IN THE CIRCUIT COURT OF THE 10th
JUDICIAL CIRCUIT IN AND FOR
POLK COUNTY, FLORIDA

CASE NO: 2003-CA 4300 (4)

WILLIAM DOUGLAS OGBURN, and **BERTHA OGBURN,** as Co-Personal Representatives of the Estate of **WILLIAM DOUGLAS OGBURN, JR.**, deceased, on behalf of all statutory survivors,

Plaintiffs,

vs.

S&R TRANSPORT, INC., a Florida corporation for profit; and **JACINTO LOMBILLO**, individually,

Defendants.
_____/

PLAINTIFFS' MOTION FOR LEAVE TO AMEND TO ADD ADDITIONAL PARTIES AND CLAIMS FOR PUNITIVE DAMAGES AND SPOLIATION OF EVIDENCE AND MEMORANDUM OF LAW

Plaintiffs, by and through undersigned counsel, file this Motion for Leave To Amend their Amended Complaint to add additional defendants and claims, including claims for punitive damages and spoliation of evidence, and as grounds therefore state as follows:

1. On September 19, 2003 14 year-old William Douglas Ogburn, Jr. Was run over and killed by a semi tractor trailer truck driven by Defendant LOMBILLO while working for Defendant S&R TRANSPORT.

2. LOMBILLO had a long history of traffic infractions of which Defendant S&R TRANSPORT was aware. (*See* Exhibits B-1 and B-2 attached hereto.)

3. LOMBILLO was finishing a 14 hour day that began at 3 a.m. in which his employer, S&R TRANSPORT, forced him to complete numerous runs in a hot truck with broken air conditioning and defective brakes. (*See* Exhibits C-1, C-2, C-3 and C-4 attached hereto.)

4. After running over and killing Ogburn, LOMBILLO drove his truck into a public school bus, destroying it as well.

5. The limited discovery thus far has revealed that S&R TRANSPORT violated all bounds of reasonable care by requiring its drivers to work inappropriately long hours in hot, defective trucks. Defendant was admittedly aware that its drivers were fatigued and often too tired to drive. LOMBILLO had driven an average of 14 hours a day for the prior two weeks. (*See* Deposition of Dwight Graves, April 16, 2004, filed herewith.)

6. Defendants also are guilty of spoliation of critical evidence in this case: the subject truck, which was disposed of and disassembled in the weeks following release from police impound. The truck was disassembled after communication between the parties regarding inspection and photographing of the subject truck. (*See* Exhibits D-1, D-2, D-3 and D-4 attached hereto, letters from defense counsel Spengler setting up inspection of truck and follow up

correspondence between counsel.)

7. The additional defendants to be added include the general manager of S&R Transport, Dwight Graves, the Senior Vice President, James A. Jahna, and the President, Allen Keesler, Jr. All of these additional parties played a direct and indirect role in the death of William Douglas Ogburn.

8. The Plaintiffs are contemporaneously filing the depositions of Dwight Graves and R. Carl McCollum, as well as the exhibits to the depositions. Additionally, the traffic homicide report and statements are being filed as exhibits in support of Plaintiffs' Motion for Leave to Amend to add a count for punitive damages.

9. There is no unfair prejudice in the granting of this motion. It is basic law that leave to amend should be freely granted.

10. A Second Amended Complaint is attached to this Motion and Memorandum as Exhibit "A", which the Plaintiffs ask that this Court deem filed as of the date of the entry of the order granting this motion.

MEMORANDUM OF LAW ON PUNITIVE DAMAGES

Florida Statutes Section 768.72 allows a claim for punitive damages when there is a reasonable showing by evidence in the record or proffered by a party which would provide a reasonable basis for recovery of punitive damages. Punitive damages are appropriate when a Defendant engages in conduct which is fraudulent,

malicious, or committed with such gross negligence as to indicate a wanton disregard for the rights of others. *W.R. Grace & Company v. Waters*, 638 So.2d 502 (Fla. 1994).

An evidentiary hearing is not required by the statute before a trial court has the authority to permit an amendment. *Solis v. Calvo*, 689 So.2d 366 (Fla. 3rd DCA 1997) and *Strasser v. Yalamanchi*, 677 So.2d 22, 23 (Fla. 3rd DCA 1996). Under §768.72, *Fla. Stat.,* a mere proffer of evidence is sufficient to support a trial court's determination that a reasonable basis exists for the recovery of punitive damages. *Id.* It is not the function of the court to weigh or prejudge the evidence before it, but merely to determine whether a factual predicate for punitive damages exists. See *Dolphin Cove Association v. Square Co.*, 616 So.2d 553 (Fla. 2d DCA 1993). If the evidence or reasonable inferences support the claim, the amendment should be allowed.

Similarly, Section 768.72 does not allow a defendant to proffer evidence to oppose Plaintiffs' Motion. While a defendant may argue over the sufficiency of evidence and the inferences to be drawn from the evidence, a defendant cannot inject new evidence at the hearing. This conclusion is consistent with the plain language of Section 768.72, which requires the trial court to decide whether the plaintiffs have a reasonable basis to assert a claim for punitive damages but leaves to the trier of fact the determination of whether punitive damages will be awarded.

The criteria for imposition of punitive damages

The formalistic criteria for a punitive award have not changed in the past thirty-eight years, and in that sense the Supreme Court's declaration in *Carraway v. Revell*, 116 So. 2d 16, 20 n. 12 (Fla. 1959), quoting *Cannon v. State*, 91 Fla. 214, 107 So. 360, 363 (1926) (citations omitted) remains good law:

> The character of negligence necessary to sustain an award of punitive damages must be a "gross and flagrant character, evincing reckless disregard of human life, or of the safety of the 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.

This formulation has been endorsed repeatedly by the Supreme Court over the intervening years. See, *e.g.*, *W.R. Grace & Co. v. Waters*, *supra*; *Chrysler Corp. v. Wolmer*, 499 So.2d 823, 824 (Fla. 1986); *Como Oil Co. v. O'Loughlin*, 466 So.2d 1061, 1062 (Fla. 1985) (per curiam); *White Construction Co. v. Dupont*, 455 So.2d 1026, 1029 (Fla. 1984).

The various criteria articulated in *Carraway* are written in the alternative, and thus any one of the phrases used--including the criterion of "wantonness or recklessness," or "grossly careless disregard"--should be sufficient to support a punitive award. Therefore, punitive damages should be available even if the defendant has not intentionally caused harm. The line between intentional and

reckless conduct is not any easy one, but in general, the defendant's misconduct is intentional if he intended not only to do what he did, but also to cause injury which he caused; while a reckless actor intends the conduct but not necessarily the consequences. As the authors of the *Restatement (Second) of the Law of Torts* §500, Comment(f), at 590 (1965) put it: "While an act to be reckless must be intended by the actor, the actor does not intend to cause the harm which results from it."

In the latter case, the Florida courts have consistently affirmed the availability of punitive awards. Pursuant to the Supreme Court in *Ingram v. Petit*, 340 So.2d 922, 924 (Fla. 1976), a punitive award may be predicated upon either "[t]he intentional infliction of harm, or a recklessness which is the result of an intentional act..." It is in this sense that the Supreme Court declared in *Carraway* that punitive awards may be predicated not only upon the knowing or intentional causation of injury, but also upon a "reckless indifference to the rights of others which is the equivalent to an intentional violation of them." This formulation is found throughout the cases.[1]

[1]See, e.g., *American Cyanamid Co. v. Roy*, 498 So.2d 859, 861 (Fla. 1986) (conduct so reckless "as to parallel an intentional and reprehensible act"); *Johns-Manville Sales Corp. v. Janssens*, 463 So.2d 242, 247 (Fla. 1st DCA 1984), *review denied*, (evil intent may be inferred from the defendant's having pursued a course of action in wanton disregard of the consequences), 467 So.2d 999 (Fla. 1985); *Toyota Motor Co. v. Moll*, 438 So.2d 192 (Fla. 4th DCA 1983); *Piper Aircraft Corp. v. Coulter*, 426 So.2d 1108 (Fla. 4th DCA), *review denied*, 436 So.2d 100 (Fla. 1983) (even if defendant did not intend to injure anyone, the failure to correct a known defect in the face of a substantial danger to the lives of aircraft occupants was sufficiently reckless to warrant punitive damages); *American Motors Corp. v. Ellis*, 403 So.2d 459 (Fla. 5th DCA 1981), *review denied,* 415 so.2d 1359 (Fla. 1982); *Dean Witter Reynolds, Inc. v. Leslie*, 410 So.2d 961, 964 (Fla. 3rd DCA 1982) ("entire want of care or attention to duty" and "great indifference to... persons... has long been sufficient to justify" civil punishment). Cf. *Nesbitt v. Auto Owners Ins. Co.*, 390 So.2d

The criminal law analogy

This concept of recklessness is not at all inconsistent with the Supreme Court's declaration in *Carraway v. Revel*, 116 So.2d at 20, that there is a "real affinity between the character (or kind or degree) of negligence necessary to recover punitive damages or to sustain or warrant a conviction of manslaughter." See *Keller Industries, Inc. v. Waters*, 501 So.2d 125, 125-26 (Fla. 2d DCA 1987). Of course, the Supreme Court in *Carraway* did not mean to imply that punitive damages are not available unless the defendant can actually be convicted of a crime. It mentioned only the "affinity" between the "character" of the wrongdoing necessary to sustain a punitive award. As the court has noted more than once, punitive damages are a civil analog to criminal prosecution, providing for punishment in "areas not covered by the criminal law."[2]

Since Florida law requires only behavior analogous to criminal misconduct, there is ample support for the minimal standard of recklessness. The manslaughter jury charge prescribes conviction for "culpable negligence," defined as negligence

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1209 (Fla. 5th DCA 1980) ("willful or wanton conduct or conduct which displays a reckless indifference to the rights of others is tantamount to intentional conduct for the purposes of {the contribution} statute"). See also *Maxey v. Freightliner*, 722 F.2d 1238, 1241-42 (5th Cir. 1984)(Florida law); *Dorsey v. Honda Motor Co.*, 655 F.2d 650 (5th Cir. 1981), modified, 670 F.2d 21 (5th Cir.), cert. denied, 459 U.S. 880, 103 S. Ct. 177, 74 L. Ed. 2d 145 (1982). See generally *Restatement (Second) of the Law of Torts* §500, Comment (a), at 587 (defendant who deliberately proceeds to act or fail to act, in conscious disregard, or indifference to, that risk).

[2] *Campbell v. Government Employees Ins. Co.*, 306 So.2d 525, 531 (Fla. 1974), quoted in *Celotex Corp. v. Pickett,* 490 So.2d 35, 38 (Fla. 1986) Accord, *Chrysler Corp. v. Wolmer*, 499 So.2d 823, 825 (Fla. 1986).

of a "gross and flagrant" character, "committed with an utter disregard for the safety of others"-- that is, "consciously doing an act or following a course of conduct that the defendant must have known, or reasonably should have known, was likely to cause death or great bodily injury".[3] Of course, as we have noted, recklessness requires an intentional act, and thus a defendant may not be convicted of manslaughter if he acted unintentionally with "disregard of the safety of others." *Rushton v. State*, 395 So.2d 610, 613 (Fla. 5th DCA 1981), citing *McCreary v. State*, 371 So.2d 1024 (Fla. 1979). But as the standard jury instruction makes clear, a defendant may be convicted of manslaughter for "consciously doing an act or following a course of conduct which any reasonable person would know would likely result in death or great bodily injury to some other person, even though done without the intent to injure any person but with utter disregard for the safety of another.[4] Thus, a defendant may be convicted who "set the stage for the tragedy which ultimately and inevitably followed, and he must have be held criminally

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[3]Supreme Court Committee on Standard Jury Instructions in Criminal Cases, Florida Standard Jury Instructions in Criminal Cases at 70 (1981 ed.). The manslaughter standard is thus virtually identical to the civil standard governing punitive damages. See *Charletin v. Wainwright*, 558 F.2d 162, 164 (5th Cir. 1979)(Florida law); *Fulton v. State*, 108 So.2d 473, 475 (Fla. 1959); *Tongay v. State,* So.2d 673, 674 (Fla. 1955); *Miller v. State*, 75 So.2d 312, 313-14 (Fla. 1954).

[4]*Marsa v. State*, 394 So.2d 544, 545 (Fla. 5th DCA 1981), review denied, 402 So.2d 613 (Fla. 1982). Accord, *O'Berry v. State*, 348 So.2d 670 (Fla. 3rd DCA 1977) (question is, "notwithstanding her belief, whether [the defendant] was culpably negligent in proceeding with the aforementioned course of conduct").

responsible therefore, even though he had no intention of killing [the decedent].[5] Thus, it is not surprising that the Florida courts repeatedly have sustained convictions for manslaughter based on conduct which was neither knowing nor intentional.[6]

The best recitation of the standard for imposition of punitive damages is found in what the jury will hear at trial. Florida Standard Jury Instruction PD1(a)(1), which incorporates the *Carraway* standard, states:

> Punitive damages are warranted if you find by clear and convincing evidence that:
>
> (1) the conduct causing the loss was so gross and flagrant as to show a reckless disregard of human life or the safety of persons exposed to the effects of such conduct; **or**
>
> (2) the conduct showed such an entire lack of care that the defendant must have been consciously indifferent to the consequences; **or**
>
> (3) the conduct showed such an entire lack of care that the defendant must have wantonly or recklessly disregarded the safety and welfare of the public...

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[5] *Dolan v. State*, 85 So.2d 139 (Fla.1956). Accord, *McBride v. State*, 191 So.2d 70, 71 (Fla. 1st DCA 1956) (defendant "set the stage for the tragedy which ultimately followed even though he may have had not [sic] intention of killing the decedent").

[6] See, *Tongay v. State*, 79 So.2d 673 (Fla. 1955) (allowing child to jump off high tower into pool); *Hulst v. State*, 123 Fla. 115, 166 So. 828, 830 (1936) (failure to see pedestrian on road in front of car); *Hamilton v. State*, 439 So.2d 238 (Fla 2d DcA 1983) (excessively high speed in residential neighborhood); *Pritchett v. State,* 414 So.2d 2 (Fla. 3rd DCA)(per curiam)(flying aircraft at low altitude), review denied, 424 So.2d 762 (Fla.1982); *O'Berry v. State*, 348 So.2d 336 So.2d 1261, 1262 (Fla. 1st DCA 1961) (holding shotgun in midst of bar altercation, mistakenly thinking safety was on). See also *Charlton v. Wainwright*, 558 F.2d 162, 163 (5th Cir. 1979) (per curiam) (Florida law) (excessive force in evicting intoxicated patron from lounge).

The Plaintiffs need only meet one o f the above criteria in order to recover punitive damages. Under the evidence already adduced in this action, a jury could reasonably find that the defendant's conduct met the above criteria.

Constructive knowledge of imminent risk of serious harm

There are numerous Florida cases which support the thesis that a punitive damages award can be based on constructive knowledge--on what the defendant knew or should have known--because a defendant who closes his eyes to an obvious danger should be no less culpable than the defendant who keeps his eyes open but proceeds nonetheless. As a general proposition, the Supreme Court has stated that "the means of knowledge are the same as knowledge itself." *Nardone v. Reynolds*, 333 So.2d 25, 34 (Fla. 1976), *modified on other grounds, Tanner v. Hartog*, 618 So.2d 177 (Fla. 1993). *Accord, Steiner v. Ciba-Geigy Corp.*, 364 So.2d 47, 52 n.4 (Fla. 3rd DCA 1978), *cert. denied*, 373 So.2d 461 (Fla. 1979). Even the standard jury instruction on criminal manslaughter, see *supra*, allows for conviction if the defendant has intentionally engaged in conduct which he "must have known, or reasonably should have known, was likely to cause death or great bodily injury."

In *Paterson v. Deeb*, 472 So.2d 1210 (Fla. 1st DCA 1985), rev. den. 484 So.2d 8 (Fla. 1986), allegations of a residential landlord's willful violation of its statutory duty to provide locks and keys and maintain common areas in a safe

condition was held sufficient to state a claim for punitive damages in a case arising from a sexual assault upon a tenant in an area prone to criminal activities. The Plaintiff had complained to the landlord of missing and defective locks which had permitted trespassers to enter the premises on prior occasions, but the landlord willfully refused because they planned to demolish the building and did not want to "waste" the money. See *Id.*

In *American Motors Corp. v. Ellis*, 403 So.2d 459, 467 (Fla. 5th DCA 1981), *review denied*, 415 So.2d 1359 (1982), "the jury could have found that AMC was aware of the catastrophic results of fuel tank fires in its vehicles from its own crash tests, and that AMC chose not implement the recommendation of its engineers to relocate the fuel tank in order to maximize profits." Although such knowledge was not based on what actually happened in the crash tests, but only on the "reasonable inference" to be drawn from the test results, 403 So.2d at 468, the district court took pains to base its affirmance on the conclusion that "AMC was aware" of the danger.

Similarly, in *Toyota Motor Co. v. Moll*, 438 So.2d 192 (Fla. 4th DCA 1983), Toyota conducted tests in which "the gas cap remained on," *Id.* at 195 n.3, but those tests nevertheless "indicated that the gas cap would be pried off as the filler neck rotated forward," because it rotated even in low-speed tests. *Id.* at 195. That alone may not have been enough, see discussion *infra*, but there was also evidence

that Toyota had "changed the [dangerous] configuration" in every one of its other models; and "for reasons that were never satisfactorily explained at trial...the '73 Corona was the only vehicle in the entire line" which was not changed. *Id.* That aided the district court's conclusion that the evidence permitted a finding that "Toyota knew of the defects..." *Id.*

In *Dorsey v. Honda Motor Co., Ltd.*, 655 F.2d 650, 656 (5th Cir. 1981) (Florida law), *cert. denied*, 459 U.S. 880, 103 S. Ct. 177, 74 L. Ed. 2d 145 (1982), there was "substantial evidence that tests carried out by Honda demonstrated that, apart from being small, the AN 600 had serious design deficiencies creating an unreasonable risk of harm to passengers." For example, in tests conducted at 30 m.p.h., a pillar of the car had deformed inward, and the dummy's head had struck it. *Id. at 653.* Since the actual dangerous condition--not just the likelihood of that condition--had manifested itself in the tests, a punitive damages award was appropriate.

Finally, in *Domke v. McNeil-P.P.C., Inc.*, 939 F.Sup 849, (M.D. Fla. 1996), the court found that a reasonable basis for claiming punitive damages existed when the defendant manufacturer had actual knowledge that liver damage could occur when casual alcohol consumption combined with acetaminophen and, failed to convey the risk of liver damage or alcohol/acetaminophen interaction to

consumers. *Id. at 939*. Further, the defendant intended to `muddy the waters' in the event of negative publicity. *Id.*

Here the Defendant not only knew of the hazards, but encouraged such practices and under some circumstances forced its drivers to drive when doing so clearly posed a grave risk to the public. By creating a coercive environment whereby drivers are forced to operate heavy trucks loaded with rock for 14 and 15 hours a day for six days straight, S&R Transport creates a hazard from which it directly benefits financially. Every minute that those trucks roll with a payload, S&R Transport makes money.

The Defendant further had "policies" in effect to weed out dangerous drivers, yet failed to follow its own policies. This is all show because the defendant – by it's own claimed standards – should have terminated Defendant JACINTO LOMBILLO prior to the deadly crash on September 19, 2003. His driving record **before this crash** mandated his termination. *See* Deposition of Dwight Graves, April 16, 2004. Defendant S&R TRANSPORT continued to profit from LOMBILLO and require him to drive 14 hour days in a truck with defective brakes, broken air conditioning and no windshield washer. Then, after LOMBILLO kills this 14 year-old boy and destroys a school bus (claiming that there was a "phantom" car that pulled in front of him that no other eyewitness saw), Defendant S&R TRANSPORT

disposes of the crucial evidence in its control.[7] *(A copy of the Winter Haven Police Department Traffic Homicide Report is attached hereto as Exhibit E.)*

The evidence proffered by the Plaintiffs and evident in the record establishes that Plaintiffs have a reasonable basis for the recovery of punitive damages. *Strasser v. Yalamanchi*, 677 So. 2d 22, 23 (Fla. 4th DCA 1996), *rehearing denied, review dismissed*, 699 So. 2d 1372 (setting forth standard for leave to amend to seek punitive damages). As set forth above, ample evidence exists that the Defendant's conduct was gross and flagrant in character, demonstrated an entire want of care that raises a conscious indifference to consequences, was wanton and reckless, and grossly careless. *See White Constr. Co., Inc. v. Dupont,* 455 So. 2d 1026, 1029 (Fla. 1984); *W.R. Grace & Co. v. Waters*, 638 So. 2d 502, 203 (Fla. 1994).

WHEREFORE, Plaintiffs move this Court for entry of an order granting them leave to amend to add defendants and add a count for punitive damages against Defendant S&R Transport, and to deem the attached Second Amended Complaint filed as of the date of the order granting this motion.

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[7]The Defendant maintains that the 14 year-old victim was somehow comparatively negligent and alleges that he was not crossing the street in an appropriate location. Thus the physical evidence from the trucks becomes critical: marks, scrapes, tissue and blood would all be highly relevant in determining positioning of the victim at the time he was struck. Since that is very much at issue, Defendant has destroyed critical evidence.

WE HEREBY CERTIFY that a true and correct copy fo the foregoing was sent by Federal Express this _____ day of May, 2004 to: Kurt Spengler, Esq., *(counsel for Defendants S & R Transport, Inc. and Jacinto Lombillo)* Wicker, Smith, O'Hara, McCoy, Graham & Ford, P.A., P.O. Box 2753, Orlando, FL 32802-2753; Mark N. Miller, Esq. *(co-counsel for Defendant S&R Transport)*, GrayRobinson, P.A., One Lake Morton Drive, Lakeland, FL 33803; and Victor G. Swift, Esq. and Donald Watson, Esq., *(co-counsel for Plaintiff Bertha Ogburn)* Gary, Williams, Parenti, Finney, Lewis, McManus, Watson & Sperando, P.L., Waterside Professional Building, 221 E. Osceola Street, Stuart, FL 34994.

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