

COMMONWEALTH OF MASSACHUSETTS

SUPREME JUDICIAL COURT

No. SJC-11294

MICHAEL ALEO, INDIVIDUALLY AND AS ADMINISTRATOR OF THE
ESTATE OF ROBIN ALEO,
PLAINTIFF-APPELLEE

V.

TOYS "R" US, INC., TOYSRUS.COM, LLC,
DEFENDANTS-APPELLANTS

ON APPEAL FROM A JUDGMENT OF THE SUPERIOR COURT FOR
ESSEX COUNTY
CIVIL ACTION NO. 2008-02149
APPEALS COURT CASE NO. 2012-P-1181

BRIEF OF *AMICUS CURIAE*
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STATEMENT OF THE INTEREST OF THE AMICUS

The Massachusetts Defense Lawyers Association ("MassDLA"), *amicus curiae*, is a voluntary, non-profit, statewide professional association of trial lawyers who defend corporations, individuals and insurance companies in civil lawsuits. MassDLA is actively involved in assisting courts on issues of interest to its members; appearing as *amicus curiae* in numerous appellate cases, commenting on proposed Court Rules, and providing its members with professional fellowship, specialized continuing legal education, and multifaceted support, including a forum for the exchange of information and ideas. MassDLA members represent clients in defending actions in all types of civil matters, and as a result, they have a direct interest in achieving fairness and balance in the law governing the liability of their clients and the damages to which they may be subjected.

Counsel for MassDLA has reviewed the briefing in this matter and believes that the MassDLA can provide an important broader perspective that goes beyond the facts of this particular case. No party has funded nor drafted this *amicus* brief. This brief is the work of counsel representing MassDLA.

MassDLA is not taking a position on the merits of the underlying case nor any legal issues relating to the trial of this matter. Rather, MassDLA is submitting this brief because it feels compelled to respond to the Court's question as to whether punitive damages based on gross negligence should be evaluated differently from punitive damages based on willful, wanton and reckless conduct. As discussed more fully below, MassDLA respectfully answers the question affirmatively and submits this *amicus* brief in support of its position.

ISSUE PRESENTED

Whether punitive damages based on gross negligence should be evaluated differently from punitive damages based on willful, wanton and reckless conduct. See BMW of North America, Inc. v. Gore, 517 U.S. 559, 575, 580, 583 (1996); State Farm Mut. Auto. Ins. Co. v. Campbell, 538 U.S. 408, 416 (2003); Dartt v. Browning-Ferris Indus., 427 Mass. 1, 18 (1998); Clifton v. MBTA, 445 Mass. 611, 623 (2005).

STATEMENT OF THE CASE

MassDLA adopts by reference the Statement of the Case contained in the Brief for the Defendants-

Appellants, Toys "R" Us, Inc. and Toysrus.com, LLC at pgs. 2-11.

ARGUMENT

I. Punitive Damages Awards Based Upon Gross Negligence Must Be Strictly Limited to Pass Constitutional Muster.

Massachusetts is one of only eight states¹ which permits punitive damages to be awarded for gross negligence; the remaining states require more egregious conduct, such as recklessness, wantonness and malice. Other states that permit punitive damages based on gross negligence have statutory restrictions and court-mandated limitations on such awards, which follow Supreme Court guidelines.

The Commonwealth has not enacted statutory restrictions on punitive damages for gross negligence, and this Court has not articulated limitations on such damages in light of the Supreme Court's recognition that gross negligence is the "least blameworthy" conduct to give rise to punitive damages. Exxon Shipping Co. v. Baker, 554 U.S. 471, 512 (2008). As the Commonwealth permits punitive damages based on

¹ Besides Massachusetts, the other states that permit punitive damages based upon gross negligence are Florida, Illinois, Kentucky, Mississippi, New Mexico, North Carolina and Texas. *Infra*.

conduct at the lowest end of the culpability spectrum, these punitive damages must be strictly limited to pass constitutional muster.

The United States Supreme Court has established three guideposts, which courts are required to consider in determining the constitutionality of punitive damages awards. This Court in Labonte v. Hutchins & Wheeler recognized the factors used to determine whether a punitive damage award is excessive. 424 Mass. 813, 826-827 (1997) *citing* BMW of N. America, Inc., 517 U.S. 559 (1996). These guideposts are "the degree of reprehensibility of the defendant's conduct"; the ratio of the punitive damage award to the "actual harm inflicted on the plaintiff"; and a comparison of "the punitive damages award and the civil or criminal penalties that could be imposed for comparable misconduct." BMW of N. America, Inc., *supra* at 575, 580, 583.

The most important guidepost is the "degree of reprehensibility of the conduct," with gross negligence at one end of the spectrum and malice at the far opposite end. Id. at 575-576. The Court recognized the principle that "some wrongs are more blameworthy than others" with "trickery and deceit

more reprehensible than negligence." Id. The Supreme Court subsequently established "gross negligence" as "the least blameworthy conduct triggering punitive liability." Exxon, 554 U.S. at 512.

In the Commonwealth, punitive damages based upon gross negligence must be evaluated differently than other more egregious conduct in light of this Court's recognition in Altman v. Aronson and its progeny, that gross negligence is a lesser degree of culpability than intentional or reckless conduct. In Altman, this Court defined gross negligence as negligence that is:

substantially and appreciably higher in magnitude than ordinary negligence. It is materially more want of care than constitutes simple inadvertence. It is an act or omission respecting legal duty of an aggravated character as distinguished from a mere failure to exercise ordinary care. . . . The element of culpability which characterizes all negligence is in gross negligence magnified to a high degree as compared with that present in ordinary negligence.

231 Mass. 588, 591-592 (1919).

Gross negligence involves "conduct falling short of intentional wrongs." Altman, 231 Mass. 588, 592 (1919); Christopher v. Father's Huddle Café, Inc., 57 Mass.App.Ct. 217, 230 (2003). Gross negligence

"amounts to indifference to [a] present legal duty and to utter forgetfulness of legal obligations so far as other persons may be affected." Id. "Gross negligence" requires a "manifestly smaller amount of watchfulness and circumspection than the circumstances require of a person of ordinary prudence." Id. at 231. This Court has further defined "gross negligence" as the "omission of even such diligence as habitually inattentive and careless men do not fail to exercise in avoiding danger to their own person or property." Altman, 231 Mass. at 593. Some of the common indicia of gross negligence are "deliberate inattention or voluntary incurring of obvious risk or impatience of reasonable restraint or persistence in a palpably negligent course of conduct over an appreciable period of time." Pruzynski v. Malinowski, 338 Mass. 58, 60 (1958).

Reckless conduct, on the other hand, has been defined by this Court as "intentional conduct, by way either of commission or of omission where there is a duty to act, which conduct involves a high degree of likelihood that substantial harm will result to another." Manning v. Nobile, 411 Mass. 382, 387 (1991). This Court has further stated that "reckless

conduct involves a degree of risk and a voluntary taking of that risk so marked that, compared to negligence, there is not just a difference in degree *but also a difference in kind* [emphasis added]." Sandler v. Commonwealth, 419 Mass. 334, 337 (1995). In other words, there is a difference "between negligent conduct (*including grossly negligent conduct*) and reckless conduct...[in that] reckless conduct must be based on a high degree of risk that death or serious bodily injury will result from a defendant's action or inaction when under a duty to act [emphasis added]." Sandler, 419 Mass. at 337. See also Forbush v. City of Lynn, 35 Mass. App. Ct. 696, 701-702 (1994) ("reckless, willful, and wanton conduct" requires more than "gross negligence").

This Court has evaluated punitive damages in the context of intentional conduct, conduct more culpable than gross negligence. For example, in Clifton v. MBTA, this Court upheld punitive damages for a "pattern of egregious racial harassment and retaliation perpetrated on the plaintiff. . . throughout nine years of his employment." 445 Mass. 611, 624 (2005).

In Haddad v. Wal-Mart Stores, Inc., this Court established that "punitive damages may be awarded only where the defendant's conduct is outrageous or egregious... [and] are warranted where the conduct is so offensive that it ... warrants public condemnation and punishment." 455 Mass. 91, 110-111 (2009) *citing Clifton*, 444 Mass. at 624.

Consequently, since this Court has recognized the significant difference between gross negligence and reckless/intentional conduct, punitive damages based upon those varying degrees of culpability should be limited in accordance with the guidelines articulated by the Supreme Court and enacted by various other states.

While "gross negligence" may give rise to punitive damages in several other states besides Massachusetts, those states require a higher level of culpability for punitive damages. For example, in Florida, punitive damages are permitted when a "defendant engages in conduct. . .with *such* gross negligence as to indicate a wanton disregard for the rights of others." W.R. Grace & Co.-Conn. v. Waters, 638 So. 2d 502, 503 (Fla. 1994) (emphasis added). The Florida Supreme Court has articulated that

The character of negligence necessary to sustain an award of punitive damages must be of "a gross and flagrant character, evincing reckless disregard of human life, or of the safety of persons exposed to its dangerous effects, or there is that entire want of care which would raise the presumption of a conscious indifference to consequences, or which shows wantonness or recklessness, or a grossly careless disregard of the safety and welfare of the public, or that reckless indifference to the rights of others *which is equivalent to an intentional violation of them* [emphasis added]." Id.

The Florida Supreme Court recognized that the above definition "appears to be in line with the weight of authority as to the character of negligence necessary to be shown to sustain criminal liability." Carraway v. Revell, 116 So. 2d 16, 20 (1959) *citing* Mr. Chief Justice Brown in Cannon v. State, 107 So. 360, 363 (1926). The Court went on to recognize that "conduct can exist which is termed gross negligence which will not justify the imposition of punitive damages." Carraway, 116 So. 2d at 21. In other words, gross negligence and "culpable negligence" giving rise to punitive damages "are not necessarily synonymous." Carraway, 116 So. 2d at 21.

In Kentucky, while gross negligence is the least culpable conduct used as the basis for punitive damages, such conduct must have "the same character of

outrage justifying punitive damages as willful and malicious misconduct in torts where the injury is intentionally inflicted." Peoples Bank of N. Ky., Inc. v. Crowe Chizek & Co. LLC, 277 S.W.3d 255, 268 (Ky. Ct. App. 2008).

In Mississippi, punitive damages are permitted if the plaintiff proves that the defendant acted with "gross negligence which evidences a willful, wanton or reckless disregard for the safety of others." Miss. Code Ann. § 11-1-65(3)(a). The Mississippi Supreme Court has articulated that "[p]unitive damages may be recovered for a willful and intentional wrong, or for such gross negligence and reckless negligence *as is equivalent to such a wrong.*" Seals v. St. Regis Paper Co., 236 So. 2d 388, 392 (1970) (emphasis added). Additionally, Mississippi has enacted a comprehensive punitive damages statutory scheme which requires, in part, a separate trial for punitive damages, and a burden of proof of clear and convincing evidence. Miss. Code Ann. § 11-1-65(3)(a).

New Mexico allows a plaintiff to recover punitive damages as long as the wrongdoer's conduct is willful, wanton, malicious, reckless, oppressive, grossly negligent, or fraudulent and in bad faith. Madrid v.

Marquez, 131 N.M. 132, 135 (N.M. Ct. App. 2001) *citing* Sanchez v. Clayton, 877 P.2d 567, 573 (1994).

Recognizing that punitive damages are in the nature of punishment, New Mexico courts recognize that "it is necessary that there be some evidence of a culpable mental state, whether recklessness or 'utter indifference.'" Gonzales v. Sansoy, 103 N.M. 127, 130 (N.M. Ct. App. 1984).

In North Carolina, punitive damages may be awarded in negligence cases for "wanton or gross acts," however, such "outrageous behavior" requires "evidence of 'insult, indignity, malice, oppression or bad motive.'" Rogers v. T.J.X. Cos., 329 N.C. 226, 230 (N.C. 1991); Mazza v. Medical Mut. Ins. Co., 311 N.C. 621, 626 (N.C. 1984).

Texas defines gross negligence which can give rise to punitive damages as an act or omission:

(A) which when viewed objectively from the standpoint of the actor at the time of its occurrence involves an extreme degree of risk, considering the probability and magnitude of the potential harm to others; and

(B) of which the actor has actual, subjective awareness of the risk involved, but nevertheless proceeds with conscious indifference to the rights, safety, or welfare of others.

Tex. Civ. Prac. & Rem. Code § 41.001

The Texas Supreme Court further recognized the "constitutional fence around exemplary damages," constructed by the Supreme Court, and understood that they "must police [the fence] to prevent the 'acute danger of arbitrary deprivation of property.'" Bennett v. Reynolds, 315 S.W.3d 867, 885 (2010). The Texas Supreme Court further accepted the Supreme Court's disapproval "of awards 'that dwarf the corresponding compensatories.'" Id.

As discussed above, states other than Massachusetts which permit punitive damages based upon gross negligence articulate a higher level of culpability more akin to the Commonwealth's definition of reckless conduct. Consequently, this Court has an even greater impetus to place restrictions on punitive damages for conduct which is the least culpable to give rise to such damages.

II. The Ratio Between Compensatory Damages and Punitive Damages Based Upon Gross Negligence Must Be at the Lowest End of the Spectrum.

The second Gore guidepost is the ratio between compensatory and punitive damages awards. The Supreme Court has articulated that a punitive damages award four times the amount of compensatory damages is "close to the line [of] constitutional impropriety."

Pacific Mut. Life Ins. Co. v. Haslip, 499 U.S. 1, 23-24 (1991). Subsequently, the Supreme Court reasoned that "when compensatory damages are substantial, then a lesser ratio, perhaps only equal to compensatory damages, can reach the outermost limit of the due process guarantee." State Farm, 538 U.S. at 424-425.

Additionally, in Exxon Shipping Co. v. Baker, the Supreme Court held that an "acceptable standard can be found in the studies [which] reflect the judgments of juries and judges in thousands of cases as to what punitive awards were appropriate in circumstances reflecting the most down to the *least blameworthy conduct*, from malice and avarice to recklessness to *gross negligence*." 554 U.S. at 512 (2008). The "data in question put the median ratio for the entire gamut at less than 1:1, meaning that the compensatory award exceeds the punitive award in most cases." Id.

The Supreme Court further determined that "few awards exceeding a single-digit ratio between punitive and compensatory damages, to a significant degree, will satisfy due process." Exxon, 554 U.S. at 501 *citing State Farm*, 538 U.S. at 425. "When compensatory damages are substantial, then a lesser ratio, perhaps only equal to compensatory damages, can

reach the outermost limit of the due process guarantee." Id.

Accordingly, punitive damages awards based upon gross negligence in the Commonwealth should be at the lowest end of the ratio spectrum.² This Court's adoption of a maximum 1:1 ratio for punitive damages based on gross negligence is consistent with the Supreme Court's recognition that "courts have accepted primary responsibility for reviewing punitive damages." Exxon, 554 U.S. at 507-508. The Supreme Court warned against "judicially derived standards [that] leave the door open to outlier punitive-damages awards," and stressed that "the judiciary [cannot] wash its hands of a problem it created, simply by calling quantified standards legislative." Id. Additionally, the Majority in Exxon embraced Justice Ginsburg's prior dissenting opinion in State Farm that "[i]n a legislative scheme or a state high court's design to cap punitive damages, the handiwork in setting single-digit and 1-to-1 benchmarks could hardly be questioned." Id. citing State Farm, supra,

² *Amicus* does not concede that punitive damages should have been awarded in the instant matter or that they should be awarded in any instance of gross negligence; these arguments are submitted solely in response to this Court's inquiry into whether damages based upon gross negligence should be evaluated differently than punitive damages based upon willful and reckless conduct.

at 438 (Ginsburg, J., dissenting).

The Supreme Court in Exxon further stated that "[i]n a well-functioning system, we would expect that awards at the median or lower would roughly express jurors' sense of reasonable penalties in cases with no earmarks of exceptional blameworthiness within the punishable spectrum [such as cases] without intentional or malicious conduct." 554 U.S. at 512-513. Consistent with the above reasoning, other states which permit punitive damages based on gross negligence have limited such awards to the lowest end of the spectrum.

For example, in Illinois, punitive damages are permitted when a defendant acts "willfully, or with *such* gross negligence as to indicate a wanton disregard of the rights of others [emphasis added]." Lawlor v. N. Am. Corp. of Ill., 2012 IL 112530, P58 (2012) *citing* Kelsay v. Motorola, Inc., 74 Ill. 2d 172, 186 (1978). The Illinois Supreme Court has articulated that when "there is no evidence that the defendant had an intentional, premeditated scheme to harm" the plaintiff, but rather only had a reckless disregard for plaintiff's rights, "this places defendant's conduct on the *low end of the scale for*

punitive damages, far below those cases involving a defendant's deliberate attempt to harm another person." Lawlor, 2012 IL 112530, P62 (Ill. 2012) (emphasis added); Slovinski v. Elliot, 237 Ill. 2d 51, 64 (2010). Based upon the above reasoning, the Illinois Supreme Court remitted the punitive damages in both cases to a 1:1 ratio with the compensatory damages. Id.

In Florida, punitive damages are capped at three times the amount of compensatory damages for the most egregious conduct, and plaintiffs must proffer "clear and convincing evidence" to support same. Fla. State. Ann. § 768.73(1)(a); In re Std. Jury Instructions in Civil Cases -- Report No. 09-01 (Reorganization of the Civil Jury Instructions).

Kentucky has established an "upper limit [for] a punitive damage award equal to four times the compensatory damages," for the most egregious conduct. McDonald's Corp. v. Ogborn, 309 S.W.3d 274, 301-302 (Ky. Ct. App. 2009). Additionally, plaintiffs may recover punitive damages only with proof of clear and convincing evidence of the conduct giving rise to such damages. Ky. Rev. State. § 411.184(2).

The North Carolina Supreme Court held that the North Carolina statute limiting punitive damages to three times the compensatory damages, or \$250,000, whichever is greater, was in line with the United States Supreme Court limitations on awards of punitive damages. Rhyne v. K-Mart Corp., 358 N.C. 160, 184-185 (2004) *citing* N.C. Gen. Stat. § 1D-25. Citing the Supreme Court's recognition that "there was a long legislative history of 'providing for sanctions of double, treble, or quadruple damages to deter and punish,'" the North Carolina Supreme Court found that "limiting the punitive award [to] three times the compensatory award, is in line with the standards suggested by the United States Supreme Court to prevent grossly excessive awards." Rhyne, 358 N.C. at 184-185 *citing* State Farm, 538 U.S. at 425. This treble damages limit to punitive damages encompasses the most egregious conduct upon which punitive damages can be assessed in North Carolina, thus gross negligence would fall at the opposite end of the spectrum.

In Texas, punitive damages may not exceed an amount equal to the greater of (1) two times the amount of economic damages, plus an amount equal to

any non-economic damages found by the jury, not to exceed \$ 750,000, or (2) \$ 200,000. Tex. Civ. Prac. & Rem. Code § 41.008. Additionally, punitive damages are only permitted if the plaintiff proves by clear and convincing evidence that the harm complained of resulted from fraud, malice, or gross negligence. Tex. Civ. Prac. & Rem. Code § 41.003.

The above caps on punitive damages include damages based upon the most egregious conduct. Thus, punitive damages based upon gross negligence, at the lowest end of the culpability spectrum, should not approach the upper limit caps for such damages and should be significantly limited in line with the majority of states which have addressed this issue.

III. The Treble Damages Permitted by Mass. Gen. Laws Chapter 93A Should Be the Maximum Allowed Penalty in the Commonwealth for the Most Egregious Conduct.³

The Supreme Court has held that any punitive damages award that exceeds a relevant comparable criminal or civil penalty may be unconstitutional. BMW, 517 U.S. at 584. In the Commonwealth, Mass. Gen.

³ *Amicus* does not concede that "punitive damages" can be awarded under M.G.L. Chapter 93A but rather raises this comparative analysis solely in response to this Court's inquiry into whether damages based upon gross negligence should be evaluated differently than punitive damages based upon willful and reckless conduct.

Laws Chapter 93A permits no more than treble damages for the most egregious unfair and deceptive practices. Such a civil remedy should operate as a guide for this Court in establishing the maximum punitive damages for the most egregious conduct.

93A requires "willful" and "knowing" conduct for the imposition of double or treble damages. Mass. Gen. Laws Chapter 93A. Damages are to be "doubled (or trebled)" under 93A where "the act or practice was a willful or knowing violation" of 93A. Wasserman v. Agnastopoulos, 22 Mass. App. Ct. 672, 680-681 (1986) *citing* Linthicum v. Archambault, 379 Mass. 381, 388 (1979). Violations of 93A "having their origin in negligence are not generally regarded as warranting penalty damages." Id.

Prior to the enactment of 93A in 1989, this Court recognized that compensatory damages could be doubled or trebled if the defendant's conduct was "willful or knowing." Rhodes v. AIG Domestic Claims, Inc., 461 Mass. 486, 497-498 (2012) *citing* Bertassi v. Allstate Ins. Co., 402 Mass. 366 (1988); Wallace v. American Mfrs. Mut. Ins. Co., 22 Mass. App. Ct. 938 (1986); Trempe v. Aetna Cas. & Sur. Co., 20 Mass. App. Ct. 448 (1985).

It is axiomatic that gross negligence does not include "willful" or "knowing" conduct; therefore, the imposition of treble punitive damages should only be attributed to the most egregious conduct for which punitive damages can be awarded. Conversely, damages based upon gross negligence should not be doubled or tripled since it does not involve "willful" conduct.

IV. Conclusion

Seven states, in addition to the Commonwealth, permit punitive damages based upon gross negligence. Unlike Massachusetts, however, these states have embraced the limitations articulated by the Supreme Court in BMW v. Gore and its progeny. From capping damages at three times the exemplary damages for the most egregious conduct, to requiring clear and convincing evidence for the awarding of such damages, to restricting damages based on the least culpable conduct to a ratio of 1:1 or less with compensatory damages, other states have set strict parameters for punitive damages based on gross negligence. As there are no similar statutory or common law restrictions in the Commonwealth, it is imperative that this Court establish judicial parameters to evaluate punitive

damages, specifically placing heightened restrictions on such damages based upon gross negligence.

For the reasons stated above, it is necessary for this Court to provide guidance to the Courts in the Commonwealth on the permissible boundaries of punitive damages, especially those based upon gross negligence. Consistent with Supreme Court precedent, punitive damages based upon gross negligence, the *least culpable* conduct permitted for punitive damages, should not exceed a 1:1 ratio with compensatory damages while punitive damages based upon the most egregious conduct should not exceed a 3:1 ratio with compensatory damages consistent with Mass. Gen. Laws Chapter 93A.

In light of the above analysis and parameters, the \$18 million punitive damage award in addition to the approximately \$2.5 million in compensatory damages for gross negligence far exceeds the acceptable parameters articulated by the Supreme Court and enacted in numerous states around the country.

Respectfully Submitted,

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**CERTIFICATION OF COMPLIANCE PURSUANT
TO MASS. R.A.P. 16(k)**

I, Christopher P. Flanagan, hereby certify that the foregoing brief complies with the rules of the court that pertain to the filing of briefs, including, but not limited to, Mass. R.A.P. 16(a)(6); Mass. R.A.P. 16(e), Mass. R.A.P. 16(f); Mass. R.A.P. 16(h), Mass. R.A.P. 18, and Mass. R.A.P. 20.



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ADDENDUM

Statutes

Fla. State. Ann. § 768.73(1)(a)
Ky. Rev. State. § 411.184(2)
Miss. Code Ann. § 11-1-65(3)(a)
N.C. Gen. Stat. § 1D-25
Tex. Civ. Prac. & Rem. Code § 41.001
Tex. Civ. Prac. & Rem. Code § 41.008

Other Authorities

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Instructions) (35 So. 3d 666, 724)



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*** Statutes and Constitution are updated through the 2012 Regular Session and 2012 Special Session B. ***
*** Annotations are current through March 18, 2013 ***

TITLE 45. TORTS (Chs. 766-774)
CHAPTER 768. NEGLIGENCE
PART II. DAMAGES

GO TO FLORIDA STATUTES ARCHIVE DIRECTORY

Fla. Stat. § 768.73 (2012)

§ 768.73. Punitive damages; limitation

(1) (a) Except as provided in paragraphs (b) and (c), an award of punitive damages may not exceed the greater of:

1. Three times the amount of compensatory damages awarded to each claimant entitled thereto, consistent with the remaining provisions of this section; or

2. The sum of \$ 500,000.

(b) Where the fact finder determines that the wrongful conduct proven under this section was motivated solely by unreasonable financial gain and determines that the unreasonably dangerous nature of the conduct, together with the high likelihood of injury resulting from the conduct, was actually known by the managing agent, director, officer, or other person responsible for making policy decisions on behalf of the defendant, it may award an amount of punitive damages not to exceed the greater of:

1. Four times the amount of compensatory damages awarded to each claimant entitled thereto, consistent with the remaining provisions of this section; or

2. The sum of \$ 2 million.

(c) Where the fact finder determines that at the time of injury the defendant had a specific intent to harm the claimant and determines that the defendant's conduct did in fact harm the claimant, there shall be no cap on punitive damages.

(d) This subsection is not intended to prohibit an appropriate court from exercising its jurisdiction under *s. 768.74* in determining the reasonableness of an award of punitive damages that is less than three times the amount of compensatory damages.

(2) (a) Except as provided in paragraph (b), punitive damages may not be awarded against a defendant in a civil action if that defendant establishes, before trial, that punitive damages have previously been awarded against that defendant in any state or federal court in any action alleging harm from the same act or single course of conduct for which the claimant seeks compensatory damages. For purposes of a civil action, the term "the same act or single course of conduct" includes acts resulting in the same manufacturing defects, acts resulting in the same defects in design, or failure to warn of the same hazards, with respect to similar units of a product.

(b) In subsequent civil actions involving the same act or single course of conduct for which punitive damages have already been awarded, if the court determines by clear and convincing evidence that the amount of prior punitive damages awarded was insufficient to punish that defendant's behavior, the court may permit a jury to consider an award of subsequent punitive damages. In permitting a jury to consider awarding subsequent punitive damages, the court shall make specific findings of fact in the record to support its conclusion. In addition, the court may consider whether the defendant's act or course of conduct has ceased. Any subsequent punitive damage awards must be reduced by the amount of any earlier punitive damage awards rendered in state or federal court.

(3) The claimant attorney's fees, if payable from the judgment, are, to the extent that the fees are based on the punitive damages, calculated based on the final judgment for punitive damages. This subsection does not limit the payment of attorney's fees based upon an award of damages other than punitive damages.

(4) The jury may neither be instructed nor informed as to the provisions of this section.

(5) The provisions of this section shall be applied to all causes of action arising after the effective date of this act.

HISTORY: SS. 52, 65, ch. 86-160; s. 1, ch. 87-42; s. 5, ch. 87-50; s. 1, ch. 88-335; s. 71, ch. 91-282; ss. 2, 3, ch. 92-85; s. 16, ch. 97-94; s. 23, ch. 99-225.

NOTES:

FLORIDA STATUTES REFERENCES

Chapter 760. Discrimination in the Treatment of Persons; Minority Representation, *F.S. § 760.11*. Administrative and civil remedies; construction.

Chapter 768. Negligence, *F.S. § 768.35*. Continuing domestic violence.

Chapter 768. Negligence, *F.S. § 768.737*. Punitive damages; application in arbitration.

LexisNexis (R) Notes:

CASE NOTES

1. *Fla. Stat. § 768.73* did not provide the statutory authority necessary for shareholders in a shareholders' derivative suit to seek punitive damages. *Chemplex Fla. v. Norelli*, 790 So. 2d 547, 2001 Fla. App. LEXIS 9811 (Fla. 4th DCA 2001).



KENTUCKY REVISED STATUTES ANNOTATED
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*** Current through the 2012 First Extraordinary Session and measure approved at the November 6, 2012 General Election ***

*** Annotations current through October 25, 2012 ***

TITLE XXXVI Statutory Actions and Limitations
CHAPTER 411 Rights of Action and Survival of Actions

Go to the Kentucky Code Archive Directory

KRS § 411.184 (2012)

411.184. Definitions -- Punitive damages -- Proof of punitive damages.

(1) As used in this section and *KRS 411.186*, unless the context requires otherwise:

(a) "Oppression" means conduct which is specifically intended by the defendant to subject the plaintiff to cruel and unjust hardship.

(b) "Fraud" means an intentional misrepresentation, deceit, or concealment of material fact known to the defendant and made with the intention of causing injury to the plaintiff.

(c) "Malice" means either conduct which is specifically intended by the defendant to cause tangible or intangible injury to the plaintiff or conduct that is carried out by the defendant both with a flagrant indifference to the rights of the plaintiff and with a subjective awareness that such conduct will result in human death or bodily harm.

(d) "Plaintiff" means any party claiming punitive damages.

(e) "Defendant" means any party against whom punitive damages are sought.

(f) "Punitive damages" includes exemplary damages and means damages, other than compensatory and nominal damages, awarded against a person to punish and to discourage him and others from similar conduct in the future.

(2) A plaintiff shall recover punitive damages only upon proving, by clear and convincing evidence, that the defendant from whom such damages are sought acted toward the plaintiff with oppression, fraud or malice.

(3) In no case shall punitive damages be assessed against a principal or employer for the act of an agent or employee unless such principal or employer authorized or ratified or should have anticipated the conduct in question.

(4) In no case shall punitive damages be awarded for breach of contract.

(5) This statute is applicable to all cases in which punitive damages are sought and supersedes any and all existing statutory or judicial law insofar as such law is inconsistent with the provisions of this statute.

HISTORY: (Enact. Acts 1988, ch. 224, § 2, effective July 15, 1988.)

NOTES: Kentucky Bench & Bar.

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Kentucky Law Journal.

Murphy, "Common Sense Legal Reform" and Bell's Toll: Eliminating Punitive Damage Claims from Jurisdictional Amount Calculations in Federal Diversity Cases, 84 *Ky. L.J.* 71 (1995-96).

McIntyre, The Future of Kentucky's Punitive Damages Statute and Jural Rights Jurisprudence: A Call for Separation of Powers, 88 *Ky. L.J.* 719 (1999-2000).

Northern Kentucky Law Review.

Comment, A Survey of Kentucky Tort Reform, 17 *N. Ky. L. Rev.* 473 (1990).

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Kareth, Owens-Corning Fiberglas Corp. v. Golightly: A Lost Opportunity for the Kentucky Supreme Court, 26 *N. Ky. L. Rev.* 159 (1999).

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Article: Recovery of Nonpecuniary Damages in Mass Tort Actions in Kentucky: A Defense Perspective, 35 *N. Ky. L. Rev.* 197 (2008).

General Law Issue: Article: The Doctrine of Other Wrongs: A Framework for Punishing Civil Recidivism, 36 *N. Ky. L. Rev.* 67 (2009).

LexisNexis 50 State Surveys, Legislation & Regulations

Punitive Damages

Cited:

Klepper v. First Am. Bank, 916 F.2d 337, 1990 U.S. App. LEXIS 17437 (6th Cir. 1990); *Carter v. Builders Transport, Inc.*, 812 F. Supp. 97, 1992 U.S. Dist. LEXIS 20735 (W.D. Ky. 1992); *Tractor & Farm Supply, Inc. v. Ford New Holland, Inc.*, 898 F. Supp. 1198, 1995 U.S. Dist. LEXIS 13296 (W.D. Ky. 1995), criticized, 223 F.3d 382, 2000 FED App. 0250P, 2000 FED App. 250P, 2000 U.S. App. LEXIS 18086 (6th Cir. Ky. 2000); *Nicely v. McBrayer, McGinnis, Leslie, & Kirkland*, 163 F.3d 376, 1998 FED App. 366P, 1998 U.S. App. LEXIS 31482 (6th Cir. 1998),



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*** Current through the 2012 Regular Session ***

TITLE 11. CIVIL PRACTICE AND PROCEDURE
CHAPTER 1. PRACTICE AND PROCEDURE PROVISIONS COMMON TO COURTS

GO TO MISSISSIPPI STATUTES ARCHIVE DIRECTORY

Miss. Code Ann. § 11-1-65 (2012)

§ 11-1-65. Punitive damages; limitations

(1) In any action in which punitive damages are sought:

(a) Punitive damages may not be awarded if the claimant does not prove by clear and convincing evidence that the defendant against whom punitive damages are sought acted with actual malice, gross negligence which evidences a willful, wanton or reckless disregard for the safety of others, or committed actual fraud.

(b) In any action in which the claimant seeks an award of punitive damages, the trier of fact shall first determine whether compensatory damages are to be awarded and in what amount, before addressing any issues related to punitive damages.

(c) If, but only if, an award of compensatory damages has been made against a party, the court shall promptly commence an evidentiary hearing to determine whether punitive damages may be considered by the same trier of fact.

(d) The court shall determine whether the issue of punitive damages may be submitted to the trier of fact; and, if so, the trier of fact shall determine whether to award punitive damages and in what amount.

(e) In all cases involving an award of punitive damages, the fact finder, in determining the amount of punitive damages, shall consider, to the extent relevant, the following: the defendant's financial condition and net worth; the nature and reprehensibility of the defendant's wrongdoing, for example, the impact of the defendant's conduct on the plaintiff, or the relationship of the defendant to the plaintiff; the defendant's awareness of the amount of harm being caused and the defendant's motivation in causing such harm; the duration of the defendant's misconduct and whether the defendant attempted to conceal such misconduct; and any other circumstances shown by the evidence that bear on determining a proper amount of punitive damages. The trier of fact shall be instructed that the primary purpose of punitive damages is to punish the wrongdoer and deter similar misconduct in the future by the defendant and others while the purpose of compensatory damages is to make the plaintiff whole.

(f) (i) Before entering judgment for an award of punitive damages the trial court shall ascertain that the award is

reasonable in its amount and rationally related to the purpose to punish what occurred giving rise to the award and to deter its repetition by the defendant and others.

(ii) In determining whether the award is excessive, the court shall take into consideration the following factors:

1. Whether there is a reasonable relationship between the punitive damage award and the harm likely to result from the defendant's conduct as well as the harm that actually occurred;

2. The degree of reprehensibility of the defendant's conduct, the duration of that conduct, the defendant's awareness, any concealment, and the existence and frequency of similar past conduct;

3. The financial condition and net worth of the defendant; and

4. In mitigation, the imposition of criminal sanctions on the defendant for its conduct and the existence of other civil awards against the defendant for the same conduct.

(2) The seller of a product other than the manufacturer shall not be liable for punitive damages unless the seller exercised substantial control over that aspect of the design, testing, manufacture, packaging or labeling of the product that caused the harm for which recovery of damages is sought; the seller altered or modified the product, and the alteration or modification was a substantial factor in causing the harm for which recovery of damages is sought; the seller had actual knowledge of the defective condition of the product at the time he supplied same.

(3) (a) In any civil action where an entitlement to punitive damages shall have been established under applicable laws, no award of punitive damages shall exceed the following:

(i) Twenty Million Dollars (\$ 20,000,000.00) for a defendant with a net worth of more than One Billion Dollars (\$ 1,000,000,000.00);

(ii) Fifteen Million Dollars (\$ 15,000,000.00) for a defendant with a net worth of more than Seven Hundred Fifty Million Dollars (\$ 750,000,000.00) but not more than One Billion Dollars (\$ 1,000,000,000.00);

(iii) Five Million Dollars (\$ 5,000,000.00) for a defendant with a net worth of more than Five Hundred Million Dollars (\$ 500,000,000.00) but not more than Seven Hundred Fifty Million Dollars (\$ 750,000,000.00);

(iv) Three Million Seven Hundred Fifty Thousand Dollars (\$ 3,750,000.00) for a defendant with a net worth of more than One Hundred Million Dollars (\$ 100,000,000.00) but not more than Five Hundred Million Dollars (\$ 500,000,000.00);

(v) Two Million Five Hundred Thousand Dollars (\$ 2,500,000.00) for a defendant with a net worth of more than Fifty Million Dollars (\$ 50,000,000.00) but not more than One Hundred Million Dollars (\$ 100,000,000.00); or

(vi) Two percent (2%) of the defendant's net worth for a defendant with a net worth of Fifty Million Dollars (\$ 50,000,000.00) or less.

(b) For the purposes of determining the defendant's net worth in paragraph (a), the amount of the net worth shall be determined in accordance with Generally Accepted Accounting Principles.

(c) The limitation on the amount of punitive damages imposed by this subsection (3) shall not be disclosed to the trier of fact, but shall be applied by the court to any punitive damages verdict.

(d) The limitation on the amount of punitive damages imposed by this subsection (3) shall not apply to actions brought for damages or an injury resulting from an act or failure to act by the defendant:

(i) If the defendant was convicted of a felony under the laws of this state or under federal law which caused the damages or injury; or

(ii) While the defendant was under the influence of alcohol or under the influence of drugs other than lawfully prescribed drugs administered in accordance with a prescription.

(4) Nothing in this section shall be construed as creating a right to an award of punitive damages or to limit the duty of the court, or the appellate courts, to scrutinize all punitive damage awards, ensure that all punitive damage awards comply with applicable procedural, evidentiary and constitutional requirements, and to order remittitur where appropriate.

HISTORY: SOURCES: Laws, 1993, ch. 302, § 2; Laws, 2002, 3rd Ex Sess, ch. 4, § 6; Laws, 2004, 1st Ex. Sess., ch. 1, § 4, eff from and after September 1, 2004, and applicable to all causes of action filed on or after September 1, 2004.

NOTES: EDITOR'S NOTE. --Laws, 1993, ch. 302, § 5, effective July 1, 1993, provides as follows:

"SECTION 5. This act shall take effect and be in force from and after July 1, 1993. Procedural provisions of this act including subsections (1)(a), (b), (c) and (d) of Section 2 [§ 11-1-65] shall apply to all pending actions in which judgment has not been entered on the effective date of the act and all actions filed on or after the effective date of the act. All other provisions shall apply to all actions filed on or after July 1, 1994."

AMENDMENT NOTES. --The 2002 amendment, 3rd Ex Sess, ch. 4, redesignated (g) as (2); inserted (3) and (4); and redesignated former (2) as (5) and made stylistic changes in (5).

The 2004 amendment, 1st Ex Sess, ch. 1, made a stylistic change in (1)(c); deleted "or the seller made an express factual representation about the aspect of the product which caused the harm for which recovery of damages is sought" at the end of (2); substituted "Five Million Dollars (\$5,000,000.00)" for "Ten Million Dollars (\$10,000,000.00)" in (3)(a)(iii); substituted "Three Million Seven Hundred Fifty Thousand Dollars (\$3,750,000.00)" for "Seven Million Five Hundred Thousand Dollars (\$7,500,000.00)" in (3)(a)(iv); substituted "Two Million Five Hundred Thousand Dollars (\$2,500,000.00)" for "Five Million Dollars (\$5,000,000.00)" in (3)(a)(v); substituted "Two percent (2%)" for "Four percent (4%)" in (3)(a)(vi); deleted (3)(d), which read "The exceptions provided in paragraph (d) shall not apply to an employer of a person acting outside the scope of such person's employment or responsibility as an agent or employee"; and deleted (5), which provided that subsections (1) and (2) did not apply to contracts, libel and slander, or asbestos actions.

CROSS REFERENCES. --Provisions of this section as effecting exception to what otherwise might constitute consequential damages, see § 75-2-715.

LexisNexis 50 State Surveys, Legislation & Regulations

Punitive Damages

JUDICIAL DECISIONS

1. In general
2. Breach of contract
3. Torts
4. Availability



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*** Statutes current through the 2012 Regular Session ***
*** Annotations current through January 11, 2013 ***

CHAPTER 1D. PUNITIVE DAMAGES

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N.C. Gen. Stat. § 1D-25 (2013)

§ 1D-25. Limitation of amount of recovery

(a) In all actions seeking an award of punitive damages, the trier of fact shall determine the amount of punitive damages separately from the amount of compensation for all other damages.

(b) Punitive damages awarded against a defendant shall not exceed three times the amount of compensatory damages or two hundred fifty thousand dollars (\$ 250,000), whichever is greater. If a trier of fact returns a verdict for punitive damages in excess of the maximum amount specified under this subsection, the trial court shall reduce the award and enter judgment for punitive damages in the maximum amount.

(c) The provisions of subsection (b) of this section shall not be made known to the trier of fact through any means, including voir dire, the introduction into evidence, argument, or instructions to the jury.

HISTORY: 1995, c. 514, s. 1.

NOTES: CROSS REFERENCES. --As to cap on stay of execution bonds pending appeal with respect to noncompensatory damages, see *G.S. 1-289(b)*.

LEGAL PERIODICALS. --For article, "North Carolina's New Punitive Damages Statute: Who's Being Punished, Anyway?," see *74 N.C.L. Rev. 2174 (1996)*.

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Punitive Damages

CASE NOTES



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CIVIL PRACTICE AND REMEDIES CODE
TITLE 2. TRIAL, JUDGMENT, AND APPEAL
SUBTITLE C. JUDGMENTS
CHAPTER 41. DAMAGES

GO TO TEXAS CODE ARCHIVE DIRECTORY

Tex. Civ. Prac. & Rem. Code § 41.001 (2012)

§ 41.001. Definitions

In this chapter:

(1) "Claimant" means a party, including a plaintiff, counterclaimant, cross-claimant, or third-party plaintiff, seeking recovery of damages. In a cause of action in which a party seeks recovery of damages related to injury to another person, damage to the property of another person, death of another person, or other harm to another person, "claimant" includes both that other person and the party seeking recovery of damages.

(2) "Clear and convincing" means the measure or degree of proof that will produce in the mind of the trier of fact a firm belief or conviction as to the truth of the allegations sought to be established.

(3) "Defendant" means a party, including a counterdefendant, cross-defendant, or third-party defendant, from whom a claimant seeks relief.

(4) "Economic damages" means compensatory damages intended to compensate a claimant for actual economic or pecuniary loss; the term does not include exemplary damages or noneconomic damages.

(5) "Exemplary damages" means any damages awarded as a penalty or by way of punishment but not for compensatory purposes. Exemplary damages are neither economic nor noneconomic damages. "Exemplary damages" includes punitive damages.

(6) "Fraud" means fraud other than constructive fraud.

(7) "Malice" means a specific intent by the defendant to cause substantial injury or harm to the claimant.

(8) "Compensatory damages" means economic and noneconomic damages. The term does not include exemplary damages.

(9) "Future damages" means damages that are incurred after the date of the judgment. Future damages do not include exemplary damages.

(10) "Future loss of earnings" means a pecuniary loss incurred after the date of the judgment, including:

(A) loss of income, wages, or earning capacity; and

(B) loss of inheritance.

(11) "Gross negligence" means an act or omission:

(A) which when viewed objectively from the standpoint of the actor at the time of its occurrence involves an extreme degree of risk, considering the probability and magnitude of the potential harm to others; and

(B) of which the actor has actual, subjective awareness of the risk involved, but nevertheless proceeds with conscious indifference to the rights, safety, or welfare of others.

(12) "Noneconomic damages" means damages awarded for the purpose of compensating a claimant for physical pain and suffering, mental or emotional pain or anguish, loss of consortium, disfigurement, physical impairment, loss of companionship and society, inconvenience, loss of enjoyment of life, injury to reputation, and all other nonpecuniary losses of any kind other than exemplary damages.

(13) "Periodic payments" means the payment of money or its equivalent to the recipient of future damages at defined intervals.

HISTORY: Enacted by Acts 1987, 70th Leg., 1st C.S., ch. 2 (S.B. 5), § 2.12, effective September 2, 1987; am. Acts 1995, 74th Leg., ch. 19 (S.B. 25), § 1, effective September 1, 1995; am. Acts 2003, 78th Leg., ch. 204 (H.B. 4), § 13.02, effective September 1, 2003.

NOTES:

1995 Notes:

Amendments made by ch. 19 take effect September 1, 1995, and apply only to a cause of action that accrues on or after that date. A suit filed before September 1, 1995, is governed by the law applicable to the claim that existed immediately before September 1, 1995, and that law is continued in effect for that purpose. Acts 1995, 74th Leg., ch. 19, § 2.

The transition provision [Acts 1995, 74th Leg., ch. 19, § 2] is unclear about a cause of action that accrues before September 1, 1995, if the suit is filed after that date. The former version of the exemplary damages statutes applies to actions that were filed after September 1, 1987, but that accrued before September 1, 1995.

* See *Texas Litigation Guide*, Ch. 20, *Damages in Tort*; *Texas Torts and Remedies*, Ch. 85, *Punitive Damages*.

LexisNexis (R) Notes:

CASE NOTES



LexisNexis (R) Texas Annotated Statutes
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CIVIL PRACTICE AND REMEDIES CODE
TITLE 2. TRIAL, JUDGMENT, AND APPEAL
SUBTITLE C. JUDGMENTS
CHAPTER 41. DAMAGES

GO TO TEXAS CODE ARCHIVE DIRECTORY

Tex. Civ. Prac. & Rem. Code § 41.008 (2012)

§ 41.008. Limitation on Amount of Recovery

(a) In an action in which a claimant seeks recovery of damages, the trier of fact shall determine the amount of economic damages separately from the amount of other compensatory damages.

(b) Exemplary damages awarded against a defendant may not exceed an amount equal to the greater of:

(1) (A) two times the amount of economic damages; plus

(B) an amount equal to any noneconomic damages found by the jury, not to exceed \$ 750,000; or

(2) \$ 200,000.

(c) This section does not apply to a cause of action against a defendant from whom a plaintiff seeks recovery of exemplary damages based on conduct described as a felony in the following sections of the Penal Code if, except for Sections 49.07 and 49.08, the conduct was committed knowingly or intentionally:

(1) Section 19.02 (murder);

(2) Section 19.03 (capital murder);

(3) Section 20.04 (aggravated kidnapping);

(4) Section 22.02 (aggravated assault);

(5) Section 22.011 (sexual assault);

(6) Section 22.021 (aggravated sexual assault);

(7) Section 22.04 (injury to a child, elderly individual, or disabled individual, but not if the conduct occurred while providing health care as defined by Section 74.001);

(8) Section 32.21 (forgery);

(9) Section 32.43 (commercial bribery);

(10) Section 32.45 (misapplication of fiduciary property or property of financial institution);

(11) Section 32.46 (securing execution of document by deception);

(12) Section 32.47 (fraudulent destruction, removal, or concealment of writing);

(13) Chapter 31 (theft) the punishment level for which is a felony of the third degree or higher;

(14) Section 49.07 (intoxication assault);

(15) Section 49.08 (intoxication manslaughter);

(16) Section 21.02 (continuous sexual abuse of young child or children); or

(17) Chapter 20A (trafficking of persons).

(d) In this section, "intentionally" and "knowingly" have the same meanings assigned those terms in *Sections 6.03(a) and (b), Penal Code*.

(e) The provisions of this section may not be made known to a jury by any means, including voir dire, introduction into evidence, argument, or instruction.

(f) This section does not apply to a cause of action for damages arising from the manufacture of methamphetamine as described by Chapter 99.

HISTORY: Enacted by Acts 1987, 70th Leg., 1st C.S., ch. 2 (S.B. 5), § 2.12, effective September 2, 1987; am. Acts 1995, 74th Leg., ch. 19 (S.B. 25), § 1, effective September 1, 1995 (renumbered from Sec. 41.007); am. Acts 2001, 77th Leg., ch. 643 (H.B. 2087), § 3, effective September 1, 2001; am. Acts 2003, 78th Leg., ch. 204 (H.B. 4), § 13.06, effective September 1, 2003; am. Acts 2007, 80th Leg., ch. 593 (H.B. 8), § 3.03, effective September 1, 2007; am. Acts 2009, 81st Leg., ch. 309 (H.B. 533), § 2, effective June 19, 2009.

NOTES:

1995 Note:

See note following § 41.001.

* See *Texas Litigation Guide*, Ch. 20, *Damages in Tort*; *Texas Torts and Remedies*, Ch. 85, *Punitive Damages*. Applicability. --

Acts 2007, 80th Leg., ch. 593 (H.B. 8), § 4.01(a) provides: "Except as provided by Subsections (b) and (c) of this section, the change in law made by this Act applies only to an offense committed on or after September 1, 2007. An offense committed before September 1, 2007, is covered by the law in effect when the offense was committed, and the former law is continued in effect for that purpose. For the purposes of this section, an offense was committed before September 1, 2007, if any element of the offense occurred before that date."

Acts 2009, 81st Leg., ch. 309 (H.B. 533), § 3 provides: "The change in law made by this Act applies only to a cause of action that accrues on or after the effective date of this Act [June 19, 2009]. A cause of action that accrues before the



1 of 1 DOCUMENT

IN RE: STANDARD JURY INSTRUCTIONS IN CIVIL CASES -- REPORT NO. 09-01 (REORGANIZATION OF THE CIVIL JURY INSTRUCTIONS). IN RE: STANDARD JURY INSTRUCTIONS IN CIVIL CASES -- REPORT NO. 09-02 (GREATER WEIGHT OF THE EVIDENCE, NEGLIGENCE, BELIEVABILITY OF WITNESSES AND CLOSING INSTRUCTIONS). IN RE: STANDARD JURY INSTRUCTIONS IN CIVIL CASES -- REPORT NO. 09-03 (JURY DEADLOCKED). IN RE: STANDARD JURY INSTRUCTIONS IN CIVIL CASES -- REPORT NO. 09-04 (BURDEN OF PROOF ON DEFENSE ISSUES). IN RE: STANDARD JURY INSTRUCTIONS IN CIVIL CASES -- REPORT NO. 09-05 (MEDICAL MALPRACTICE INSURER'S BAD FAITH FAILURE TO SETTLE). IN RE: STANDARD JURY INSTRUCTIONS IN CIVIL CASES -- REPORT NO. 09-06 (PROBABLE CAUSE -- MALICIOUS PROSECUTION AND FALSE IMPRISONMENT). IN RE: STANDARD JURY INSTRUCTIONS IN CIVIL CASES -- REPORT NO. 09-07 (INTENTIONAL TORT EXCEPTION TO EXCLUSIVE REMEDY OF WORKERS' COMPENSATION). IN RE: STANDARD JURY INSTRUCTIONS IN CIVIL CASES -- REPORT NO. 09-08 (PROFESSIONAL NEGLIGENCE). IN RE: STANDARD JURY INSTRUCTIONS IN CIVIL CASES -- REPORT NO. 09-09 (PUNITIVE DAMAGES).

No. SC09-284, No. SC09-296, No. SC09-299, No. SC09-300, No. SC09-301, No. SC09-302, No. SC09-303, No. SC09-304, No. SC09-306

SUPREME COURT OF FLORIDA

35 So. 3d 666; 2010 Fla. LEXIS 302; 35 Fla. L. Weekly S 149

March 4, 2010, Decided

SUBSEQUENT HISTORY: Later proceeding at *In re Std. Jury Instructions in Civ. Cases-Report No. 09-10 (Prods. Liab.)*, 2012 Fla. LEXIS 964 (Fla., May 17, 2012)

PRIOR HISTORY: Original Proceeding - Standard Jury Instructions in Civil Cases Committee. *In re Standard Jury Instructions (Civil Cases)*, 435 So. 2d 782, 1983 Fla. LEXIS 2653 (Fla., 1983)

COUNSEL: [**1] Tracy Raffles Gunn, Chair, Supreme Court Committee on Standard Jury Instructions in Civil Cases, of Gunn Appellate Practice, Tampa, Florida,

Judge James M. Barton, II, Vice Chair, Thirteenth Judicial Circuit, Tampa, Florida, Larry S. Stewart, Chair, Book Reorganization Subcommittee, Miami, Florida, Judge Ralph Artigliere, Chair, Errors and Omissions Subcommittee, Blue Ridge, Georgia, Joseph H. Lang, Jr., Chair, Supreme Court Filing Subcommittee, of Carlton Fields, P.A., Tampa, Florida, and Judge Lucy C. Brown, Chair, Plain English Subcommittee, Fifteenth Judicial Circuit, West Palm Beach, Florida; John F. Harkness, Jr., Executive Director, and Jodi Beth Jennings, Bar Liaison, The Florida Bar, Tallahassee, Florida, for Petitioner.

JUDGES: QUINCE, C.J. and PARIENTE, LEWIS,

If the issue of damages is being submitted to the jury for determination, then the entire instruction should be given.

404.8 BURDEN OF PROOF

If the greater weight of the evidence does not support the claim of (claimant), your verdict should be for (defendant).

However, if the greater weight of the evidence does support the claim of (claimant), then [your verdict should be for (claimant) and against (defendant)] [you shall consider the defense raised by (defendant)].

404.9 CONCLUDING INSTRUCTION [**149] WHEN COURT TO AWARD DAMAGES

If your verdict is for (claimant), the court will award damages in an amount allowable under Florida law.

NOTE ON USE FOR 404.9

This instruction does not ask the jury to insert on the verdict form the amounts of the judgment, interest, costs and attorneys' fees in the underlying case, because these amounts, in many cases, will be decided by the court as a matter of law. The committee does not intend the omission of these issues from the instructions to affect the admissibility of such amounts. When any damages are to be determined by the jury, appropriate instructions and verdict form will be needed. See instruction 404.10-13.

404.10 DAMAGES (CASES WITH CLAIMS FOR MENTAL DISTRESS)

If your verdict is for (claimant), you will next decide (claimant's) claim for mental distress. On (claimant's) claim for mental distress, the issues for your determination are:

whether (defendant's) [denial of] [failure to timely pay] the claim resulted in (insured's) failure to receive necessary or timely health care; and if so

[*724] whether this failure caused or aggravated (insured's) [medical] [psychiatric] condition; and if so

whether (insured) suffered mental distress related to the condition [150] or the aggravation of the condition.**

NOTES ON USE FOR 404.10

1. Use this instruction only if the court determines that there is a sufficient predicate to support a claim for mental distress. See *Time Insurance Co. v. Burger*, 712 So.2d 389 (Fla. 1998). The committee takes no position on whether claims for mental distress may be available in other situations.

2. This instruction should be followed by instructions 404.11 and 404.12.

404.11 BURDEN OF PROOF ON MENTAL DISTRESS CLAIM

If the greater weight of the evidence does not support the claim of (claimant) for mental distress, your verdict should be for (defendant) on this issue.

However, if the greater weight of the evidence does support the claim of (claimant) for mental distress, then your verdict should be for (claimant) and against (defendant) on this issue.

404.12 DAMAGES ON MENTAL DISTRESS CLAIM

If you find for (claimant) on the claim for mental distress, then you should award (claimant) an amount of damages that the evidence shows will fairly compensate claimant for [his] [or] [her] [loss] [injury] [or] [damage] as a result of the mental distress. Your damage award should be for mental distress only. The court will enter judgment for [**151] other damages to which (claimant) is entitled under the law.

404.13 PUNITIVE DAMAGES

Punitive damages are warranted if you find by clear and convincing evidence that:

the acts giving rise to the violation occurred with such frequency as to indicate a general business practice; and

these acts were willful, wanton, and

malicious, or in reckless disregard for the rights of the (insured) (beneficiary).

"Clear and convincing evidence" differs from the "greater weight of the evidence" in that it is more compelling and persuasive. "Clear and convincing evidence" is evidence that is precise, explicit, lacking in confusion, and of such weight that it produces a firm belief or conviction, without hesitation, about the matter in issue.

NOTES ON USE FOR 404.13

1. If a claim for punitive damages is made pursuant to *F.S. 624.155*, use this instruction instead of instructions 503.1 and 503.2. For common law punitive damages claims, see instructions 503.1 and 503.2.

2. The committee has assumed that the clear and convincing evidence burden of proof provided in *F.S. 768.725* applies to punitive damages claims made pursuant to *F.S. 624.155*.

SECTION 405 -- DEFAMATION

405.1 Introduction

405.2 Summary of Claims and Contentions [**152]

405.3 Greater Weight of the Evidence

405.4 Clear and Convincing Evidence

405.5 Negligence

405.6 Legal Cause

405.7 Issues on Plaintiff's Claim -- Plaintiff a Public Official or Public Figure

[*725] 405.8 Issues on Plaintiff's Claim -- Plaintiff a Private Individual and a Media Defendant

405.9 Issues on Plaintiff's Claim -- Private Claimant, Non-Media Defendant

405.10 Defamation Damages

NOTES ON USE

1. There are three alternative instructions on

defamation liability issues, 405.7, 405.8 and 405.9. Instruction 405.7 is for claims in which the claimant is a public official or a public figure and by First Amendment standards must prove that defendant made a false defamatory statement with "actual malice." Instruction 405.8 is for claims in which the claimant is not a public person but defendant is a member of the press or broadcast media publishing on a matter of public concern, who by First Amendment standards cannot be held liable for a false publication without proof of fault. Instruction 405.9 is for all other claims and it invokes Florida's truth and good motives defense and the qualified privilege to speak falsely but without "express malice."

2. These categories and their boundaries are [**153] debatable and in flux, due to the unique influence upon them of both federal and Florida constitutional law as well as the common law. To enable assessment of the instructions, the committee has explained its reasoning in the general notes following the instructions, and calls attention to areas of evident dispute.

405.1 INTRODUCTION

Members of the jury, you have now heard and received all of the evidence in this case. I am now going to tell you about the rules of law that you must use in reaching your verdict. [You will recall at the beginning of the case I told you that if, at the end of the case I decided that different law applies, I would tell you so. These instructions are (slightly) different from what I gave you at the beginning and it is these rules of law that you must now follow.] When I finish telling you about the rules of law, the attorneys will present their final arguments and you will then retire to decide your verdict.

NOTES ON USE FOR 405.1

1. When instructing the jury before taking evidence, use instruction 202.1 in lieu of instruction 405.1. See Model Instruction No. 1. Instruction 405.1 is for instructing the jury after the evidence has been concluded. Use the bracketed [**154] language in instruction 405.1 when the final instructions are different from the instructions given at the beginning of the case. If the instructions at the end of the case are different from those given at the beginning of the case, the committee recommends that the court point out the differences with appropriate language in the final instructions, including