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LAW ON PUNITIVE DAMAGES IN NORTH CAROLINA

By James W. Bryan

In 1995, the North Carolina General Assembly enacted tort reform legislation with respect to punitive damages. *N.C.Gen.Stat. § 1D-1 et seq.* The purpose of punitive damages is to punish a defendant for egregiously wrongful acts and to deter the defendant and others from committing similar wrongful acts. *Id.* In 2005 the law on punitive damages in North Carolina is shaped largely by the tort reform statute and court decisions construing its provisions.

A. Aggravating Factors

Punitive damages may be awarded only if the plaintiff proves that the defendant is liable for compensatory damages and that one of the following aggravating factors was present and was related to the injury for which compensatory damages were awarded: fraud, malice, and willful or wanton conduct. *Id.* at § 1D-15(a). These three aggravating factors are defined in the statute. Fraud does not include constructive fraud unless an element of intent is present. *Id.* at § 1D-5(4). "Malice" means a sense of personal ill will toward the claimant that activated or incited the defendant to perform the act or undertake the conduct that resulted in harm to the claimant. *Id.* § 1D-5(5). "Willful or wanton conduct" means the conscious and intentional disregard of and indifference to the rights and safety of others, which the defendant knows or should know is reasonably likely to result in injury, damage, or other harm; willful or wanton conduct means more than gross negligence. *Id.* at § 1D-15(7); see *McNeil v. Holloway*, 141 N.C.App. 109, 539 S.E.2d 309 (2000) (allegations of intoxication alone did not support a finding of wanton conduct and are not a sufficient basis to permit a punitive damages claim to be submitted to a jury).

B. Burden of Proof

With the enactment of the punitive damages statute, the burden on the plaintiff to prove punitive damages is no longer by the preponderance of the evidence. The plaintiff must prove the existence of an aggravating factor by clear and convincing evidence. *N.C. Gen. Stat. § 1D-15(b)*; see *Atlantic Contracting and Material Co., Inc. v. Adcock*, 161 N.C.App. 273, 588 S.E.2d 36 (2003).

C. No Vicarious Liability

Punitive damages shall not be awarded against a person solely on the basis of vicarious liability for the acts or omissions of another. *N.C. Gen. Stat. § 1D-15(c)*. Punitive damages may

LAW ON PUNITIVE DAMAGES IN SOUTH CAROLINA

By Stephen P. Groves, Sr.

In 1988 the South Carolina Legislature adopted some minor "tort reform" measures regarding punitive damages. While the 2005 Legislature is currently considering some more substantive "tort reform" provisions, the law of punitive damages in South Carolina is still effectively controlled by case decisions and the common law.

A. Factors In Making Punitive Damages Award

Punitive damages are imposed as punishment. *Clark v. Cantrell*, 339 S.C. 369, 529 S.E.2d 528 (2000). Punitive damages are allowed to vindicate the injured party's private rights and in the interest of society in the nature of punishment and as a warning/example to deter the wrongdoer and others from committing like offenses in the future. *Austin v. Specialty Transportations Services, Inc.*, 358 S.C. 298, 594 S.E.2d 867 (Ct.App. 2004). Punitive damages serve at least three important purposes: (1) punishment of the defendant's reckless, willful, wanton, or malicious conduct; (2) deterrence of similar future conduct by the defendant or others; and (3) compensation for the reckless or willful invasion of the plaintiff's private rights. *Austin v. Specialty Transportations Services, Inc.*, 358 S.C. 298, 594 S.E.2d 867.

The South Carolina Supreme Court has set forth the following non-exclusive factors which the finder-of-fact should consider when making a punitive damages award: (1) the character of the defendant's acts; (2) the nature and extent of the harm to plaintiff which defendant caused or intended to cause; (3) defendant's degree of culpability; (4) the punishment that should be imposed; (5) duration of the conduct; (6) defendant's awareness or concealment; (7) the existence of similar past conduct; (8) likelihood the award will deter the defendant or others from like conduct; (9) whether the award is reasonably related to the harm likely to result from such conduct; and (10) defendant's wealth or ability to pay. See *Gamble v. Stevenson*, 305 S.C. 104, 406 S.E.2d 350 (1991); *Welch v. Epstein*, 342 S.C. 279, 306, 536 S.E.2d 408, 422 (Ct.App.2000).

B. Burden of Proof

South Carolina law requires that proof of punitive damages be made by clear and convincing evidence. *S.C. Code Ann. § 15-33-135* (West Group Supp. 2004); *South Carolina Jurisprudence, Damages, § 45* (West Group 2004). This "clear and convincing" standard has been "defined as the measure or degree of proof necessary to produce in the mind of the trier of

be awarded against a person only if that person participated in the conduct constituting the aggravating factor giving rise to the punitive damages, or if, in the case of a corporation, the officers, directors, or managers of the corporation participated in or condoned the conduct constituting the aggravating factor giving rise to punitive damages. *Id.*; see *Phillips v. Restaurant Management of Carolina*, 146 N.C.App. 203, 552 S.E.2d 686, rev. denied, 355 N.C. 214, 560 S.E.2d 132 (2001) (plaintiff failed to forecast any credible evidence that any officer, director or manager of defendant restaurant owners participated in or condoned any fraudulent, malicious, or willful or wanton act that might provide the basis for punitive damages); *Miller v. H.B. Enterprises, Inc.*, 152 N.C.App. 532, 568 S.E.2d 219 (2002) (whether bar manager condoned off-duty bouncer's attack on patron was question for jury in considering whether to assess punitive damages against corporation, based on conduct of its manager).

D. Limitation of Amount of Recovery

Punitive damages awarded against a defendant shall not exceed three times the amount of compensatory damages, or \$250,000, whichever is greater. N.C. Gen. Stat. § 1D-25(b); see *Rhyne v. K-Mart Corp.*, 358 N.C. 160, 594 S.E.2d 1 (2004) (statute limiting punitive damage awards to the greater of \$250,000 or three times compensatory damages did not violate the state or federal constitutions); *Zubaidi v. Earl L. Pickett Enterprises, Inc.*, 164 N.C.App. 107, 595 S.E.2d 190 (2004) (within the statutory limits, a jury may award punitive damages in its sound discretion, and the trial court should not disturb such an award unless the amount assessed is excessively disproportionate to the circumstances of contumely and indignity present in the case).

This cap on damages 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. N.C. Gen. Stat. § 1D-25(c). If the trier of fact returns a verdict for punitive damages in excess of the maximum amount specified under this statute, the trial court shall reduce the award and enter judgment for punitive damages in the maximum amount. *Id.* at § 1D-25(b).

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. *Id.* at § 1D-25(a).

E. Driving While Impaired

The limitation on the amount of recovery for punitive damages (three times compensatory damages, or \$250,000, whichever is greater) shall not apply to a claim for punitive damages for injury or harm arising from a defendant's operation of a motor vehicle if the actions of the defendant in operating the motor vehicle would give rise to an offense of driving while impaired under certain motor vehicle statutes (N.C. Gen. Stat. §§ 20-138.1, 20-138.2, or 20-138.5). *Id.* at § 1D-26.

F. Bifurcated Trial

Upon the motion of a defendant, the issues of liability

fact a firm belief or conviction.' " South Carolina Jurisprudence, Damages, § 45. Moreover, the issue of "[p]unitive damages should be submitted to the jury [when] . . . there is evidence a tortfeasor's conduct was willful, wanton, or in reckless disregard of the rights of another." *Cartee v. Lesley*, 290 S.C. 333, 337, 350 S.E.2d 388, 310 (1986). In addition, a claimant "who can show only simple negligence [is not entitled to] punitive damages [since] '[e]vidence of simple negligence alone will not support an award of punitive damages.'" South Carolina Jurisprudence, Damages, § 40 (quoting *Carter v. R.L. Jordon Oil Co.*, 294 S.C. 435, 455, 365 S.E.2d 324, 329 (Ct.App. 1988), reversed on other grounds, 299 S.C. 439, 385 S.E.2d 820 (1989)).

C. Vicarious Liability

There is no restriction on an award of punitive damages for vicarious liability, master/servant relationship, respondeat superior, etc. See generally *Hundley ex rel. Hundley v. Rite Aid of South Carolina, Inc.*, 339 S.C. 285, 529 S.E.2d 45; *Austin v. Specialty Transportations Services, Inc.*, 358 S.C. 298, 594 S.E.2d 867.

D. Limitation On The Amount Of Recovery

In South Carolina "[t]here is no mathematical formula for determining the proportion punitive damages should bear to actual damages, [and the] award is peculiarly within the judgment and discretion of the jury, [however, it is always] subject to the supervisory power of the trial judge." *Durham v. Clements*, 295 S.C. 90, 92, 367 S.E.2d 174, 175 (Ct.App. 1988). Evidence of "the amount of punitive damages which would get the defendant's attention" is permissible. *Cock-n-Bull Steak House, Inc. v. Generali Insurance Co. a/k/a Generali - U.S. Branch*, 321 S.C. 1, 466 S.E.2d 727 (1996).

A ratio formula of punitive damages to compensatory is often used. *State Farm Mutual Insurance Co. v. Campbell*, 538 U.S. 408, 424 (2003) ("few awards exceeding a single-digit ratio between punitive and compensatory damages, to a significant degree, will satisfy due process."). In South Carolina the courts have approved a ratio of *50 to 1*, *Hundley ex rel. Hundley v. Rite Aid of South Carolina, Inc.*, 339 S.C. 285, 529 S.E.2d 45 (Ct.App. 2000); *28 to 1*, *Cock-n-Bull Steak House, Inc. v. Generali Insurance Co. a/k/a Generali - U.S. Branch*, 321 S.C. 1, 466 S.E.2d 727; *23 to 1*, *Lister v. NationsBank of Delaware*, 329 S.C. 133, 152-53, 494 S.E.2d 449, 460 (Ct.App.1997) *11 to 1*, *Weir v. Citicorp National Services*, 312 S.C. 511, 435 S.E.2d 864 (1993); *10 to 1*, *Collins Entertainment Corp. v. Coats and Coats Rental Amusement*, 355 S.C. 125, 584 S.E.2d 120 (Ct.App. 2004); *7 to 1*, *Dunsil v. E.M. Jones Chevrolet Co.*, 268 S.C. 291, 233 S.E.2d 101 (1977); *2.5 to 1*, *Austin v. Specialty Transportations Services, Inc.*, 358 S.C. 298, 594 S.E.2d 867; *1 to 0.80*, *Pinckney v. Orkin Exterminating Co.*, 268 S.C. 430, 234 S.E.2d 654 (1977); *1 to 1*, *Frazier v. Badger*, 361 S.C. 94, 603 S.E.2d 587 (2004). A ratio of *179 to 1* was reversed. *Frazier v. Badger*, 361 S.C. 94, 603 S.E.2d 587.

E. Driving While Impaired

for compensatory damages and the amount of compensatory damages, if any, shall be tried separately from the issues of liability for punitive damages and the amount of damages, if any.

Id. at § 1D-30. Evidence relating solely to punitive damages shall not be admissible until the trier of fact has determined that the defendant is liable for compensatory damages and has determined the amount of the compensatory damages. Id. The same trier of fact that tried the issues relating to compensatory damages shall try the issues relating to punitive damages. Id.

G. Factors in Determining Punitive Damages Award

In determining the amount of punitive damages, if any, to be awarded, the trier of fact must consider the purposes of punitive damages set forth in this statute, namely, to punish a defendant for egregiously wrongful acts and to deter the defendant and others from committing similar wrongful acts. Id. at §§ 1D-1 and 1D-35(1). The trier of fact may consider other evidence, but only evidence that relates to the reprehensibility of the defendant's motives and conduct; the likelihood at the relevant time of serious harm; the degree of the defendant's awareness of the probable consequences of its conduct; the duration of the defendant's conduct; the actual damages suffered by the claimant; any concealment by the defendant of the facts or consequences of its conduct; the existence and frequency of any similar past conduct by the defendant; whether the defendant profited from the conduct; and the defendant's ability to pay punitive damages, as evidenced by its revenues or net worth. Id. at § 1D-35(2); see *Vanwyk Textile Systems, B.V. v. Zimmer Machinery America, Inc.*, 994 F.Supp. 350 (W.D.N.C. 1997) (ratio of \$200,000 exemplary award to compensatory award of \$140,824, or 1.42 times damages, was not shockingly disparate, and was reasonably related to harm); see also *State Farm Mutual Insurance Co. v. Campbell*, 538 U.S. 408, 424 (2003) ("few awards exceeding a single-digit ratio between punitive and compensatory damages, to a significant degree, will satisfy due process.").

H. Attorney's Fees

The court shall award reasonable attorney's fees, resulting from the defense against the punitive damages claim, against the claimant who files a claim for punitive damages that the claimant knows or should have known to be frivolous or malicious. N.C. Gen. Stat. § 1D-45. The court shall award reasonable attorney's fees against a defendant who asserts a defense in a punitive damages claim that the defendant knows or should have known to be frivolous or malicious. Id.. The purpose of this provision is to encourage professional peer review by limiting the possibility of unreasonable litigation expenses. See *Rhyné v. K-Mart Corp.*, 358 N.C. 160, 594 S.E.2d 1 (2004) (for purposes of attorneys' fees statute, defense is frivolous if a proponent can present no rational argument based upon the evidence or law in support of it, and a defense is malicious if it is wrongful and done intentionally without just cause or excuse or as a result of ill will).

I. Judicial Review of Award

In reviewing the evidence regarding a finding by the

Other than the standard limitations, there is no special statutory and/or case decision restrictions on the award of punitive damages when there is proof that the at-fault party was operating a motor vehicle, boat, airplane, etc. while under the influence of alcohol and/or drugs. See generally *Estate of Rattenni By and Through Rattenni v. Grainger*, 298 S.C. 276, 379 S.E.2d 890 (1989) (\$200,000.00 punitive damages award).

F. Bifurcated Trial

A party against whom punitive damages are sought may move the trial court to separate the issues of compensatory and punitive damages. The finder-of-fact first addresses whether compensatory damages are appropriate and, if so, then considers the issue of punitive damages. Generally speaking, the defendant's net worth is not disclosed until a compensatory damages award is rendered. See generally *Durham v. Vinson*, 360 S.C. 639, 602 S.E.2d 760 (2004) (citing Rule 42(b), SCRPC; *Senter v. Piggly Wiggly Carolina Co.*, 341 S.C. 74, 77, 533 S.E.2d 575, 577 (2000)). Bifurcation is left to the trial judge's discretion and while not a requirement in punitive damage cases is encouraged by our appellate courts.

G. Factors In Determining Punitive Damages Award

The South Carolina Supreme Court, in *Frazier v. Badger*, 361 S.C. 94, 603 S.E.2d 587 (citing *State Farm Mutual Insurance Co. v. Campbell*, 538 U.S. 408) recognized that in determining the appropriateness and, in turn, the constitutionality of a punitive damages award, the reviewing court must look to three guideposts: (1) the degree of reprehensibility of the defendant's misconduct; (2) the disparity between the actual and potential harm suffered by the plaintiff and the punitive damages award; and (3) the difference between the punitive damages awarded by the jury and the civil penalties authorized or imposed in comparable cases.

H. Attorneys' Fees, Costs, Etc.

Under the South Carolina Frivolous Civil Proceedings Sanctions Act, as codified in S.C. Code Ann. §§ 15-36-10, et. seq. (West Group Supp 2004), the trial court may award attorneys' fees and costs for the prosecution or defense of a civil action for an "improper" purpose. See generally *Father v. South Carolina Department of Social Services*, 353 S.C. 254, 578 S.E.2d 11 (2003); *Hanahan v. Simpson*, 326 S.C. 140, 485 S.E.2d 903 (1997). As a practical matter, few awards are ever made due to the high standard of proof.

I. Judicial Review Of Punitive Damages Award

As noted, a claimant must prove his entitlement to punitive damages by clear and convincing evidence. S.C. Code Ann. § 15-33-135 (West Group Supp. 2004). He is also required to show, under this same standard, that the defendant had wantonly, willfully, or maliciously violated the claimant's rights. *Gamble v. Stevenson*, 305 S.C. 104, 111, 406 S.E.2d 350, 353 (1991).

In *Gamble*, the South Carolina Supreme Court set forth the

trier of fact concerning liability for punitive damages or the amount of punitive damages awarded, the trial court shall state in a written opinion its reasons for upholding or disturbing the finding or award. N.C. Gen. Stat. § 1D-50. In doing so, the Court shall address with specificity the evidence, or lack thereof, as it bears on the liability for or the amount of punitive damages, in light of the requirements of this statute. *Id.*; see *Zubaidi v. Earl L. Pickett Enterprises, Inc.*, 164 N.C.App. 107, 595 S.E.2d 190 (2004) (trial court not required to review or set aside jury's award of \$150,000 in punitive damages; statute did not require such review, award was within \$250,000 statutory cap, award was less than three times the award of \$62,000 in compensatory damages, and award was not excessively disproportionate to the circumstances of the case).

J. Pleading Requirements

A demand for punitive damages shall be specifically stated, except for the amount, and the aggravating factor that supports the award of punitive damages shall be averred with particularity. N.C. Gen. Stat. § 1A-1, Rule 9(k) of the North Carolina Rules of Civil Procedure. The amount of damages shall be pled in accordance with Rule 8 of the North Carolina Rules of Civil Procedure. *Id.*; see *Zubaidi*, 164 N.C.App. 107, 595 S.E.2d 190.

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elements of the post-verdict judicial review of a punitive damages award. The Court stated that:

... to ensure ... a punitive damage award is proper, the trial court shall conduct a post-trial review and may consider the following: (1) defendant's degree of culpability; (2) duration of the conduct; (3) defendant's awareness or concealment; (4) the existence of similar past conduct; (5) likelihood the award will deter the defendant or others from like conduct; (6) whether the award is reasonably related to the harm likely to result from such conduct; (7) defendant's ability to pay; and finally, (8) ... other factors deemed appropriate.

Gamble v. Stevenson, 305 S.C. 104, 111-12, 406 S.E.2d 353, 354. See also *Frazier v. Badger*, 361 S.C. 94, 603 S.E.2d 587, 593 (2004). Nevertheless, the "word 'may' signifies that the *Gamble* factors are to provide guidance, not 'hard and fast' requirements." *Frazier v. Badger*, 361 S.C. 94, 603 S.E.2d 587, 593.

An award of punitive damages will not be overturned because a defendant is unable to pay. While a defendant's wealth is a relevant factor in assessing punitive damages, it is not necessarily controlling. *Hicks v. Herring*, 246 S.C. 429, 144 S.E.2d 151 (1965); *Norton v. Ewaskio*, 241 S.C. 557, 565, 129 S.E.2d 517, 521 (1963); *Rogers v. Florence Printing Co.*, 233 S.C. 567, 106 S.E.2d 258 (1958).

The South Carolina Supreme Court, in *Frazier v. Badger*, 361 S.C. 94, 603 S.E.2d 587 (citing *State Farm Mutual Insurance Co. v. Campbell*, 538 U.S. 408 (2003)) recognized that when "determining the constitutionality of a punitive damages award, the ... court must look to three guideposts: (1) the degree of reprehensibility of the defendant's misconduct; (2) the disparity between the actual and potential harm suffered by the plaintiff and the punitive damages award; and (3) the difference between the punitive damages awarded by the jury and the civil penalties authorized or imposed in comparable cases."

J. Pleading Requirements

There are no special pleading requirements directed to allegations seeking an award of punitive damages. The standard pleading rules apply.

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