

Punitive Damages Based on Gross Negligence: Massachusetts Bucks the Trend

In the recent decision in *Aleo v. SLB Toys USA, Inc.*, 466 Mass. 398 (2013), the Massachusetts Supreme Judicial Court (SJC) found that an \$18 million punitive damages award based on gross negligence was not grossly excessive or violative of due process. As one of eight states that permit punitive damages awards based on gross negligence, Massachusetts is the only state that has not yet enacted statutory restrictions or imposed court-mandated limitations on such damages as articulated by the United States Supreme Court (Supreme Court). The SJC had the opportunity in *Aleo* to bring the Commonwealth's treatment of punitive damages awards based on gross negligence in line with other states that permit such awards; unfortunately it chose not to do so. Specifically, the SJC declined to establish a standard to guide juries in the Commonwealth to distinguish between punitive damages awards based on gross negligence and such awards based on willful, wanton or intentional conduct.

BACKGROUND

In *Aleo*, the estate of a woman who died after going down an inflatable pool slide head-first alleged that the defendant retailer failed to test to ensure that the slide complied with a Consumer Product Safety Commission regulation applicable to pool slides. The defendant denied that the regulation applied to inflatable pool slides. Further, it argued that it had in good faith relied on a third-party reputable testing agency, which certified that the slide complied with all applicable federal regulations. The jury found that the defendant was grossly negligent, and awarded \$2,640,000 in compensatory damages and \$18 million in punitive damages. On appeal, the defendant challenged the constitutionality of the punitive damages award, arguing that the award, which

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NEWSLETTER

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was based on gross negligence, was grossly excessive and violated due process. The Massachusetts Defense Lawyers Association filed an *amicus* brief in support of the defendant's position.

DECISIONS

The SJC recognized that in Massachusetts, punitive damages may be awarded only by statute, and in the instant matter the wrongful death statute permits the award of punitive damages based on the gross negligence of the defendant. See M.G.L. c. 229 § 2. The SJC further recognized the three guideposts articulated by the Supreme Court to evaluate the constitutionality of punitive damages awards, which include (1) "the degree of reprehensibility of the defendant's conduct," (2) the ratio of the punitive damage award to the "actual harm inflicted on the plaintiff," and (3) 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. vs. Gore*, 517 U.S. 559, 575, 580, 583 (1996).

The Supreme Court has determined that the most important guidepost in evaluating the constitutionality of punitive damages awards 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. On that issue, the Supreme Court has held that "[i]n a well-functioning system, [the Supreme Court] 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." *Exxon Shipping Co. v. Baker*, 554 U.S. 471, 512-513 (2008).

The second *Gore* guidepost is the ratio between compensatory and punitive damages awards. The Supreme Court has held 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 Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 424-425 (2003).



The Supreme Court has further held that "few awards exceeding a single-digit ratio [9:1] between punitive and compensatory damages, to a significant degree, will satisfy due process." *Exxon* 554 U.S. at 501 citing *State Farm*, 538 at 425. Additionally, 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*." *Exxon*, 554 U.S. at 512. 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.*

Despite the limitations on punitive damages awards established by the Supreme Court, the SJC found in *Aleo* that the defendant's gross negligence – i.e., failure "to ensure that the slide complied with applicable safety regulations" – exhibited a "substantial degree of reprehensibility" sufficient to uphold a punitive damages award, which was seven times the compensatory damages award. In so holding, the SJC conceded that "although only grossly negligent, rather than malicious or willful, [the defendant]'s conduct nonetheless caused grievous physical harm, evinced an indifference to the safety of others, and involved repeated actions." It appears that the SJC focused more on the end result of the alleged conduct – i.e., the loss of life – as opposed to the actual conduct at issue – i.e., the alleged failure to comply with regulations. However, the SJC warned against "judicially derived standards [that] leave the door open to outlier punitive-
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damages awards.” See *Exxon*, 554 U.S. at 507-508. Unfortunately, the *Aleo* punitive damages award of seven times the compensatory damages based on allegedly grossly negligent conduct appears to be such an outlier.

MASSACHUSETTS THE OUTLIER

Besides Massachusetts, only Florida, Illinois, Kentucky, Mississippi, New Mexico, North Carolina and Texas permit punitive damages based on gross negligence. See *W.R. Grace & Co. Conn. v. Waters*, 638 So. 2d 502, 503 (Fla. 1994); *Slovinski v. Elliot*, 237 Ill. 2d 51, 64 (2010); *Peoples Bank of N. Ky., Inc. v. Crowe Chizek & Co. LLC*, 277 S.W.3d 255, 268 (Ky. Ct. App. 2008); Miss. Code Ann. § 11-1-65(3)(a); *Gonzales v. Sansoy*, 103 N.M. 127, 130 (N.M. Ct. App. 1984); *Rogers v. T.J.X. Cos.*, 329 N.C. 226, 230 (N.C. 1991) citing *Mazza v. Medical Mut. Ins. Co.*, 311 N.C. 621, 626 (N.C. 1984); Tex. Civ. Prac. & Rem. Code § 41.001. The remaining 42 states only permit punitive damages awards based on conduct more severe than gross negligence, such as willful, wanton, intentional and malicious conduct.

Of the states that permit punitive damages based on gross negligence, Massachusetts is the only state that has not yet enacted statutory restrictions or imposed court-mandated limitations as articulated by the Supreme Court in *Gore* and its progeny.

For example:

- The Illinois Supreme Court held that without “evidence that the defendant had an intentional, premeditated scheme to harm” the plaintiff . . . “defendant’s [grossly negligent] conduct [is] 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 v. N. Am. Corp. of Ill.*, 2012 IL 112530, P58 (2012) (emphasis added); *Slovinski v. Elliot*, 237 Ill. 2d 51, 64 (2010). The Illinois Supreme Court limited punitive awards based on gross negligence to a 1:1 ratio with compensatory damages. *Id.*

- In North Carolina and Florida, punitive damages are capped at three times the amount of compensatory damages for the most egregious conduct, with awards based on gross negligence at the lowest end of the spectrum. See *Rhyne v. K-Mart Corp.*, 358 N.C. 160, 184-185 (2004) citing N.C. Gen. Stat. § 1D-25; 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).
- Additionally, Kentucky and Mississippi courts have held that the gross negligence that permits punitive damages awards must be equivalent to intentional conduct. *Peoples Bank of N. Ky., Inc. v. Crowe Chizek & Co. LLC*, 277 S.W.3d 255, 268 (Ky. Ct. App. 2008); *Seals v. St. Regis Paper Co.*, 236 So. 2d 388, 392 (1970) citing Miss. Code Ann. § 11-1-65(3)(a).

In sum, these states have articulated standards to guide juries in making punitive damages awards based on varying degrees of conduct; however, with the *Aleo* decision, Massachusetts remains the outlier.

SUMMARY

It is interesting to note that the SJC had elicited *amicus* briefs as to whether “punitive damages based on gross negligence should be evaluated differently from punitive damages based on willful, wanton and reckless conduct.” The *Aleo* decision indicates that the SJC has answered this question in the negative. Ironically, the penalizing aspect of punitive damages awards seems to be defanged by the *Aleo* decision, which suggests that there is no clear delineation for punitive damages awards based on gross negligence or based on intentional, willful, wanton conduct and even malicious conduct. It remains to be seen how the Massachusetts courts will instruct juries in light of this decision; but certainly there is great concern that this decision will have a significant adverse effect on potential liability exposure for defendants in the Commonwealth.

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