

STATE OF SOUTH CAROLINA)	IN THE COURT OF COMMON PLEAS
COUNTY OF RICHLAND)	CIVIL ACTION NO. 2014-CP-40-05467
Jami Allison Owens,)	ORDER REVIEWING PUNITIVE
)	DAMAGES AND DENYING
Plaintiff,)	DEFENDANT'S MOTION FOR A NEW
)	TRIAL <i>NISI REMITTITUR</i>
v.)	
James A. Boulware,)	
)	
Defendant.)	

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 SC Court of Appeals

INTRODUCTION

This matter came before Judge DeAndrea Gist Benjamin on June 8, 2016 in the Court of Common Pleas for Richland County, South Carolina. Present for Plaintiff, Jami Allison Owens, were attorneys Virginia W. Williams and David R. Williams. Present for Defendant, James A. Boulware, was Bradley L. Lanford. This action is a negligence case and the issues were tried in a bifurcated manner. The jury returned a verdict in favor of the Plaintiff in the amount of \$89,000.00 actual damages and \$1,000,001.00 punitive damages. Defendant moved the court for a new trial, or alternatively, for a new trial *nisi remittitur*, as well as a post-trial review of the punitive damages verdict. For the reasons set forth below, the Court **DENIES** Defendant's motion for a new trial *nisi remittitur*. The Court also finds the punitive damages award is reasonable.

FACTS AND PROCEDURAL HISTORY

This case arises from a rear-end collision that occurred after a University of South Carolina football game on October 2, 2011. Defendant was driving under the influence of alcohol and with an open container in the vehicle. He rear-ended the car Plaintiff drove, causing her neck injuries. Defendant was arrested and plead guilty to driving under the influence ("DUI") under S.C. Code

Ann. § 56-5-2930 and to having an open container of alcohol under S.C. Code Ann. § 61-4-110. Defendant had a prior history of drinking and driving, including a prior guilty plea to a DUI less than one year before the accident and a suspended license at the time of this accident due to the prior DUI.

The Plaintiff continued to experience neck and back pain after the accident and eventually sought treatment from a pain specialist and Orthopedist who specializes in spine surgery who gave her a 13 % whole body impairment rating based on a diagnosis of cervical disc disruption with radiculopathy. Given the permanent nature of Plaintiff's injury, the Court charged the jury on the mortality table. Plaintiff is a pharmacist who reduced her work hours due to the pain caused by the accident. Her actual medical expenses at the time of trial were \$33,167.27. Medical bills reflecting these expenses were admitted into evidence without objection from Defendant. A life care plan consultant testified that Plaintiff's future care and pain management would cost \$89,211.00 to \$118,294.00. Plaintiff also testified that she had to cut her work week from forty hours to thirty hours which resulted in lost wages.

Prior to trial, Defendant admitted simple negligence and the parties stipulated that Defendant was at fault for the accident. Defendant made a pre-trial motion to bifurcate the issues of actual and punitive damages, which the Court granted. All parties and the Court agreed that for Plaintiff to proceed in a punitive damages trial, she must first prove in the actual damages trial, that Defendant engaged in reckless, willful, or wanton conduct.

NEW TRIAL NISI REMITTITUR

“When considering a motion for a new trial based on the inadequacy or excessiveness of the jury’s verdict, the trial court must distinguish between awards that are merely unduly liberal or conservative and awards that are actuated by passion, caprice, or prejudice.” *Proctor v. Dep't of*

Health and Envtl. Control, 368 S.C. 279, 320, 628 S.E.2d 496, 518 (Ct. App. 2006) (quotation marks omitted). “[C]ompelling reasons must be given to justify invading the jury’s province by granting a new trial *nisi remittitur*.” *Id.* “The consideration for a motion for a new trial *nisi remittitur* requires the trial judge to consider the adequacy of the verdict in light of the evidence presented.” *Id.* In this case, Defendant cannot show the punitive damages verdict was merely excessive, nor can he offer a compelling reason for invading the jury’s province. Rather, the evidence supports the jury’s punitive damages verdict.

Defendant’s sole argument for a new trial *nisi remittitur* is that the punitive damages verdict is more than eleven times the actual damages verdict. This alone does not qualify as a compelling reason to invade the jury’s province. *See, e.g., Curtis v. Blake*, 392 S.C. 494, 501, 709 S.E.2d 79, 82 (Ct. App. 2011) (affirming the denial of a motion for new trial *nisi remittitur* where the defendant argued “the award of \$450,000.00 is almost one hundred times” the proven damages). As discussed below, this ratio is appropriate and satisfies due process.

POST-TRIAL PUNITIVE DAMAGES REVIEW

The Court must conduct a post-trial review of punitive damages to evaluate due process. If the trial judge is convinced that the amount awarded is over-liberal, she has the authority and corresponding duty to reduce the verdict by order *nisi*. *Gamble v. Stevenson*, 305 S.C. 104, 111, 406 S.E.2d 350, 354 (1991) (internal citations omitted). Punitive damages serve at least three important purposes: (1) punishment of Defendant’s reckless, willful, wanton, or malicious conduct; (2) deterrence of similar future conduct by the Defendant or others; (3) and compensation for the reckless or willful invasion of the Plaintiff’s private rights. *Clark v. Cantrell*, 339 S.C. 369, 379, 529 S.E.2d 528, 533 (2000). A post-trial review of the constitutionality of a punitive damages award must consider the three *Gore* guideposts:

(1) the reprehensibility of the defendant's conduct; (2) the disparity between the actual harm suffered by the Plaintiff and the amount of the award; (3) and civil penalties imposed or authorized in comparable cases. *Mitchell v. Fortis Ins. Co.*, 385 S.C. 570, 587-88, 686 S.E.2d 176, 185-86 (2009); *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 568, 116 S.Ct. 1589, 1595 (1996).

Reprehensibility

First, when reviewing a punitive damages award, the Court should consider the degree of reprehensibility of defendant's conduct. *Mitchell*, 538 S.C. at 587, 686 S.E.2d at 185 (citing *Gore*, 517 U.S. at 575, 116 S.Ct. at 1599). The most important consideration in a punitive damages analysis is the degree of reprehensibility of the Defendant's conduct. *Id.* In evaluating the reprehensibility of a Defendant's conduct, the court should consider whether:

(1) the harm caused was physical as opposed to economic; (2) the tortious conduct evinced an indifference to or a reckless disregard for the health and safety of others; (3) the target of the conduct had financial vulnerability; (4) the conduct involved repeated actions or was an isolated incident; and (5) the harm was the result of intentional malice, trickery, or deceit, rather than mere accident.

Id.

Four of the *Mitchell* factors are relevant in this case. As to the first factor, the Defendant caused harm to Plaintiff which resulted in permanent physical injury. A 13 % whole body impairment rating weighs in favor of reprehensibility because it is a physical injury. *See Hollis v. Stonington Dev., LLC*, 394 S.C. 383, 397, 714 S.E.2d 904, 912 (Ct. App. 2011) (finding only economic harm would typically weigh against reprehensibility).

As to the second factor, Defendant's conduct demonstrates a reckless disregard for the health and safety of others. Defendant voluntarily became intoxicated and then got behind the wheel of a car, exposing not only Plaintiff but others to risk of injury. *Austin v. Stokes-Craven Holding Corp.*, 387 S.C. 22, 53, 691 S.E.2d 135, 151 (2010) (finding defendant's misrepresentation that a used truck had not been wrecked displayed an indifference to or a reckless disregard for the

health and safety of Plaintiff and those sharing the road with the unsafe vehicle; defendant's conduct exhibited an extremely high degree of reprehensibility).

As to the third factor, this case does not specifically relate to financial vulnerability. Plaintiff accrued past and future medical bills from her injuries. Also, Plaintiff testified that she can no longer work the hours she once worked. As such, Plaintiff is more financially vulnerable due to Defendant's conduct. The record does not reflect evidence to suggest Plaintiff was targeted by Defendant's conduct.

As to the fourth factor, Defendant's conduct involved repeated acts of deliberate indifference. During the punitive damages trial, Defendant admitted to pleading guilty to more than one DUI. Defendant also testified that he got behind the wheel of a vehicle after consuming alcohol numerous times. Defendant's pattern of driving under the influence of alcohol demonstrates deliberate indifference to the safety of others. The Court recognizes that a recidivist may be punished more severely than a first time offender to send the message that repeated misconduct is more reprehensible than an individual instance of malfeasance. *See BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 577, 116 S.Ct. 1589, 1599 (1996); *see also Duncan v. Ford Motor Co.*, 385 S.C. 119, 144, 682 S.E.2d 877, 890 (Ct. App. 2009) (affirming punitive damages where the defendant-manufacturer repeatedly installed a defective switch in its automobiles). Defendant's repeated misconduct supports a finding of a high degree of reprehensibility and a more severe punitive damages award.

As to the fifth factor, the evidence shows the injury occurred from Defendant's negligence while driving, but also that the Defendant attempted to engage in trickery. The Defendant knew that operating a vehicle while under the influence of alcohol is illegal and dangerous, yet intentionally and deliberately drove anyway. Further, Defendant testified he knew he should not

be driving. Defendant also testified he knowingly chose a more dangerous route because it was more convenient. Defendant testified his choice posed a greater danger to Plaintiff and others. The Court's analysis of the reprehensibility factors shows that Defendant's conduct was repetitive and highly reprehensible and supports a high award of punitive damages.

Ratio

Second, when reviewing a punitive damages award, the Court must consider the disparity between the actual or potential harm suffered by the plaintiff and the amount of the punitive damages award. *Mitchell*, 385 S.C. at 587, 686 S.E.2d at 185. When determining the reasonableness of a particular ratio of actual or potential harm to a punitive damages award, a court may consider:

- (1) the likelihood that the award will deter the defendant from like conduct; (2) whether the award is reasonably related to the harm likely to result from such conduct; and (3) the defendant's ability to pay.

Id. The Supreme Court has remarked "few awards exceeding a single-digit ratio between punitive and compensatory damages, to a significant degree, will satisfy due process." *Id.*

The ratio of actual or potential harm to the punitive damages award is reasonable in this case. As to the first factor, a punitive damages award of \$1,000,001.00 is likely to deter Defendant from continuing his pattern of driving under the influence. *See Austin*, 387 S.C. at 54, 691 S.E.2d at 151 (finding an award with a ratio of 8.21 will inevitably serve as a deterrent to defendant from engaging in future misconduct).

As to the second factor, the ratio in this case of actual to punitive damages is approximately 1:11. The jury awarded the Plaintiff \$89,000.00 in actual damages and \$1,000,001.00 in punitive damages. Although the ratio does exceed a single-digit ratio, it is reasonably related to Plaintiff's actual harm. 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 the plaintiff and the general damages recovered." *Mitchell*, 385 S.C. at 588, 686 S.E.2d at 185. The Plaintiff sustained \$33,167.27 in past medical bills. A life care plan consultant testified to Plaintiff's future medical bills in the amount of \$89,211.00 to \$118,294.00. Plaintiff testified to reducing her work schedule from 40 hours to 30 hours due to her injuries, which resulted in lost wages. Further, Plaintiff suffered permanent physical impairment and property damage to her vehicle. Importantly, the potential harm in this case is significant as the Defendant's conduct could have resulted in more serious injury or tragic death to Plaintiff and others.

As to the third consideration, there was no evidence presented by the Plaintiff that Defendant had the ability to pay that type of punitive award. The only evidence presented at trial was from Defendant. He testified that he worked forty hours per week as a welder. The Court's analysis of Plaintiff's injuries and Plaintiff's potential injuries demonstrates that the ratio of actual to punitive damages in this case is reasonable.

Penalties for Similar Misconduct

The third guidepost in the Court's review of a punitive damages award is the difference between the punitive damages awarded by the jury and the civil penalties authorized or imposed in comparable cases. *Mitchell*, 385 S.C. at 589, 686 S.E.2d at 185-86.

The Defendant's conduct in this case is criminal. Under S.C. Code Ann. § 56-5-2930, it is "unlawful for a person to drive a motor vehicle within this State while under the influence of alcohol to the extent that the person's faculties to drive a motor vehicle are materially and appreciably impaired." Defendant pled guilty to violating § 56-5-2930. This was his second offense, which is punishable by a fine up to \$5,100.00 and imprisonment up to one year. § 56-5-2930 (A)(2). The Defendant could have been charged with a felony DUI under § 56-5-2945 of the

South Carolina Code, which carries a fine up to \$10,000.00 and imprisonment up to fifteen years. § 56-5-2945 (A)(1). Defendant's open container violation carries a penalty of not more than \$100.00 or imprisonment of not more than thirty days. S. C. Code Ann. § 61-4-110. While these criminal statutes do not contain comparable civil penalties, they demonstrate Defendant was aware of the severity of the consequences of his actions.

Courts in comparable civil cases involving automobile accidents caused by drunk driving have found punitive damages awards greater than ten times the actual damages to satisfy due process. In *Coalson v. Canchola*, the defendant drove while drunk and hit the plaintiff's vehicle, causing minor injuries to the plaintiff and her passenger. 754 S.E.2d 525, 527 (Va. 2014). The defendant's prior record included seven DUIs and a revoked license. *Id.* The jury awarded the plaintiff \$5,600.00 actual damages and \$100,000.00 punitive damages, 17.85 times the actual damages. The Supreme Court of Virginia reinstated the jury's award of punitive damages, citing the state's interest in promoting public safety through prevention and deterrence of driving while intoxicated, the degree of necessary punishment in a case involving a repeat offender, and the fact that the defendant's conduct endangers many people and could result in death. *Id.* at 529-30.; *see also Strenke v. Hogner*, 704 N.W.2d 309 (Wis. Ct. App. 2005) (affirming jury award of \$2,000.00 actual damages and \$225,000.00 punitive damages for a car accident caused by defendant driving while intoxicated); *Craig v. Holsey*, 590 S.E.2d 742 (Ga. Ct. App. 2003) (affirming jury award of \$8,801.40.00 actual damages and \$200,000.00 punitive damages for car accident caused by Defendant who was drunk and high and crashed into the back of Plaintiff's car).

Further, the Legislature recently indicated that a larger punitive damages verdict is warranted in a case involving a defendant who acted while under the influence of alcohol. On

January 1, 2012,¹ the Legislature enacted S.C. Code Ann. § 15-32-530, which caps punitive damages at three times the amount of compensatory damages. § 15-32-530(A). However, the Legislature specified that “there shall be *no cap on punitive damages*” in a case where “the defendant acted or failed to act while *under the influence of alcohol*.” § 15-32-530(C)(3) (emphasis added). This statute supports the Court's finding that Defendant's conduct in driving while under the influence of alcohol is extremely reprehensible and warrants the punitive damages amount determined by the jury. The award in this case is constitutional in light of South Carolina's public policy and comparable civil penalties.

CONCLUSION

Upon reviewing the *Gore* factors, it is clear that a punitive damages award of \$1,000,001.00 is not grossly out of proportion to the Defendant's actions and does not offend due process. The Defendant's conduct was highly reprehensible and the amount of damages awarded is reasonably related to the harm suffered by Plaintiff, or potential harm suffered by Plaintiff. Last, comparing this case to other cases involving drunk driving demonstrates the damages award is consistent. This Court finds that the facts from this case meet all three *Gore* guideposts.

IT IS THEREFORE ORDERED that Defendant's motion for new trial *nisi remittitur* is **DENIED**.

ITS IS THEREFORE ORDERED the punitive damages award in this case is reasonable and not grossly excessive or unduly liberal, was not actuated by passion, caprice, or prejudice, or some other influence outside of the evidence, does not violate due process, and is hereby upheld as a result of this Court's post-trial analysis.

¹ This statute became law shortly after the accident occurred in this case. However, it is indicative of South Carolina public policy goals of punishing and deterring those who drink and drive.