IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF OREGON

PORTLAND DIVISION

ARCH CHEMICALS, INC.,
a Virginia corporation, and
LEXINGTON INSURANCE COMPANY,
a Massachusetts corporation,

Plaintiffs,

v.

RADIATOR SPECIALTY COMPANY,
a North Carolina corporation,

Defendant.

Civil No. 07-1339-HU

Order on Plaintiffs' Oral Motion in Limine to Exclude Evidence of Willful and Wanton Misconduct

HUBEL, Magistrate Judge.

During the pretrial conference while discussing the plaintiffs' motions in limine and the evidence defendant had indicated it would be offering at trial, the court noted the similarity between the proffered evidence and the issue addressed by Plaintiffs' motion for partial summary judgment to eliminate the affirmative defense alleging there is no right to contribution for punitive damage liability [dkt #314]. In that motion plaintiffs

had sought an order that there being no material issue of fact that the settlement with the Davidson family did not include any payment for punitive damages. That motion for partial summary judgment was granted for the reasons stated in the opinion and order filed on December 13, 2010, pages 10 to 14. [dkt#387]

At the time this motion [dkt# 314] was filed by the plaintiffs, the amended answer the defendant had sought and been granted leave to file in an order dated June 30, 2009, had not been filed by the defendant despite the approaching trial. The form of answer defendant had sought leave to file had a Fifth Affirmative Defense (Failure to Apportion Punitive and Compensatory damages) and a Sixth Affirmative Defense (Willful and Wanton Misconduct). The Fifth Defense was based on the failure to apportion punitive and compensatory damages in the Settlement Agreement resolving the Davidsons' claims. It was argued that this failure caused the entire contribution action to fail since contribution is not available for punitive damages and with the amount of punitive damages paid for the release being unknown, no contribution could be obtained by plaintiffs. The Sixth Defense alleged that Arch Chemicals conduct creating liability to the Davidsons was willful and wanton and as a result contribution was barred by O.R.S. 31.600. Both defenses rely on the premise that punitive damages or damages flowing from willful and wanton conduct are personal to the actor and under Oregon law cannot be subject to joint liability which is necessary to support a contribution claim.

Seventeen days after the opinion and order granting the plaintiffs summary judgment against the fifth affirmative defense, the defendant for the first time since being granted leave on June

30, 2009, filed its revised amended answer on December 30, 2010. It raised the same two defenses despite the December 13, 2010 opinion and order. As a result plaintiff filed motions in limine to exclude the evidence defendant planned to offer on the punitive damages fifth affirmative defense and it encompassed the evidence that was offered on the willful and wanton defense. See document # 441.

When I granted the motion in limine, defense counsel asked if the court was striking the willful and wanton misconduct defense. The effect of my order does strike the defense and upon further reflection and review of defendant's authorities and arguments I reaffirm that ruling.

As the Fifth Affirmative Defense description chosen by the defendant notes, it is a defense based on the failure to apportion punitive and compensatory damages in the settlement agreement with the Davidsons. It has never been the defendant's position that compensatory damages were not subject to an action for contribution. It is unclear if the Sixth Affirmative defense tries to approach the issue from perhaps a different angle, claiming that all the liability of Arch for compensatory and punitive damages is based on Arch's alleged willful and wanton misconduct and thus not able to support a contribution claim. The damages award for compensatory damages are intended to make the plaintiff who was injured whole as best a money award can accomplish that. Punitive damages on the other hand are intended to punish the defendant whose conduct is sufficiently culpable and deter others from acting in a similar manner. Because punitive damages are measured by the particulars of each defendant's conduct, the defendant argues that

joint liability, necessary to support a contribution action, cannot be established for these exemplary damages under Oregon law, relying on Shin v. Sunriver Prepatory School Inc., 199 Or. App. 352, 111 P.3d 762 (2005) and Andino v. Tamarack Steakhouse and Saloon, LLC, 2005 WL 1182362 (9th Cir. 2005).

These cases do not address the situation before this court. Shin was a case where a former international student sued a private boarding school for negligently failing to supervise the student while her father visited resulting in the father raping and sexually abusing the student. At trial before a jury, the school sought to have the jury apportion fault for the injuries sustained by the plaintiff between it (based on claims of negligence) and the father (based on alleged intentional torts in the third party complaint). The trial court found that the comparative fault statute did not allow such a comparison of intentional fault with negligent fault. On appeal, the Court of Appeals affirmed noting that:

> "***From what we glean that 'fault' as used in the 1975 amendments-now codified at ORS 30.600 and ORS 30.605-includes 'tortious conduct, however described, in which contributory negligence is an appropriate defense.' [citation omitted] Before the adoption of comparative fault, contributory negligence was not a defense to willful or intentional misconduct. [citations omitted] Accordingly, intentional misconduct is not 'fault' subject to apportionment within the meaning of ORS 30.600 and 30.605."

Shin, 199 Or. App. at 376.

The Shin case involved the intentional torts of the father. The father had been joined by Sunriver Prep as a third party defendant. The reported opinion never mentions what tort theory was alleged to create the father's liability, but it is clear the

court of appeals treated it as an intentional tort. Indeed, when the court summarized its holding it abandoned the needlessly broad language about willful conduct cited above and said "***ORS 31.600 [sic, presumably the court meant ORS 30.600 as it cited to earlier] and related statutes do not encompass intentional conduct to which contributory negligence was not a defense." Shin, 199 Or. App. at 379.

Oregon case law has an interesting wrinkle with respect to intentional torts. It takes the position that some intentional torts include an element of subjective intent to harm the victim, while other intentional torts, such as battery, do not. Indeed, one case noted that battery, while an intentional tort, has a lesser included tort of negligently inflicted injury. See, Ledford v. Gutoski, 319 Or. 397, 405, 877 P.2d 80 (1994):

> "The subjective intent of the defendant is an element of malicious prosecution. That is not the case with respect to some other intentional torts, such as battery, as to which this court has concluded that the inference of an intent to cause harm does not apply. Those other intentional torts have 'lesser included torts,' such as negligence, under which liability may be imposed for similar conduct without any subjective intent to cause harm."

While Shin does not identify the tort alleged against the father, the court of appeals presumably found it embodied a subjective intent to harm such that a lesser included tort such as negligence would not support liability that could be apportioned. Absent from the Shin case is any discussion of apportioning damages. It is a case that addresses apportioning fault. The subject of punitive damages is not present in Shin's discussion of apportioning fault.

That being said, taking Shin literally for the moment, the question is whether willful and wanton misconduct or any conduct leading to liability for punitive damages was subject to a defense of contributory negligence before the adoption of comparative fault. In Blunt v Bocci et al, 74 Or. App. 697 , 704 P.2d 534 (1985), a motorist injured in an auto accident sued the estate of the deceased driver of the other car and the club that allegedly served him alcohol when he was visibly intoxicated. The successful plaintiff recovered punitive damages against the club.

In Grady v. Cedar Side Inn, Inc, 330 Or. 42, 997 P.2d 197 (2000), a passenger injured in an auto accident sued his own driver and the convenience store that had sold both the plaintiff and his driver alcohol when the driver was visibly intoxicated. The store argued on appeal that plaintiff, being complicit in the drinking, was barred from having any claim for his injuries. The Supreme Court noted this was a case of first impression in Oregon. It found that to bar the claim outright as suggested by the defendant would reestablish contributory negligence as a defense which the legislature had abolished. The court went on to say that the complicity of the plaintiff was properly treated under Oregon's comparative fault scheme as fault for the jury to apportion between the plaintiff and the defendant. Grady, 330 Or. at 46-7.

Assuming without deciding that the Oregon Supreme Court would follow the Court of Appeals decision in Shin, and reading Grady and Blunt together, it appears the Supreme Court would not extend the holding that fault cannot be apportioned between intentional torts and negligence to all situations involving liability for punitive damages. Since the Supreme Court is aware that punitive damages

are recoverable in cases like Blunt where an establishment serves a visibly intoxicated person who later injures a third party, and yet any fault of the injured plaintiff can be compared to the fault of the establishment under Grady , the implication seems clear that some damages can be apportioned according to fault between the defendant who may be liable for punitive damages and the plaintiff who is guilty of only simple negligence. While I acknowledge the Grady and Blunt decisions do not address directly the apportionment of punitive damages, neither did Shin. So the question of an apportionment for fault leading to liability for punitive damages remains after these cases.

I note also the opinion in Sandford v. Chevrolet Division of General Motors, 292 Or. 590, 642 P.2d 624 (1982). While it is an opinion many might rather forget, it does decide an issue of some significance here. It did hold that in a products liability claim against a manufacturer of an allegedly defective product, the injured plaintiff is subject to a defense of comparative fault. The number of cases where a strict product liability plaintiff received an award of punitive damages against a manufacturer are too numerous to cite.

The court has found a case that does address the question of comparing fault of an injured plaintiff with that of a defendant and differentiates between compensatory damages and punitive damages. Waddill v. Anchor Hocking, Inc., 175 Or. App. 294 (2001), involved a plaintiff who received a verdict assigning 25% fault to plaintiff and 75% fault to defendant. Compensatory damages were found to be $134,472 and punitive damages were set at $1,000,000. Judgment was entered after reducing the compensatory damages by 25%

with no reduction in the punitive damages in the sum of $1,100,854. On appeal the defendant argued the punitive damages should have been reduced by 25% as well.

In rejecting defendant's argument, the court of appeals noted that there is a different purpose for compensatory damages and punitive damages, as well as a different basis of liability for them. Compensatory damages are intended to compensate the plaintiff for that portion of his or her damages caused by defendant's conduct in order to make the plaintiff whole. Punitive damages on the other hand are not intended to compensate the plaintiff, but rather to punish the defendant for particularly egregious conduct and to deter others form engaging in that conduct. The court found no basis for reducing the punitive damages by the percentage of plaintiff's fault because plaintiff's fault did not cause the defendant's conduct to which the punitive damages are intended to respond.

Turning back to the opinion and order granting the summary judgment to plaintiffs on the fifth affirmative defense related to a failure to apportion the punitive damages from the compensatory damages in the Davidson settlement, all the evidence supported but one conclusion. There were no punitive damages paid to obtain that release. Indeed, looking at the record of this case one finds the declaration of J. Michael Alexander, one of the attorney's representing the Davidsons. [dkt#135. filed April 3, 2009]. There he explains why the settlement never contemplated any amount for punitive damages, but only included compensatory damages.

> "5. The claim for compensatory damages in this case was fully supported by the evidence. Indeed, as noted above, the survivors suffered serious burns and had

> significant economic damages. In addition, part of their own recoverable non-economic damages related to the emotional trauma suffered by the parents and their son.
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> The parents had properly seat belted their children in the vehicle. Then, after this fire suddenly erupted in the vehicle they were able to exit, both of them on fire themselves. They then tried to rescue their two younger children who could not get out of their seatbelts. The parents were forced to watch while their children burned to death in front of their eyes. There were five seasoned lawyers working on behalf of the plaintiffs. I don't think that any of us had ever encountered a more compelling case for the recovery of non-economic damages. We felt a recovery of non-economic damages in excess of $50 million was certainly possible if not probable.
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> ***There was never any consideration for allocating any part of the settlement for punitive damages. Indeed, the settlement itself *** contemplated that all payments were on account of personal injury, and did not include punitive damages. Had Arch tried to allocate any amount as payment for punitive damages, which did not occur, we would have demanded a much greater settlement. As it was the settlement reached was a substantial compromise of the economic and non-economic damages that were not only claimed but that could have been recovered if it were a Plaintiff's verdict."

Declaration of J. Michael Alexander [dkt#135] pages 3-4.

As I was preparing this written opinion I had occasion to listen to the description of the fire by Mrs. Hibdon, a witness who immediately came upon the scene. Her account, given nearly 9 years after this fire was chilling. She described the horrible scene presented to the mother and father, on fire themselves, and forced to endure the holocaust-like scene of their youngest children dying a painful, unimaginable death, which is no doubt seared into their memories. This certainly supports Mr. Alexander's declaration about the damages recoverable and the substantial compromise made to settle those claims. However, even without this testimony of Mrs. Hibdon, no reasonable inference of a payment of punitive

damages in this settlement can be made from this record.

The case of Patton v. Target Corp., 349 Or. 230, 242 P.3d 611 (2010) is relevant to this discussion as well. The case involved a wrongful discharge case that went to trial in our court. A verdict was returned for compensatory damages and punitive damages against the employer. Post verdict and prior to entry of any judgment the parties entered a settlement which called for a stipulated judgment dismissing the case. It was undisputed that the settlement did not include any payment for punitive damages. While defendant RSC here contends there must have been punitive damages in the Davidson settlement, there was no evidence to support that position on summary judgment and none offered now. It remains undisputed that no punitive damages were paid to the Davidsons. While the Patton case largely involved statutory construction issues, it clearly depends in part on the freedom of the parties to contract for the release of claims and payment of damages as they choose to characterize the payments. In Patton the State of Oregon lost its potential claim to 60% of the $900,000.00 in punitive damages awarded by a jury's verdict, but which evaporated with the settlement before it was reduced to judgment. The Supreme Court characterized the State as having at most an economic expectancy. If parties are free to contractually agree to settle in this situation and allocate nothing to punitive damages, surely they can do so before the injured party goes to trial or obtains a verdict for any damages, compensatory or punitive. The defendant who settles not only buys its peace with the plaintiff, but avoids the possibility that it may not be able to recover contribution for the punitive damages from other released

tortfeasors. The defendant in RSC's position must surely have less than an economic expectancy and more like an evanescent hope it could avoid contribution for punitive damages that were never addressed, much less assessed by a jury, and reduced to judgment.

For all these reasons, I adhere to my opinion and order [dkt#387] and extend it to dismiss the sixth affirmative defense. Only compensatory damages were paid under the settlement with the Davidsons. Compensatory damages are subject to a contribution claim in Oregon. There is no distinction between the compensatory damages recoverable for negligence, or any other level of culpability. Compensatory damages are measured not by the conduct of the defendant, but by the injuries of the plaintiff. While I can understand the argument that punitive damages are measured by the conduct of the defendant and liability for conduct subjectively intended to harm should not be able to be compared with simple negligence, even if the Supreme Court of Oregon were to adopt that view, it has no application here where there was no payment of any amount for punitive damages.

IT IS SO ORDERED,

Dated this 11th day of February, 2011.

/s/ Dennis J. Hubel

Dennis James Hubel
United States Magistrate Judge