac arrest and was not seen by her physician once in the days leading to her death, as he had retired and was not replaced by another doctor. The decedent had to be intubated and had fluid leaking out of her eyes before her death, while expressing the extent of her physical pain to her family that were present. Thus, the Court reasoned that in light of the evidence, the survival action's jury verdict of $1.83 million, which included damages for the decedent's conscious pre-death pain and suffering, did not "shock the conscience" so much as to require a remittitur. *Hyrcza v. W. Penn Allegheny Health Sys., Inc.*, 978 A.2d 961 (Pa. Super. 2009).

The Commonwealth Court of Pennsylvania held that where one medical expert testified that the decedent did experience conscious pain and suffering and another testified that the decedent did not experience conscious pain and suffering, instructing the jury that it could award damages for conscious pain and suffering only if it found that the decedent was conscious was not error, as argued by the defendant. The decedent was involved in a motor-vehicle collision between his vehicle and a passenger bus, with conflicting accounts of whether the decedent was conscious at all following the collision. Thus, the Court held that a neutral instruction to the jury permitting them to draw a reasonable inference from the competing or conflicting testimony was not error. *Williams v. Se. Pa. Transp. Auth.*, 741 A.2d 848 (Pa. Cmmw. 1999).

The Superior Court of Pennsylvania held that where lay testimony was the only evidence establishing that a decedent who was in a "persistent vegetative state" experienced conscious pre-death pain and suffering, admission of such testimony was error. The decedent entered a vegetative state following a medical procedure where alleged malpractice led to the decedent's brain injury. The decedent's adult, non-medically trained children testified that they believed the decedent experienced conscious pain and suffering. The Court reasoned that the admission of this testimony was "incompetent and should not have been admitted," and without expert medical opinion testimony establishing that a person in a vegetative state can experience pain and suffering, the trial court's damage award for the decedent's conscious pre-death pain and suffering of $950,000 should be vacated. *Cominsky v. Donovan*, 846 A.2d 1256 (Pa. Super. 2004).

XL. Rhode Island

Statutes: 9 R.I. Gen. Laws § 9-1-6; 10 R.I. Gen. Laws § 10-7-7

Summary:

Rhode Island does not have an express conscious pain and suffering provision in its survival statute. 9 R.I. Gen. Laws § 9-1-6. However, the statute states that "the following causes of action shall also survive: . . . [c]auses of action and actions for damages to the person or to real or personal estate." *Id.* at subd. (3). Rhode Island courts have interpreted this language as permitting the recovery of damages for a decedent's conscious pre-death pain and suffering.

Rhode Island does have an express pain and suffering provision in its wrongful death statute. 10 R.I. Gen. Laws § 10-7-7. The statute states that in a wrongful death action, "recovery may be had for pain and suffering." *Id.* This expressly authorizes damage awards for a decedent's conscious pre-death pain and suffering in wrongful death actions. This differs from many other states in which wrongful death claims are aimed at compensating the decedent's next of kin and loved ones for their own personal pain and suffering, and not that of the decedent.

Under either of these statutory means of recovery for a decedent's conscious pain and suffering, Rhode Island courts emphasize the requirement that there be some evidence to permit a reasonable trier of fact to infer that the decedent was conscious for some period of time between injury and death, in which they experienced pain and suffering. If there is no evidence such as this to show that the decedent suffered, then an award of damages for pain and suffering will likely be improper under Rhode Island law.

Case Law:

The Supreme Court of Rhode Island held that where the record showed evidence that an infant decedent experienced conscious pre-death pain and suffering then a jury instruction and subsequent damage award were not improper on the issue of damages for pain and suffering. The infant decedent died of asphyxiation twenty-seven minutes after birth via cesarian section. The trial court determined that the death was caused by the delivering physicians' negligence and malpractice, and awarded the parents of the infant decedent $100,000 for his conscious pre-death pain and suffering. The Supreme Court reasoned that this award should stand given the evidence that the decedent experienced a large degree of pain not found in a "normal birth": "he was born pale and blue as a result of oxygen deprivation; his heart was barely beating . . . physicians made three attempts to intubate [the decedent]." *Oliveira v. Jacobson*, 846 A.2d 822 (R.I. 2004).

The Superior Court of Rhode Island held that where the evidence suggests that the "decedent suffered extreme pain" prior to her death a damage award for her conscious pain and suffering of $25,000 was warranted. The decedent was murdered in the apartment she shared with her husband while her husband was away at work. She was "viciously beaten and murdered with a hammer." The Court reasoned that the award was proper based on medical testimony that the decedent was likely conscious throughout much of the beating. *Broadway v. Solomon*, No. C.A. 81-3588, 1984 WL 560563 (R.I. Super. Feb. 20, 1984).

The Supreme Court of Rhode Island held that where the jury could only base their determination of the decedent's conscious pre-death pain and suffering from a broken pelvis on medical reports, their somewhat low damage award for pain and suffering was proper. The decedent suffered a broken pelvis when she was hit by a taxi cab, prior to her death, and was awarded damages of $292.95 for her conscious pain and suffering based upon her medical records. *Hamrick v. Yellow Cab Co. of Providence*, 304 A.2d 666 (R.I. 1973).

XLI. South Carolina

Statute: S.C. Code § 15-5-90

Summary:

South Carolina does not have an express conscious pain and suffering provision in its survival statute. S.C. Code 15-5-90. However, the statute states that "[c]auses of action for and in respect to . . . any and all injuries to the person . . . shall survive both to and against the personal or real representative." *Id.* South Carolina courts have interpreted this language as permitting recovery of damages for a decedent's conscious pre-death pain and suffering. To recover in a survival action for conscious pain and suffering, there must be at least a scintilla of evidence to show that the decedent was conscious between injury and death and that during this time they experienced pain and suffering. "Pre-impact fright" as a means of recovering damages for conscious pain and suffering even when a decedent died instantly will only be allowed if the evidence would allow a reasonable juror to conclude that the decedent had sufficient time to consciously consider and fear their impending death; fractions of a second are insufficient to meet this requirement.

Case Law:

The Supreme Court of South Carolina held that where the evidence showed that the decedent died instantly, recovery for conscious pre-death pain and suffering was not proper. The decedent was involved in a motor-vehicle accident from which she died instantly. There was some evidence that the decedent may have had a pulse immediately after the collision, although the Court reasoned that this by itself would not be sufficient to establish that the decedent was conscious and could experience pain, and thus a reasonable juror would not be able to find that the decedent experienced conscious pre-death pain and suffering. *Rutland v. S.C. Dept. of Transp.*, 734 S.E.2d 142 (S.C. 2012).

The Federal District Court of South Carolina, applying South Carolina law, held that where the victim of a crash only experiences pre-impact freight for "fractions of a second" as opposed to multiple seconds, recovery for the decedent's conscious pre-death pain and suffering will not be permitted. The decedent was biking when he was hit by a car and was killed instantly. His personal representative sought to recover damages for the decedent's fear in the moment between when the car hit is back tire and when he hit the car's windshield and was killed or lost consciousness instantly. The Court reasoned that under these facts recovery of pain and suffering damages was improper because there was no question that the decedent did not have time to consciously perceive his impending death. *Hoskins v. King*, 676 F.Supp. 2d 441 (D. S.C. 2009).

The South Carolina Court of Appeals held that where eyewitness testimony showed that the decedent was "rolling around" and screaming "Help me!" after being shot, his personal

representative could be awarded damages for his conscious pre-death pain and suffering. The decedent was shot following an argument and physical altercation with the defendant. The Court reasoned that because there was sufficient evidence to permit a reasonable juror to find that the decedent experienced conscious pain and suffering, the award of $100,000 for the survival claim should be upheld. *Singletary v. Shuler*, 861 S.E.2d 591, 597-8 (S.C. App. 2021).

The Supreme Court of South Carolina held that where there is "more than a scintilla" of evidence to show that the decedent experienced conscious pre-death pain and suffering, the question of damages for pain and suffering should be decided by the jury. The decedent was involved in a motor-vehicle collision in which she survived the fatal injuries for approximately twenty-nine hours, during which she moved in her hospital bed, made "terrible noises," and opened her eyes to look at her mother. The Court reasoned that this evidence was sufficient to send the issue of conscious pre-death pain and suffering to the jury, despite other medical evidence and testimony to the contrary. *Croft v. Hall*, 37 S.E.2d 537, 539-40 (S.C. 1946).

The South Carolina Court of Appeals held that where there was sufficient evidence to permit a reasonable juror to infer that the nineteen-month-old decedent experienced conscious pre-death pain and suffering, damages could be awarded. The decedent died of hyponatremia induced encephalopathy, after the defendant infused the decedent with a low concentration saline solution following multiple seizures. The decedent's brain swelled through the opening in the bottom of his skull, vomited multiple times, told his mother he didn't feel good, and experienced a hypothermic decline in temperature, prior to cessation of breathing. Thus, the Court reasoned that the damage award of $600,000 for the decedent's conscious pre-death pain and suffering was justified. *Scott v. Porter*, 530 S.E.2d 389, 396-7 (S.C. App. 2000).

XLII. South Dakota

Statute: S.D. Codified Laws § 15-4-1

Summary:

South Dakota does not have an express conscious pain and suffering provision in its survival statute. S.D. Codified Laws § 15-4-1. However, the statute does state that "[a]ll causes of action shall survive and be brought, notwithstanding the death of the person entitled . . . to the same." *Id*. South Dakota courts have interpreted this language as permitting the recovery of damages for a decedent's conscious pre-death pain and suffering. Much like other states with similar survival statutes and interpretations, South Dakota emphasizes that there must at least be some evidence to permit the trier of fact to determine that the decedent was conscious for some period of time between the injury and death, and that during this time the decedent suffered pain. When there is no evidence showing that the decedent experienced conscious pain and suffering, or only evidence to the contrary, then recovery will likely be precluded. However, South Dakota courts are unlikely to overturn a jury's damage award for a decedent's conscious pain and suffering absent a finding that the award was due to passion or prejudice.

Case Law:

The Supreme Court of South Dakota held that where a decedent survived for twelve days following a collision between his motor-vehicle and a horse, the decedent was entitled to damages for his conscious pre-death pain and suffering. The bus driven by the decedent collided with the horse at highway speeds and went into the ditch resulting in ultimately fatal injuries to the decedent. The Court reasoned therefore that the damage award of $2,671.53 was proper and justified. *Pexa v. Clark*, 176 N.W.2d 497 (S.D. 1970).

The Supreme Court of South Dakota held that where a decedent did experience pain and suffering prior to his death, his personal representative still could not recover conscious pain and suffering damages, because the parties against whom he sought damages were not negligent in causing him pain or suffering. The decedent was in a fight outside of a bar, and hit his head on the sidewalk. Observers, the bar owner and two others, took the decedent inside and walked him to the YMCA where he was renting a room, and made sure he reached his bed. The decedent died that night from injuries sustained in the fight and subsequent trauma to the head. The Court reasoned that unless the decedent's personal representative could show that there was additional pain and suffering aside from that sustained in the original injury, the observers who assisted the decedent in making it back to his rented room could not be held liable for the aggravation of the decedent's already present pain and suffering. *Steckman v. Silver Moon, Inc.*, 90 N.W.2d 170 (S.D. 1958).

The Supreme Court of South Dakota held that unless the jury's damage award for a decedent's conscious pre-death pain and suffering is the result of "passion and prejudice," the award will be upheld. The decedent lived for 256 days after an accident caused her skull to be "laid open revealing portions of the frontal lobes of her brain." Medical testimony, however, showed that the decedent was in a semi-conscious or unconscious state for much of the 256 days, but there was other evidence that could permit a reasonable juror to find that the decedent consciously experienced some pain and suffering. Thus, the Court upheld the award of $18.740.90 for her conscious pre-death pain and suffering. *Plank v. Heirigs*, 156 N.W.2d 193 (S.D. 1968).

XLIII. Tennessee

Statutes: Tenn. Code § 20-5-102; Tenn. Code § 20-5-113

Summary:

Tennessee does not have an express conscious pain and suffering provision in its survival statute. Tenn. Code § 20-5-102. However, the statute states that "[n]o civil action commenced . . . shall abate by he death of either party, but may be revived . . .." *Id*. Tennessee courts have interpreted this language as permitting the recovery of damages for a decedent's conscious pre-death pain and suffering. Survival actions are proper where it is established or possible that the decedent did not die as a result of their injuries complained of in the action, which in turn would make a wrongful death action the appropriate vehicle for the claim. Both a wrongful death action and a survival action for the same injury may be pursued provided that it is unclear whether the decedent died as a result of the injuries or some other cause; duplicative recovery will not be permitted, however.

Tennessee does have an express pain and suffering provision in its wrongful death statute. Tenn. Code § 20-5-113. It states that "[w]here a person's death is caused by the wrongful act, fault or omission of another . . . the party suing shall, if entitled to damages, have the right to recover for the mental and physical suffering . . . resulting to the deceased . . .." *Id*. Tennessee courts have interpreted this language as expressly permitting the recovery of damages for a decedent's conscious pre-death pain and suffering in a wrongful death action. A wrongful death action is the appropriate vehicle for a claim of damages for a decedent's pain and suffering if it is established that the decedent died as a result of the injuries claimed.

Case Law:

The Supreme Court of Tennessee held that the survival statute does not create a new cause of action but instead transfers the right of action from the decedent to a statutory designee to pursue the action. The Court also stated that the damages recoverable under the survival statute included "those to which the decedent would have been entitled, such as . . . pain and suffering." *Williams v. Smyrna Residential, LLC*, 685 S.W.3d 718, 733 (Tenn. 2024).

The Supreme Court of Tennessee held that where a decedent was conscious for four days before entering a coma until her death, and during that time she experienced conscious pain and suffering, recovery under the survival statute was proper. The decedent was pregnant and had preeclampsia, a blood-pressure condition associated with pregnancy. She underwent a cesarian section, but due to the medical malpractice of her obstetrician, she experienced brain swelling, a lumbar puncture, multiple organ failure, and lost the

ability to speak during the four days she was conscious following the procedure. Therefore, the Court reasoned that she did experience conscious pre-death pain and suffering as a result of the malpractice, so much so that the Court reinstated the damage award of $1.5 million, which had been remitted previously by the Court of Appeals. *Thrailkill v. Patterson*, 879 S.W.2d 836, 841-3 (Tenn. 1994).

The Tennessee Court of Appeals held that where there is competing evidence to establish or disprove that a decedent died as a result of injuries caused by the defendant, the decedent's personal representative may put forth both a survival action for personal injury and a wrongful death action. The Court reasoned that this was proper because there was evidence that the decedent experienced conscious pre-death pain and suffering, but it was unclear whether the decedent died as a result of the conduct of the defendant, so this procedure allowed a jury to decide whether the decedent's death was caused by the defendant's conduct, and then apply the damages for the decedent's pain and suffering to either the survival or wrongful death claim, while preventing double recovery. *Rolen v. Wood Presbyterian Home, Inc.*, 174 S.W.3d 158, 163-4 (Tenn. App. 2005).

The Supreme Court of Tennessee held that where a decedent died from the misdiagnosis of meningitis, and experienced fever and headache until her death, the decedent could be awarded damages for conscious pain and suffering. The trial court awarded the decedent $275,000, that was remitted to $200,000, for her conscious pre-death pain and suffering. *Rothstein v. Orange Grove Ctr., Inc.*, 60 S.W.3d 807, 813-5 (Tenn. 2001).

XLIV. Texas

Statute: Tex. Civ. Prac. & Rem. Code § 71.021

Summary:

Texas does not have an express conscious pain and suffering provision in its survival statute. Tex. Civ. Prac. & Rem. Code § 71.021. However, the statute states that "[a] cause of action for personal injury . . . does not abate because of the death of the injured person . . .." *Id.* at subd. (a). Texas courts have interpreted this language as permitting the recovery of damages for a decedent's conscious pre-death pain and suffering in survival actions. Personal representatives may bring both a survival action and a wrongful death action at the same time for the same incident, because they are distinct from one another, but, they may not recover duplicative pain and suffering damages. Texas courts often award damages for conscious pain and suffering even when a decedent dies instantly upon impact or collision, if there is evidence sufficient to permit a reasonable juror to infer or find that the decedent experienced pre-impact mental anguish. Texas courts are also reluctant to reduce juries' damage awards on appeal, unless they are deemed excessively large as a result of "passion or prejudice" on the part of the jury.

Case Law:

The Texas Court of Appeals held that where a decedent was run over by a truck immediately before his death, the jury was within its right to award damages for the decedent's mental anguish prior to his death. The decedent was getting out of the bed of a pickup truck when the driver of the truck began to reverse; the decedent was pulled under the truck and his head was run over by the rear tire. The trial jury awarded the decedent $5,000 for his mental anguish. The Court of Appeals reasoned that this award should stand as a reasonable juror could infer that the decedent experienced conscious mental anguish when he became aware of his impending death, and that the award was not excessively large. *Green v. Hale*, 590 S.W.2d 231, 237-8 (Tex. Civ. App. — Tyler 1979).

The Texas Court of Appeals held that where the evidence could allow a reasonable trier of fact to find that the decedent suffered conscious pre-death mental anguish, albeit for only seconds, damages may be awarded for the mental anguish of the decedent in anticipation of his impending death. The decedent was a pilot of a plane involved in a mid-air collision, that caused his plane to crash into the ground, killing decedent instantly. There were likely seconds where the decedent was conscious and could have experienced mental anguish in the seconds between the mid-air collision and his plane crashing into the ground causing his instant death. The Court reasoned that the damage award of $20,000 for conscious pre-death pain and suffering was not excessive because a reasonable trier of fact could infer that the decedent experienced "a tremendous amount of fear" and that the

award did not show prejudice or passion on the part of the jury. *Hurst Aviation v. Junell*, 642 S.W.2d 856, 858-9 (Tex. App. — Fort Worth 1982).

The Texas Court of Appeals held that where there is evidence that the decedent experienced conscious pre-death pain and suffering, a damage award will not be overturned unless it is the result of passion or prejudice on the part of the jury. The decedent suffered from stage IV pressure ulcers while under the defendant's medical care. Testimony was admitted that the decedent experienced pain from "the way that [the medical staff] were moving her," and she "only sporadically received adequate pain relief." The Court reasoned that this evidence could support a reasonable juror in believing that the decedent experienced conscious pre-death pain and suffering, thus justifying the award of $250,000 for the decedent. *Mariner Health Care of Nashville, Inc. v. Robins*, 321 S.W.3d 193, 210-12 (Tex. App. — Hous. [1st Dist.] 2010).
The Texas Court of Appeals held that where there is evidence sufficient to permit a jury to infer that the decedent experienced pre-impact mental anguish, damages may be awarded for the decedent's conscious pre-death pain and suffering. The decedent was in a stalled truck when it was hit by a train, upon which the decedent died instantly. The Court ruled the damage award of $19,500 was not excessive to compensate the decedent for his pre-impact mental anguish, because the evidence established that he was aware that the train would hit him for approximately six to eight seconds, so he experienced conscious pre-death pain and suffering even though he died instantly. *Mo. Pac. R. Co. v. Lane*, 720 S.W.2d 830, 833 (Tex. App. — Texarkana 1986).

The Texas Court of Appeals held that where there was evidence that a young decedent suffered for minutes prior to his death from drowning, recovery of damages for the decedent's pre-death pain and suffering was proper. The decedent fell into a neighbors pool and drowned, and the doctor who arrived on the scene did not observe any bruising, which may have been present if the decedent had become unconscious prior to entering the water, and the doctor believed that the decedent likely suffered for two to three minutes before losing consciousness and dying. Therefore, the court reasoned that the award of $5,000 in damages for the decedent's conscious pre-death pain and suffering was proper, nor was it excessive in light of the facts. *Mitchell v. Akers*, 401 S.W.2d 907, 912 (Tex. App. — Dallas 1966).

The Texas Court of Appeals held that when a decedent died instantly, he could still recover damages for the pre-impact mental anguish he experienced. The decedent's truck collided with a dump truck on a highway, careened onto an adjacent service road, and then caught on fire; eyewitness testimony established that the decedent driver visibly "appeared panicked" in the moments immediately preceding the collision. Thus, the Court reasoned that the decedent was entitled to conscious pain and suffering damages for his pre-impact mental anguish, and that the award of $400,000 was not so large as to be excessive in light of the facts. *Ruiz v. Guerra*, 293 S.W.3d 706, 722-3 (Tex. App. — San Antonio 2009).

XLV. Utah

Statute: Utah Code § 78B-3-107

Summary:

Utah does not have an express conscious pain and suffering provision in its survival statute. Utah Code § 78 B-3-107. However, the statute states that "[a] cause of action arising out of personal injury to an individual, or death caused by the wrongful act or negligence of a wrongdoer, does not abate upon the death of . . . the injured individual. The injured individual, or the personal representatives . . . has a cause of action . . . for special and general damages . . .." *Id.* at subd. (1)(a). Utah courts have interpreted this language as permitting the recovery of damages for a decedent's conscious pre-death pain and suffering. Utah courts have also placed emphasis on the requirement that there be evidence to show that the decedent experienced conscious pre-death pain and suffering, or evidence sufficient to permit a reasonable trier of fact to infer that the decedent experienced conscious pre-death pain and suffering in order to allow an award of conscious pain and suffering damages. There generally must be some showing that the decedent was conscious for at least some period of time between the injury complained of and death to allow recovery.

Case Law:

The Supreme Court of Utah held that where there is no evidence that the decedent experienced conscious pre-death pain and suffering and there is no evidence that would permit a reasonable juror to infer that the decedent experienced conscious pre-death pain and suffering, pain and suffering damages cannot be awarded in a survival action. The decedent was negligently taken off a ventilator and died eight hours later. There was no evidence to suggest or permit an inference that the decedent suffered any pain during these eight hours, as the decedent was sedated and on "palliative care." The personal representative argued that pain could be inferred from testimony of "weaning trials," where the decedent experienced pain from attempting to breath while the medical physicians tried to wean her off of the ventilator. The Court reasoned, however, that this inference was far too tenuous without any other evidence as to the decedent's experience over the eight hours between the loss of the ventilator and her death, and therefore the damage award of $450,000 was error and the defendants were entitled to judgment as a matter of law. *Meeks v. Peng*, 545 P.3d 226, 240-1 (Utah 2024).

XLVI. Vermont

Statute: Vt. Stat. tit. 14, § 1452

Summary:

Vermont does not have an express conscious pain and suffering provision in its survival statute. Vt. Stat. tit. 14, § 1452. However, the statute states that "[i]n an action for the recovery of damages for a bodily hurt or injury . . . if either party dies during the pendency of the action, the action shall survive and may be prosecuted." *Id*. Vermont courts have interpreted this language as permitting the recovery of damages for a decedent's conscious pre-death pain and suffering. The courts have imposed a requirement that there be some evidence to permit a reasonable trier of fact to find that the decedent was conscious and while conscious experienced pain and suffering. If the evidence offered is "too speculative," Vermont courts may preclude an award of pain and suffering damages for the decedent. There is not a large amount of case law in Vermont interpreting the survival statute in light of recovery of conscious pre-death pain and suffering damages for decedents.

Case Law:

The Supreme Court of Vermont held that where the evidence to support the argument that a decedent experienced conscious pre-death pain and suffering was "too speculative," pain and suffering damages could not be awarded. The decedent was killed in his home by a gunshot wound. His personal representative argued that the testimony of a state trooper that the decedent moved himself from one room to another after being shot showed that the decedent experienced conscious pre-death pain and suffering. The Court reasoned that this evidence by itself was "too speculative," and there was no evidence shown as to the location of the bullet wound or anything else to show that the decedent experienced conscious pain and suffering. Thus, the Court affirmed the lower court's denial of pain and suffering damages for the decedent. *Dubaniewicz v. Houman*, 910 A.2d 897, 899 (Vt. 2006).

XLVII. Virginia

Statute: Va. Code § 8.01-25

Summary:

Virginia does not have an express conscious pain and suffering provision in its survival statute. Va. Code § 8.01-25. However, the statute states that "[e]very cause of action, whether legal or equitable . . . shall survive either the death of the person . . . in whose favor the cause of action existed." *Id*. The statute also states that "if the cause of action asserted by the decedent in his lifetime was for personal injury and such decedent dies as a result of the injury complained of," the action shall become one for wrongful death, governed by the Virginia wrongful death statute. *Id*. Virginia courts have interpreted the survival statute's language as permitting the recovery of damages for a decedent's conscious pre-death pain and suffering. However, if the wrongful death statute applies, there may be no recovery of damages for the decedent's conscious pre-death pain and suffering, as wrongful death actions are aimed at compensating the decedent's family and next of kin for their own personal pain and suffering associated with the decedent's death. *See* Va. Code § 8.01-52. Additionally, if a survival action is brought after the decedent is already dead, the wrongful death statute will take over. *See* Va. Code § 8.01-56.

Virginia courts have allowed personal representative to assert both a wrongful death cause of action alongside a survival cause of action for the same personal injury, in order to determine whether the decedent died as a result of the wrongful conduct complained of. Then, the personal representative may further either the survival claim or the wrongful death claim depending on whether the jury decided that the injury caused the decedent's death. This often determines whether or not damages may be awarded for the decedent's conscious pre-death pain and suffering, as it will cause the application of either the wrongful death statute or the survival statute.

Even when the survival statute applies to a personal injury, Virginia courts will likely still require that there be sufficient evidence to permit a reasonable trier of fact to find or infer that the decedent was conscious following the injury, and that while conscious the decedent experienced pain and suffering caused by the injury; as is similar to most other jurisdictions permitting recovery of damages for decedents' conscious pre-death pain and suffering.

Case Law:

The Supreme Court of Virginia held that where a decedent's death was caused by the injury complained of, the proper vehicle for the claim was a wrongful death action, such that damages for the decedent's conscious pre-death pain and suffering could not be recovered. Because the personal representative could not show that the decedent did not

die as a result of the wrongful act complained of in the survival action, the Court reasoned that the claim should be in the form of a wrongful death action. The Court then followed that under the wrongful death statute, there could be no award of damages for the decedent's conscious pre-death pain and suffering. *Seymour v. Richardson*, 75 S.E.2d 77, 80-1 (Va. 1953).

The Virginia Circuit Court of Norfolk held that although there could be no recovery of conscious pain and suffering damages under the wrongful death statute, the decedent's personal representative could introduce evidence of the decedent's conscious pre-death pain and suffering. The Court reasoned that although the jury must be instructed that they cannot grant damages for the decedent's conscious pain and suffering, evidence of pain and suffering could be admitted to show the beneficiaries' mental anguish following the decedent's death. *Sciortino v. Piccioni*, No. CL11-7141, 2014 WL 8060378 (Va. Cir. 2014).

The Supreme Court of Virginia held that a personal representative may assert alternative claims for both personal injury and wrongful death, to allow the jury to decide whether the decedent's death was caused by the wrongful act or negligence of the defendant. If it was not, and the defendant's actions caused personal injury without causing the decedent's death, damages may be awarded for the decedent's conscious pre-death pain and suffering from the personal injury. The decedent died following complications with a urinary catheter, although the Court reasoned that a reasonable juror could decide to not believe the medical testimony that the decedent died as a result of complications caused by the defendant's negligent maintenance of the decedent's catheter, and thus move forward with the decedent's survival action instead of the wrongful death action. The Court also held that the award of damages for the personal injury survival claim were not so excessive as to require a remittitur; the award of $325,000 was adequate to compensate the decedent for the "develop[ing] [a] urinary tract infection," and "all the consequential medical complications arising from the infection . . .." *Centra Health, Inc. v. Mullins*, 670 S.E.2d 708 (Va. 2009).

XLVIII. Washington

Statutes: Wash. Rev. Code § 4.20.046; Wash. Rev. Code § 4.20.060

Summary:

Washington does have an express conscious pain and suffering provision in its general survival statute. Wash Rev. Code § 4.20.046. It states that "[a]ll causes of action by a person or persons against another person or persons shall survive to the personal representative of the former," and that "[i]n addition to recovering economic losses on behalf of the decedent's estate, the personal representative is only entitled to recover noneconomic damages for pain and suffering, anxiety, emotional distress, or humiliation personal to and suffered by the deceased on behalf of those beneficiaries enumerated in RCW 4.20.020." *Id.* at subd. (1)(2). These beneficiaries include the decedent's "surviving spouse, state registered domestic partner, or child living, including step children, or if leaving no[ne of these categories of beneficiary] . . . surviving parents or siblings." Wash. Rev. Code § 4.20.020. Washington courts have interpreted this language as expressly permitting the recovery of damages for a decedent's conscious pre-death pain and suffering, provided that the decedent has a surviving statutory beneficiary. The statute also explicitly states that "[d]amages under this section are recoverable regardless of whether or not the death was occasioned by the injury that is the basis for the action," which courts have interpreted to mean that it does not matter whether the decedent died of their injuries claimed in the survival action or not; the decedent may still be entitled to damages for their conscious pain and suffering. *Id.* at subd. (2).

Washington does have an express conscious pain and suffering provision in its special survival statute. Wash. Rev. Code § 4.20.060. It states that "[no] action for personal injury to any person occasioning death shall terminate . . . by reason of such death," and that the listed beneficiaries can "recover damages for the decedent's pain and suffering, anxiety, emotional distress, or humiliation . . .." *Id.* Washington courts understand this language as permitting the recovery of damages for a decedent's conscious pre-death pain and suffering provided that the decedent has a surviving beneficiary to whom these damages may be awarded. The beneficiaries include "a surviving spouse, state registered domestic partner, or child living, including step children, or if leaving no[ne of these categories of beneficiary] . . . surviving parents or siblings." *Id.* at subd. (1). Additionally, the special survival statute only applies when death results from the injury; if the injury did not cause the death, then the general survival statute applies.

Under either the general or special survival statutes, Washington courts have held that there must be some evidence to permit a reasonable trier of fact to find or infer that the decedent was conscious for some period of time between the injury and death, and that during this time the decedent experienced pain and suffering. Much of the case law from Washington courts centers around whether a decedent had a surviving statutory

beneficiary, because if there is no surviving statutory beneficiary then there can be no recovery for the decedent's conscious pre-death pain and suffering under either the general or special survival statute.

Case Law:

The Washington Court of Appeals held that damages for "loss of enjoyment of life" cannot be recovered by a decedent under the survival statute, because they are not the same as damages for a decedent's conscious pre-death pain and suffering. The Court reasoned that although a decedent could recover for pain and suffering had she been conscious at all between her aorta puncture during surgery and her death hours later, she could receive damages. However, the decedent was unconscious for the entire time between the injury and death, and because damages for "loss of enjoyment of life" are only awarded when an injured party survives the injury, the personal representative was not entitled to these damages, as the decedent died. *Otani ex rel. Shigaki v. Broudy*, 59 P.3d 126, 127-30 (Wash. App. Div. 1 2002), aff'd, 92 P.3d 192 (Wash. 2004).

The Washington Court of Appeals held that where a decedent died of her injuries caused by the negligent medical malpractice of the defendant, her personal representative could only recover damages for conscious pain and suffering under the wrongful death statute if the decedent left behind statutory beneficiaries. The decedent died with only her two parents and her siblings as potential beneficiaries, but none of them were dependent upon the decedent. Therefore, the Court reasoned that the damages for conscious pre-death pain and suffering were properly precluded by the lower court. *Wilson v. Grant*, 258 P.3d 689, 693-5 (Wash. App. Div. 3 2011).

The Washington Court of Appeals held that where a decedent died as a result of injury due to the wrongful conduct of the defendant, only the categories of beneficiaries listed in the special survival statute could recover damages for the decedent's conscious pre-death pain and suffering. The decedent did not have any beneficiaries in these categories, and therefore the Court reasoned that under both the special survival statute, the personal representative of the decedent could not recover damages for the decedent's conscious pre-death pain and suffering. The Court also held that because damages for conscious pain and suffering are not pecuniary damages, they cannot be recovered under the general survival statute either. *Tait v. Wahl*, 987 P.2d 127 (Wash. App. Div. 1 1999).

The Supreme Court of Washington held that when a decedent dies from personal injuries as a result of negligent medical malpractice, and leaves behind multiple statutory beneficiaries, damages for the decedent's conscious pre-death pain and suffering may be recovered. The decedent suffered from eclampsia following the birth of her child, due to negligent medical malpractice, which eventually caused her death. She left behind her husband and two children, all of which are statutory beneficiaries under the special survival statute, and are thus entitled to damages for the decedent's conscious pre-death pain and suffering. The Court also held that the lower court's decision to grant a remittitur

for pain and suffering damages was error, because there was a large amount of evidence showing that the decedent suffered prior to her death. Although the decedent was unconscious or sedated for "some part of her last 35 hours of life," a reasonable juror could find or infer that "during much of that period of time she not only suffered extreme conscious pain, fear, and despair at not being helped, but also had the conscious realization her life and everything fine that it encompassed was prematurely ending." For this, the Court reasoned the original conscious pain and suffering damages of $412,000 should be reinstated. *Bingaman v. Grays Harbor Cmty. Hosp.*, 699 P.2d 1230 (Wash. 1985).

XLIX. West Virginia

Statute: W.Va. Code § 55-7-6; W.Va. Code § 55-7-8a

Summary:

West Virginia does not have an express conscious pain and suffering provision in its survival statute. W.Va. Code § 55-7-8a. However, the statute does state that [i]n addition to the causes of action which survive at common law, causes of action for . . . injuries to the person and not resulting in death . . . also shall survive; and such actions be brought notwithstanding the death of the person entitled to recover." *Id.* at subd. (a). The statute also states that "[i]f the injured party dies before having begun any such action and it is not at the time of his death barred by the applicable statute of limitations . . . such action may be begun by the personal representative of the injured party." *Id.* at subd. (c). West Virginia courts have interpreted this language as permitting the recovery of damages for a decedent's conscious pre-death pain and suffering. West Virginia will also permit damages for a decedent's conscious pre-death pain and suffering in survival actions where the injury complained of did cause the decedent's death. *See* W.Va. Code § 55-7-8.

West Virginia does not have an express conscious pain and suffering provision in its wrongful death statute. W.Va. Code § 55-7-6. However, the statute states that "[i]n every such action for wrongful death, the jury, or . . . the court, may award such damages as to it may seem fair and just." *Id.* at subd. (b). Additionally, although the statute does not mention pain and suffering damages for decedent's explicitly, it does not preclude them, as before it lists the enumerated damages categories the statute states that "[t]he verdict of the jury shall include, but may not be limited to . . .." *Id.* at subd. (c). West Virginia courts have interpreted this language as permitting the recovery of damages for a decedent's conscious pre death pain and suffering under the wrongful death statute. However, these damages, unlike those from a survival action, are not distributed to the estate but are instead distributed to the surviving statutory beneficiaries. These include the decedent's surviving spouse, children, siblings, parents, and any other persons who were financially dependent on the decedent. *Id.* at subd. (b).

To recover under damages for a decedent's conscious pre-death pain and suffering under either the wrongful death or survival statutes, West Virginia courts have required that there be some evidence to permit a reasonable trier of fact to find or infer that the decedent was conscious for some period of time between the injury and death, and that the decedent experienced pain and suffering during the time they were conscious as a result of the defendant's wrongful or negligent conduct. West Virginia courts have held that if a decedent was killed instantly or was not conscious for any time between the injury and death, there can be no recovery of damages for the decedent's conscious pre-death pain and suffering.

Case Law:

The Supreme Court of West Virginia held that under the wrongful death act a jury may award damages for a decedent's conscious pre-death pain and suffering, even when the decedent did not bring a claim of personal injury forward prior to death. The Court further reasoned that in order to award damages for the decedent's conscious pre-death pain and suffering, "there must be evidence of conscious pain and suffering of the decedent prior to death," and that "[w]here death is instantaneous, or where no evidence that the decedent consciously perceived pain and suffering, no damages for pain and suffering are allowed." This decision reversed prior verdicts ruling that unless the decedent instituted an action for personal injury prior to death, the claim would abate with their death and no longer be recoverable. *McDavid v. U.S.*, 584 S.E.2d 592 (W.Va. 2003).

The Supreme Court of West Virginia held that where a decedent brought a claim of damages for conscious pain and suffering before he died, the action was revived and damages could be awarded notwithstanding the death of the decedent. The decedent was in an automobile accident that caused injury, and brought suit on these injuries before he died. Thus, the Court reasoned that his personal representative could apply the survival statute to recover damages for the decedent's conscious pre-death pain and suffering stemming from the automobile accident. *Est. of Helmick by Fox v. Martin*, 425 S.E.2d 235, 239 (W.Va. 1992).

The Supreme Court of West Virginia held that where a decedent could recover damages for her conscious pre-death pain and suffering, any non-economic damage awards, including those for the decedent's conscious pre-death pain and suffering should be capped at $1 million in accordance with the statutory cap in the West Virginia Medical Malpractice Act. The decedent was scheduled to undergo exploratory surgery in an attempt to save her life, but due to the negligence of her physician was unable to be rehydrated, went into shock, and died before the surgery could occur. The Court reasoned that the decedent was entitled to damages for her conscious pain and suffering, given the extreme pain that occurred as a result of the prolonged condition and her consciousness of her impending death. However, the Court also reasoned that these damages, being non-economic should be subject to the $1 million cap. *Karpacs-Brown v. Murthy*, 686 S.E.2d 746 (W.Va. 2009).

L. Wisconsin

Statute: Wis. Stat. § 895.01

Summary:

Wisconsin does not have an express conscious pain and suffering provision in its survival statute. Wis. Stat. § 895.01. However, the statute does state that "[i]n addition to the causes of action that survive at common law, the following survive: . . . 7. Causes of action for . . . other damage to the person . . .." *Id.* at subd. (1)(7). Wisconsin courts have interpreted this language as permitting the recovery of damages for a decedent's conscious pre-death pain and suffering. Wisconsin courts have also emphasized a requirement that damages for a decedent's pain and suffering only be awarded where there is evidence sufficient to permit a trier of fact to find or infer that the decedent was conscious for some period of time between the injury and death, and that while conscious the decedent experienced pain and suffering caused by the defendants wrongful or negligent conduct. Where damages are excessive in light of the facts and evidence establishing the decedent's conscious pain and suffering, Wisconsin courts have required remittiturs of pain and suffering damage awards to ensure they are proportional with the pain and suffering actually consciously experienced by the decedent.

Case Law:

The Supreme Court of Wisconsin held that although a decedent's survival action was governed by the damages cap set forth in the Wisconsin medical malpractice statutes, the damage award for the decedent's conscious pre-death pain and suffering, along with other non-economic damages, was not to be limited because the damage cap had been held unconstitutional. The decedent experienced conscious pain and suffering as a result of negligent medical malpractice, and the trial jury awarded her estate $500,000 for her conscious pre-death pain and suffering. The Court affirmed this award by reasoning that the damage cap in the medical malpractice did not apply because it was ruled to be unconstitutional. *Bartholomew v. Wis. Patients Compensation Fund and Compcare Health Servs. Ins. Corp.*, 717 N.W.2d 216 (Wis. 2006).

The Supreme Court of Wisconsin held that damage awards for a decedent's conscious pre-death pain and suffering are awarded to the estate of the decedent and not to their next of kin as in a wrongful death action. The decedent suffered pain prior to her death and her personal representative brought both a survival action and a wrongful death action. The Court reasoned that because $2,000 was awarded for the decedent's conscious pre-death pain and suffering, this damage award was to go towards the estate of the decedent, and not to her other surviving beneficiaries or next of kin. *Koehler v. Waukesha Milk Co.*, 208 N.W. 901 (Wis. 1926).

The Supreme Court of Wisconsin held that where damages for a decedent's conscious pre-death pain and suffering were excessive, they should be remitted to an award in accordance with the evidence presented. The decedent was a pedestrian who was struck by a vehicle and lived for approximately seven hours following the collision. The Court reasoned that because the decedent "was sometimes irrational" and "only about half conscious" between her injury and death the original pain and suffering damage award of $5,000 was excessive and should be remitted to an award between $1,500 to $3,500 instead. *Blaisdell v. Allstate Ins. Co.*, 82 N.W.2d 886 (Wis. 1957).

LI. Wyoming

Statute: Wyo. Stat. § 1-4-101

Summary:

Wyoming does not have an express conscious pain and suffering provision in its survival statute. Wyo. Stat. § 1-4-101. However, the statute does state that "causes of action for . . . injuries to the person . . . survive." *Id*. The statute also stipulates that "in actions for personal injury damages, if the person thereto dies recovery is limited to damages for wrongful death." *Id*. Wyoming courts have interpreted this language as permitting damage awards for the conscious pre-death pain and suffering of a decedent, provided that the decedent died from causes unrelated to their claim of personal injury. When the decedent dies of injuries resulting from the wrongful or negligent conduct of another, the proper vehicle for the claim is an action for wrongful death. Wyoming courts do not permit damages for the decedent's conscious pre-death pain and suffering in wrongful death actions.

There is not a large amount of case law interpreting the survival statute in relation to claims of personal injuries so as to understand the rationale. However, Wyoming courts are likely to apply the same general rules as other jurisdictions in deciding when a jury may award damages for a decedent's pain and suffering: that there is at least evidence sufficient to permit the trier of fact to find or infer that the decedent was conscious for some time between the injury and death, and that while conscious the decedent experienced pain and suffering caused by the wrongful or negligent conduct of the defendant.

Case Law:

The Supreme Court of Wyoming held that when a decedent dies as a result of the wrongful conduct of a defendant, and the defendant's other negligent conduct against the decedent caused injury but did not contribute to death, then the personal representative may pursue both a wrongful death action and a survival action. The decedent received negligent medical care during his time at the defendant nursing home; some of these negligent acts caused him pain and suffering but did not contribute to his death. The Court reasoned that both causes of action could be pursued, but damages for conscious pre-death pain and suffering could only be awarded in the survival action for the negligent acts that injured the decedent but did not contribute to his death. *Gaston v. Life Care Ctrs. of America, Inc.*, 488 P.3d 929 (Wyo. 2021).

The Supreme Court of Wyoming held that when a decedent dies of causes unrelated to their personal injuries inflicted by another party, the decedent's cause of action survives, and damages can include those for the decedent's conscious pre-death pain and suffering. The decedent died of liver failure unrelated to his survival action for personal injury

stemming from a motor-vehicle collision which caused the decedent conscious pain and suffering. The Court reasoned that because the injury complained of in the survival action for pain and suffering damages was not that which caused the decedent's death, the survival action was appropriate and damages for conscious pre-death pain and suffering were able to be awarded. *DeHerrera v. Herrera*, 565 P.2d 479 (Wyo. 1977).

The Supreme Court of Wyoming held that damages for a decedent's conscious pre-death pain and suffering cannot be awarded in a wrongful death action, and that a wrongful death action is proper when a decedent dies from the wrongfully inflicted injury claimed in the action. The decedent died as a result of negligent medical malpractice during a surgery to remove his gallbladder. Thus, the Court reasoned that the personal representative was not entitled to damages for the decedent's conscious pre-death pain and suffering, because the wrongful or negligent conduct that was the basis of the claim caused the death, making the wrongful death statute the proper vehicle, and a decedent's conscious pain and suffering are not compensable damage elements under a Wyoming wrongful death action. *Parsons v. Roussalis*, 488 P.2d 1050 (Wyo. 1971).

GUARDING AGAINST MISTAKES, MISJUDGMENT AND BIASES IN SETTLEMENT NEGOTIATIONS

Mitchell A. Orpett, Esq.
Tribler Orpett & Meyer, P.C.
Chicago, IL
312-201-6413
maorpett@tribler.com
www.tribler.com

GUARDING AGAINST MISTAKES, MISJUDGMENT AND BIASES IN SETTLEMENT NEGOTIATIONS

"Let us begin anew, remembering on both sides that civility is not a sign of weakness, that sincerity is always subject to proof. Let us never negotiate out of fear. But let us never fear to negotiate."

-------- JOHN F. KENNEDY

Mitchell A. Orpett
Tribler Orpett & Meyer, P.C.
225 W Washington – Suite 2550
Chicago, Illinois 60602

I. BACKGROUND INFORMATION

Prior to any negotiation, it is extremely useful (if not imperative) to have as much information as possible concerning the claim. Occasionally, circumstances may warrant seizing the opportunity to settle a case before you know the details. This is, however, very rare and somewhat dangerous. It is important to remain objective while obtaining and considering information and to ensure that the process for evaluating claims and arriving at settlement goals and authority minimizes faulty assumptions and cognitive biases. Working knowledge of the case and an understanding of how individuals think and make decisions will make you a much more effective negotiator. The following is a general guideline of the information you should try to assemble before you attempt to settle a claim.

A. Facts About Claim

1. Who
2. How
3. When
4. Where

B. Witnesses

C. Site Visit or Photos of Site

D. Injuries and Treatment

1. Objective or subjective
2. Duration of treatment
3. Permanency
4. Identity of treating doctors, therapists, etc.
5. Prior similar injuries

E. Damages

1. Medical expenses
2. Lost wages
3. Miscellaneous
4. Verification
5. Reasonableness

F. Prior Claims or Lawsuits by Claimant

1. Nature of prior occurrence
2. Nature of injuries in prior occurrences

G. Prior Accidents at Same Location By Other Claimants

H. Prior Similar Incidents Involving Insured and Individual Participants

I. Amounts Paid on Other Cases for Similar Injuries

J. Strong and Weak Points of Case

K. Plaintiff's Attorney

II. EVALUATION OF CASE

Once you have assembled the available background information, you must then evaluate the claim. This is an important step to complete prior to the initiation of negotiations.

A. Assessment of Key Issues

1. Liability
    a. target or peripheral defendant

b. potential liability of other parties and non-parties

2. Claimant's comparative fault

3. Costs of litigation

B. Keys to Accurate Evaluation

1. Knowledge of policy and particular coverage issued to insured

2. Knowledge of facts

3. Common sense

4. Practical/cost-effective approach

5. Experience

6. Use your available resources, i.e., co-workers, supervisors, attorneys you are comfortable consulting and in whom you have confidence.

C. A Word About Bias: Examples of How We Think "Wrong"

1. Examples of Types of Biases

a) *Confirmation* – we look for and value more highly those perceived "facts" that confirm our preliminary thoughts and opinions;

b) *Attribution* – attribution bias occurs when the causes that lead to certain outcomes are misattributed in ways that promote one's self-image or self-esteem. This bias can take on many forms and appear in various contexts;

c) *Availability* – concluding that something is more probable because it is more easily remembered;

d) *Affinity* – tending to favor or look more favorably on those who share similar interests, backgrounds and experiences with us;

e) *Law of Small Numbers* – leaping to conclusions based on inconclusively small amounts of evidence (e.g., jury verdict research);

f) *Representativeness* – An event A is judged to be more probable than an event B whenever A appears more representative than B of what we have in mind for that kind of event;

g) *Conditionality* – we don't know what we don't know and don't figure that ignorance into our judgments;

h) *Anchoring and Adjustment* – relying heavily on the information initially received. An anchoring bias occurs when we focus on one piece of information when deciding or solving a problem. We then make inaccurate final estimates due to adjustments from a faulty initial value;

i) *Recency* -- the tendency to overemphasize the importance of recent experience or latest information in estimating future events*;*

j) *Vividness* -- the tendency of individuals to be more influenced by vivid, emotionally-charged information or experiences compared to more mundane or less emotionally-stimulating information. This bias can lead people to weigh vivid information more heavily than other relevant but less striking information when making judgments or decisions;

k) *Hindsight* – the tendency for people to perceive past events as having been more predictable than they were.

2. Impact of Bias in Valuing Claims

a) Evaluation of Claims
b) Valuing a life
c) Understanding Injury Through Medical Care
d) Pain & Suffering Disparities
e) Effectiveness as Witness
f) Comparisons to Others
g) Presenting and Cross-Examining Experts
h) Source for Evaluation
i) Recipient of Evaluation

3. Impact of Bias in Negotiations

It is generally accepted in psychology that decisions can be greatly affected by one's fear of loss. But what is a "loss?" If an insurer has set a claims reserve at a specific number, implicit and unconscious bias may make it more difficult than it should be to move off that number regardless of what evidence would suggest is the "real" value of the claim. When an attorney has issued an opinion that a claim has a value of X, will evidence or facts

suggesting something to the contrary be belittled, undervalued, under-reported or under-emphasized as the case progresses?

We need to focus on what is a "loss," not only to our side but to the claimant/plaintiff as well. Interestingly, studies have demonstrated that when a known result (such as a settlement payment) is viewed as a "loss" (doing worse than was, perhaps, expected or communicated as likely by the plaintiff's attorney), people will gamble on the unknown result (trial) rather than accept the known result. To the contrary, when the known result is viewed as a gain, people will take the known result, even where the unknown has the potential of offering even more. This suggests that we need to address how our offers are framed so that we increase the likelihood that claimants and their attorneys will see them as a "gain" and not a "loss."

The process of negotiation itself may help in this regard. At times, we can increase the likelihood of claimants viewing settlement offers as gains when an offer has deviated significantly from its starting point. Threading the needle between a low-ball initial offer that can derail negotiations before they can build any momentum and creating false expectations by making an initial offer that is too high can be exceedingly difficult but is nevertheless a worthy endeavor but one that requires careful consideration of what motivates the claimant and how your offers can be best presented so as to make the gamble of the unknown less attractive. A well-timed significant move when the claimant thought it unlikely may help in that regard and turn a loss into a gain for both sides.

4. How to Interrupt and Overcome Biases and Unconscious Errors

• Be self-observant and self-critical. Pay attention to your thinking and your decision making. Be comfortable doubting your objectivity and critically examining the reasons for your decisions. Catch yourself applying faulty assumptions or stereotypes and actively redirect your thinking;

• Remind yourself of your own unconscious biases;

• Make yourself uncomfortable. Seek out situations and relationships that require you to spend time with people who are different from you;

• Expose yourself to counter-stereotypical situations. If you have a bias toward thinking of leaders as men, read about successful female leaders;

• Seek greater input from multiple and diverse people with different backgrounds and experiences to better gauge reactions and to expand the scope of the information and input received and considered. Field-test your conclusions before implementing them in negotiations.

D. Items to Complete Prior to Initiation of Negotiations

1. Establish a reserve based on a thorough and considered evaluation of the claim;

2. Make certain that you have allowed sufficient time to obtain required internal approvals of settlement authority (if any)

3. Obtain written confirmation of all required external approvals (if any):
   a. insurer
   b. insured

III. INITIATING NEGOTIATIONS

A. Demeanor

Maintain an amicable relationship, if possible, with the claimant or his attorney. This facilitates negotiations. Avoid confrontation at the outset. Start slowly with friendly conversation. In the end, it will probably make the negotiating process easier and your opponent may be willing to concede a point or two if he feels that you are being basically honest, fair and friendly.

B. Soliciting a Demand

1. Be direct – ask for the claimant's demand and basis for demand

2. Do not make an offer until you have a demand

3. Do not be in a hurry to make an offer unless circumstances require it

4. Do not bid against yourself

IV. NEGOTIATING TIPS

The following are techniques which may be used against you or you may decide to use during the negotiating process. Every negotiation is unique, so certain techniques may be appropriate in some situations and inappropriate in others. It may be necessary to

experiment with different techniques to determine those most comfortable and effective for you.

A. Listen

Listen very carefully to the words and numbers spoken by your opponent and co-defendants. Take good notes. Consider what is not said as well as what is. Read between the lines.

B. Pretend you know less than you do

If you act confused, ask a lot of questions, and generally look as if you need a little help with the details, your opponent will be disarmed and may tell you more than you need.

C. Silence

Silence often prompts the other side to speak and may result in the disclosure of useful information. It also creates the impression that you are confident in your position.

D. Patience

Overeagerness makes it appear you really want something or may be desperate to settle. If you cannot think of the right thing to do, do nothing and wait and see what happens tomorrow or ask someone with more experience for input. There is usually more time to settle than yon thinly there is. Use time to your advantage and see if your opponent begins to squirm.

E. Take One More Bite

Don't stop negotiating because you have received a demand within your authority. Continue to negotiate to determine the true bottom line of the other party. Your goal should not be simply to reach a "good" settlement, but the best possible settlement.

F. High Ball/Low Ball

Negotiations often assume that settlement will be at a point midway between the two sides' initial offers. Your opponent may try to exploit this assumption by making his initial demand ridiculously high. Don't for a second give this offer any serious consideration, unless you counter with your own ridiculous offer at the other extreme. Instead, demand that your opponent negotiate in

good faith and let him know that you are willing to walk away from the table if he doesn't.

G. Don't Back Your Opponent Into A Corner

Sometimes your opponent will want to settle but won't because it will look like he's caving in and because he is more concerned with how he looks than what his client is recovering. Sometimes the attorney may really be caving and will get angry because you have him over a barrel. Always make your opponent feel that the deal is the best one he could have gotten. Put a good spin on the result.

H. Good Cop/Bad Cop

When you have reached an impasse in friendly negotiations, one method of resuming negotiations is to advise your opponent that your supervisor will not authorize any additional money. Now your opponent is forced to negotiate with two people, one of whom wants to make the deal while the other refuses. In this manner you can rise your friendly relations to attempt to get your opponent to bend a bit and bring him around.

I. Ultimatums

It serves no purpose to tell tire other side that your offer is his "last chance" if negotiations have barely begun. They will probably call your bluff and look at your threat as a sign of weakness in your position. Save your ultimatum to the end. When you make it, explain rationally with facts and figures why you have been forced to do so.

It is a good idea to discuss ultimatums or "final offers" only when you mean it. If you give an ultimatum, stay with it unless disaster is imminent. Individual claim representatives and companies build reputations over time which affect their ability to negotiate successfully.

Test an opponent's ultimatum before believing it. Do not, however, lose a favorable settlement simply because you do not like his ultimatum.

J. Flexibility

Be flexible enough to take any information you learn during negotiations and use it to test and re-evaluate your position. Even if your negotiations do not prove successful, you may discover information which will be helpful in the future handling of the claim.

K. Punitive Damages

Never negotiate against an opponent's threats of recovering punitive damages. Statistics are overwhelmingly against such a recovery and you should tell your opponent up front and often that, for settlement purposes, punitive damages will not be considered or discussed.

V. Conclusion

No single check-list will ensure a great settlement. No "how to" book or article will suddenly cause claimants to accept dramatically low offers when their claims are worth more. Indeed, following all of the suggestions discussed in this paper will, unfortunately, note prevent us from occasionally paying more than we wanted in order to settle a claim or lawsuit. Settlement negotiations can be wildly different from claim to claim, even when involving similar facts and exposures. Where goals are malleable and results uncertain, how can we find our north star?

The answer is to ensure that the process is as sound as possible and that we on the defense side are approaching claims with the proper methods for evaluation and resolution. This process can be used to generate outcomes that, over the long term, meet our goals. This is true even while we must recognize that the results of any single case cannot be guaranteed. Knowing the facts about the claimant, the occurrence, potential witnesses, damages and legal and evidentiary issues, and understanding the psychological and emotional factors at play will greatly assist us in our evaluation of claims. When this knowledge is coupled with an avoidance of the common errors resulting from logical short-cuts and implicit biases, we can be more confident in our approach to the claim and our basis for the settlement negotiations that follow.