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SC Court of Appeals

Attachment

***(Order styled "Due Process Post-Trial Review of Punitive
Damages Award" filed 10/19/2015)***

STATE OF SOUTH CAROLINA

COUNTY OF SPARTANBURG

Angela D. Keene, Individually and as Personal
Representative of the Estate of Dennis Seay,
Deceased, and Linda Seay,

Plaintiff,

v.

3M Company, ET AL.,

Defendants.

) IN THE COURT OF COMMON
) PLEAS

) FOR THE SEVENTH JUDICIAL
) CIRCUIT

) C/A No.: 2013-CP-42-03915
)

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Due Process

Post-Trial Review of Punitive
Damages Award

I. Factual and Procedural Background

On October 8, 2015, the jury returned a verdict of \$12,000,000.00 actual damages on Plaintiff's survival, wrongful death, and loss of consortium claims. The jury awarded \$2,000,000.00 punitive damages on Plaintiff's claim for wrongful death. This order sets out the court's post-trial review of the punitive damages award.

II. Standard of Review

Under *Mitchell v. Fortis Ins. Co.*, a trial court reviewing a jury's award of punitive damages must consider: (1) the reprehensibility of the defendant's conduct; (2) the disparity or ratio between the actual or potential harm suffered by the plaintiff and the amount of the award; and (3) the difference between the punitive damages awarded by the jury and the civil penalties authorized or imposed in comparable cases. *Mitchell v. Fortis Ins. Co.*, 385 S.C. 570, 587-88, 686 S.E.2d 176, 185-86 (2009).

A. Reprehensibility

The United States Supreme Court has noted that the degree of reprehensibility of a defendant's conduct is "perhaps the most important indicium of the reasonableness of a punitive

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damages award," *BMW of North America v. Gore*, 517 U.S. 559, 565 (1996), for the simple reason that some things are worse than others. In evaluating reprehensibility, a court should consider factors such as whether:

the harm caused was physical as opposed to economic; the tortious conduct evinced an indifference to or a reckless disregard of the health or safety of others; the target of the conduct had financial vulnerability; the conduct involved repeated actions or was an isolated incident; and the harm was the result of intentional malice, trickery, or deceit, or mere accident.

State Farm Mut. Auto. Ins. Co. v. Campbell, 538 U.S. 408, 419 (2003).

Here, there was sufficient evidence for the jury to conclude that the conduct of Celanese was reprehensible. For a decade, Mr. Seay was exposed to asbestos and asbestos-containing dust while he worked in a Celanese plant. As a result, he contracted mesothelioma and died at the age of seventy. Mr. Seay could have been expected to live another thirteen years. Although Celanese was well aware of the dangers to Mr. Seay on its property, it failed to take action. Celanese never warned Mr. Seay of the dangers of asbestos, nor did it take appropriate safety precautions to eliminate the risk. This conduct was reprehensible and demonstrated a callous indifference to the health and safety of others.

Significantly, the misconduct of Celanese occurred over the course of a decade. This suggests that the harm suffered was the product of something more than mere negligence, as the jury found. For decades, Celanese had access to specialized information and medical literature discussing the toxic effects of asbestos exposure. Armed with this knowledge, Celanese was obligated to warn Mr. Seay. It consciously chose not to.

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B. Ratio

A court reviewing a punitive damages award should consider the disparity between the actual or potential harm suffered and the amount of the punitive damages verdict. *Fortis*, 385 S.C. at 587-88. As the court in *Fortis* explained:

Although the Supreme Court has 'been reluctant to identify concrete constitutional limits on the ratio between harm, or potential harm, to the plaintiff and the punitive damages award,' and has consistently declined to adopt a bright line ratio or simple mathematical test, the Court has remarked that 'in practice, few awards exceeding a single-digit ratio between punitive and compensatory damages to a significant degree will satisfy due process.' *Campbell*, 538 U.S. at 425, 123 S.Ct. 1513. Nevertheless, the Supreme Court has made clear that 'there are no rigid benchmarks that a punitive damages award may not surpass,' so long as 'the measurement of punishment is both reasonable and proportionate to the amount of harm to the plaintiff and the general damages recovered.' *Id.* at 425-26, 123 S.Ct. 1513. With this instruction in mind, we note that a court, when determining the reasonableness of a particular ratio of actual or potential harm to a punitive damages award, may consider: the likelihood that the award will deter the defendant from like conduct; whether the award is reasonably related to the harm likely to result from such conduct; and the defendant's ability to pay.

Id.

The ratio here of 1 to 6 is inverse, and is neither unreasonable nor disproportionate to the harm suffered and the actual damages. It is beyond dispute that Mr. Seay died a miserably painful death, and his family suffered a devastating loss. The verdict here furthered the ancient goals of punishment and deterrence, and is sufficiently grounded in reason to warrant a finding that the jury's award did not arbitrarily deprive Celanese of property without due process of law.

While nothing in the record suggests the ability of Celanese to pay, the absence of such evidence is not a bar to a punitive damages award. It is well established that "evidence of net worth is not a prerequisite to a punitive damage award ... [as there is] 'no requirement that the defendant be a man of means before the jury is justified in awarding punitive damages.' *Welch v. Epstein*, 342 S.C. 279, 536 S.E.2d 408, 423 (Ct. App. 2000) (citation omitted).

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C. Comparable Penalty Awards

Fortis instructs that a reviewing court "should consider the difference between the punitive damages awarded by the jury and the civil penalties authorized or imposed in comparable cases." *Fortis*, 385 S.C. at 588. To identify comparable cases, courts may consider factors such as the type of harm suffered by the plaintiff, the size of the award, the reprehensibility of the defendant's conduct, and the ratio of actual or potential harm to the punitive damages award. *Id.* at 589.

There is no evidence that the punitive award is dissimilar to those returned in other asbestos-related or wrongful death cases. The reprehensibility of Celanese's conduct, coupled with the harm suffered by Plaintiff, reveals the jury's award of punitive damages is not grossly excessive.

Further, while South Carolina courts frequently uphold verdicts on the low end of the single-digit spectrum, deviation from this norm occurs regularly. *Id.* at 593 (citing *James v. Horace Mann Ins. Co.*, 371 S.C. 187, 196-7, 638 S.E.2d 667, 671-2 (2006)); *Collins Entertainment Corp. v. Coats & Coats Rental Amusement*, 355 S.C. 125, 584 S.E.2d 120 (Ct.App.2003) (upholding a 9.96 to 1 ratio); *Cock-N-Bull Steak House, Inc. v. Generali Ins. Co.*, 321 S.C. 1, 466 S.E.2d 727 (1996) (upholding a 28 to 1 ratio). Here, the meager 1 to 6 ratio demonstrates that the jury was conservative and thoughtful. The jury did not run astray; rather, it returned a verdict in keeping with the law.

In a comparable asbestos exposure case two years ago (which involved testicular mesothelioma not resulting in death), the court granted a Defendant a new trial nisi remittitur and reduced the actual damage award to \$1,500,000.00 and the punitive damage award to \$3,500,000.00. See *Garvin v. Agco Corp.*, No. 2012-CP-40-6675, 2014 WL 8628438, at *18 (S.C.Com.Pl. Dec. 10, 2014). Celanese's conduct here as the premises owner was more


reprehensible than that of the gasket manufacturer in *Garvin*. Here the jury found a major corporation callously caused Mr. Seay's death. There was evidence from which the jury could have found that Celanese attempted to conceal its knowledge of the lethal risk of asbestos exposure that directly affected the health of Mr. Seay for a ten year period. No one who heard the evidence could say the punitive award was out of constitutional bounds.

III. Conclusion

The jury's punitive damage award rationally advanced the historic aims of punishment and deterrence. The conduct of Celanese was highly reprehensible, the ratio of the verdict to the compensatory award was reasonably proportionate, and the verdict is not dissimilar to comparable penalty awards. The verdict therefore comports with due process.

IT IS SO ORDERED.

October 14, 2015
Greenville, South Carolina



D. Garrison Hill
Circuit Judge

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