

IN THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA  
FIFTH DISTRICT

NOT FINAL UNTIL TIME EXPIRES TO  
FILE MOTION FOR REHEARING AND  
DISPOSITION THEREOF IF FILED

CORY McKINNEY AND McQUEEN  
MEMBERSHIP GROUP, LLC,

Appellants/Cross-Appellees,

v.

Case No. 5D18-3265

MICAH GRAHAM,

Appellee/Cross-Appellant.

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Opinion filed February 12, 2021

Appeal from the Circuit Court  
for Orange County,  
Bob Leblanc, Judge.

Peter D. Webster, Carlton Fields,  
Tallahassee, and Paul. L. Nettleton and  
Jeffrey A. Cohen, of Carlton Fields, Miami,  
for Appellants/Cross-Appellees.

Christopher V. Carlyle and John N.  
Bogdanoff, of The Carlyle Appellate Law  
Firm, Orlando, for Appellee/Cross-  
Appellant.

PER CURIAM.

Cory McKinney and McQueen Membership Group, LLC (“McQueen”) (collectively,  
“Appellants”) appeal the final judgment in favor of the plaintiff, Micah Graham.

Graham was stopped at a red light when he was rear-ended by McKinney.  
Thereafter, Graham instituted negligence actions against McKinney and McQueen, who

was the entity that owned the vehicle. Because McKinney was intoxicated at the time of the accident, Graham sought punitive damages against him.

Before trial, Appellants stipulated that McKinney was liable for causing the accident and that McQueen was vicariously liable.<sup>1</sup> McKinney agreed that if the jury awarded compensatory damages to Graham, Graham would be entitled to punitive damages. Appellants then moved to bifurcate the trial and exclude evidence of McKinney's intoxication during the compensatory damages phase of the trial, at which the jury would determine whether the accident caused Graham's injuries and, if so, the extent of those injuries.

The trial court agreed to bifurcate the trial but declined to exclude evidence of intoxication in the compensatory phase. Graham seized upon that opportunity, addressing McKinney's intoxication in both his opening statement and closing argument, and presenting evidence on that issue. While eager to present such argument and evidence, Graham paradoxically informed the jury that such information was irrelevant to their determination of compensatory damages. In addition, the trial court instructed the jury that McKinney was impaired and provided his blood alcohol level, which was substantially higher than the legal limit.

During trial, Graham presented several medical experts, including Dr. Sean Mahan and Dr. Robert Massan. Appellants sought to cross-examine Dr. Mahan on his alleged personal friendship with Graham's counsel, but the trial court limited such inquiry to

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<sup>1</sup> Appellants also withdrew claims of comparative and contributory negligence.

whether the two were personal friends and how long their relationship had existed.<sup>2</sup> Similarly, Appellants sought to read portions of Dr. Massan's deposition to the jury, where he refused to answer questions related to his relationship with Graham's counsel. The trial court's rationale for denying Appellants' request was that their designations for the deposition were untimely, despite Graham having filed his initial designations the day before trial.

The jury found that McKinney's admitted negligence caused Graham's injuries and awarded \$2,630,226.91 in compensatory damages. At Graham's request, and despite Appellants' earlier concession, the trial court submitted the question of Graham's entitlement to punitive damages to the jury. That question was answered in the affirmative. The trial court then conducted the second phase of trial to determine the amount of punitive damages, after which the jury rendered a verdict awarding Graham \$15,000.

On appeal, Appellants raise two issues. They allege error in the trial court's decision to allow the introduction of McKinney's intoxication despite the pre-trial concession as to both liability and punitive damages. Next, Appellants allege error in the trial court's limitation on their cross-examination of the two medical experts as to the extent of their relationship with Graham's counsel.

The Florida Supreme Court has determined that bifurcation is proper when both compensatory and punitive damages are at issue. W.R. Grace & Company-Conn. v. Waters, 638 So. 2d 502 (Fla. 1994). Grace was an asbestos case, and the primary issue

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<sup>2</sup> Proffered testimony indicated, among other things, that Dr. Mahan socialized with Graham's counsel and had been a groomsman in his wedding.

involved the imposition of multiple punitive damage awards in the mass tort litigation context. 638 So. 2d at 504. Secondly, the court developed a procedure to be used in such cases. Id. at 506. Under the described procedure, the jury, in the first phase, should hear evidence related to liability for actual damages, the amount of actual damages, and liability for punitive damages. Id. In the second phase, the same jury should hear evidence as to the amount of punitive damages. Id. The court reasoned that without the dual phases, defendants would be prejudiced because the plaintiff could present evidence of the defendant's net worth when liability for punitive damages had not yet been determined. Id. Grace neither contemplated nor addressed the circumstances presented in the instant case where the defense stipulates to both negligence and liability to punitive damages.

The issue of the introduction of evidence of intoxication despite its pretrial concession has been addressed in recent years by a number of courts. In Swanson v. Robles, 128 So. 3d 915 (Fla. 2d DCA 2013), the trial court allowed the plaintiff to introduce evidence of Swanson's drug use in the compensatory phase of the trial when liability for compensatory and punitive damages had been conceded. Similar to the instant case, the action arose out of an automobile accident. The Second District reversed, holding: "When a defendant admits liability in an automobile negligence case and the only remaining issue is the amount of compensatory damages, evidence regarding the defendant's sobriety should not be admitted into evidence." Swanson, 128 So. 3d at 917 (citations omitted). The Swanson court noted that "[t]here was no reason to admit evidence of his drug use in a bifurcated first phase other than to inflame the jury and increase the compensatory damages verdict." Id. at 918–19.

This issue was again addressed in GEICO General Insurance Co. v. Dixon, 209 So. 3d 77 (Fla. 3d DCA 2017). Before trial, GEICO and the uninsured motorist admitted liability, and the trial court ordered that the plaintiff was entitled to recover an award of punitive damages in an amount to be determined in the second phase of the proceedings. Dixon, 209 So. 3d at 79. As in the instant case, the trial court in Dixon informed the jury at the outset of the compensatory phase that the motorist had been driving under the influence at the time of the accident, and the plaintiff presented evidence of the motorist's intoxication. Id. at 79. The Third District ruled that "[i]n an automobile negligence case, when the defendant admits liability regarding the cause of the accident, evidence of the defendant's sobriety is irrelevant and prejudicial." Id. at 81 (citing Swanson, 128 So. 3d at 917–18; other citations omitted). As a result, it found that the trial court abused its discretion in allowing evidence of the motorist's intoxication and ordered a new trial on compensatory damages. Id.

The closest this Court has come to addressing this issue was in St. Paul Mercury Insurance Co. v. Coucher, 837 So. 2d 483 (Fla. 5th DCA 2002). Both St. Paul and the underinsured driver of the vehicle admitted that the driver caused the car accident while intoxicated, and the driver conceded the plaintiff's entitlement to punitive damages. Coucher, 837 So. 2d at 485. St. Paul sought to prohibit any evidence of the driver's intoxication, arguing that such evidence would be prejudicial and lead to an excessive compensatory damages award. Id. That request was denied, and in its statement of the case, the trial court informed the jury that St. Paul and the driver had admitted liability and that the driver was intoxicated at the time of the accident. Id. After the first witness

testified, the amount of punitive damages was settled. Id. No evidence of intoxication was presented nor was there any mention of intoxication thereafter. Id. at 485–86.

While much of the Coucher opinion revolved around the pleading of affirmative defenses, this Court went on to address whether the trial court had abused its discretion in denying St. Paul's motion to bifurcate the compensatory and punitive damage claims. Id. at 488. St. Paul had requested that the compensatory and punitive damage claims be heard by two different juries. Id. The Coucher court, relying upon Grace, affirmed the trial court's ruling, stating:

The trial court followed the bifurcation protocol established by the Florida Supreme Court in [Grace]. In Grace, the supreme court held that when there is a claim for punitive damages in a negligence action, the jury should hear evidence on negligence, compensatory damages, and liability for punitive damages in phase one, and then the same jury should determine the amount of punitive damages in phase two. Bifurcating in this manner will always result in a jury being questioned about, and hearing evidence of, alleged willful and wanton conduct in the same phase of the trial in which the jury is required to assess compensatory damages.

Id.

We find Coucher distinguishable. While the trial court advised the jury of the driver's intoxication as a part of its statement of the case, importantly, no evidence or mention of intoxication was made during the course of the trial.<sup>3</sup> Although we acknowledge the language in Coucher is broad enough to encompass the issue presented in the instant case, that language is dicta. Notably, neither the Second District in Swanson, nor the Third District in Dixon, felt it necessary to either cite to, distinguish, or certify conflict with Coucher. To the extent Coucher is read to allow the presentation of

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<sup>3</sup> Additionally, juries are instructed to decide the case solely on the evidence presented during the course of the trial. See Fla. Std. Jury Instr. (Civ.) 201.2.

intoxication evidence in the compensatory phase of a bifurcated trial when liability and entitlement to punitive damages are conceded, it is of no precedential value.<sup>4</sup> We align ourselves with the Second and Third District Courts of Appeal in holding that under such circumstances, it is an abuse of discretion to allow such evidence.

The lack of relevancy and the substantial prejudicial impact of such evidence was not lost on Graham. While wasting no opportunity to put McKinney's intoxication before the jury, Graham was sure to then explain why, as jurors, they should ignore that evidence when deciding compensatory damages. One of the first references was during voir dire:

So let's say, for example, a truck carrying a very valuable vase was in that truck. And as a result of being rear-ended, that vase either broke or it did not break. But if it broke, the compensation to replace that vase is not made more valuable just because of the reason why the person was rear-ended.

....

So you're not to consider the conduct as to why the accident happened in determining, what is the value of this broken vase? [sic]

However, Graham did not stop there; he revisited the theme throughout the compensatory phase of the trial, starting with the very first portion of his opening statement through virtually the last argument made to the jury. Those repeated references clearly evince an intentional strategy on behalf of Graham. Such strategy is precisely why courts have excluded intoxication evidence until the jury is called upon to consider such conduct in assessing the amount of punitive damages.

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<sup>4</sup> See State ex rel. Biscayne Kennel Club v. Bd. of Bus. Reg., 276 So. 2d 823, 826 (Fla. 1973) (recognizing that statement in district court of appeal opinion that was not essential to opinion is obiter dictum and without force as precedent).

Accordingly, we find the trial court erred in allowing presentation of McKinney's intoxication and remand for a new trial. Because we are ordering a new trial, since it is likely to recur, we find it appropriate to address the trial court's limitation on the cross-examination of Graham's medical experts.

The trial court did not allow the presentation of answers given by Dr. Massan during deposition because of an untimely counter-designation of those portions of the deposition testimony. However, the reason for the untimely designation was that Graham waited until the day before trial to make his initial designations of Dr. Massan's deposition. The defense made its counter-designations immediately thereafter, and despite the trial court acknowledging that Graham's delay placed the defense at a disadvantage, it denied the opportunity to allow presentation of the additional portions of the deposition. We find that the defense should be allowed to do so on retrial.

Likewise, the defense should be allowed to inquire into the extent of the relationship between Dr. Mahan and Graham's counsel. If counsel elects to retain personal friends as experts, that relationship is relevant to issues of bias. See Philip Morris USA, Inc. v. Chadwell, 36 So. 3d 174 (Fla. 3d DCA 2020) (recognizing that counsel has wide latitude in cross-examining adverse witness to show bias).

REVERSED; REMANDED FOR NEW TRIAL.

LAMBERT and HARRIS, JJ, concur.  
COHEN, J., concurs specially, with opinion.

COHEN, J., concurring specially.

I fully concur in the majority opinion and write to suggest that despite the decisions in Swanson, Dixon, and this case, the same issue of prejudice potentially remains and, in many cases, will not be eliminated under the current process of bifurcation. As long as the compensatory and punitive damage claims are tried before the same jury, the issue of intoxication will potentially be broached during voir dire to ascertain prospective jurors' attitudes in relation to the award of punitive damages. The same strategies utilized during this trial will be used to ensure the prospective jurors are well aware of the issue. By the conclusion of voir dire, most, if not all, of the jurors will no doubt assume that the defendant driver was impaired at the time of the accident. While, as the majority notes, jurors are instructed to decide the case based only upon the evidence received during the course of the trial, there is no way to ensure that occurs.

In my view, this difficulty is the result of applying Grace, a mass tort case, to cases arising out of negligent automobile accidents. Grace was a manufacturer of asbestos-containing products and was sued by Waters and his wife, alleging that its product caused him to suffer from pulmonary asbestosis. Grace, 638 So. 2d at 503. The primary issue in the appeal before the supreme court was whether Grace could be subject to punitive damages when such damages had been previously awarded for the same course of conduct.<sup>5</sup> Id. at 503. Additionally, Grace challenged the imposition of punitive damages on constitutional grounds. Id. at 505. The court declined to reach the latter issue because

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<sup>5</sup> Grace claimed to have stopped manufacturing asbestos-based products over twenty years earlier.

the claim for punitive damages had been struck before trial, and thus no award was entered. Id. at 505–06.

The supreme court did address whether the jury could be informed of the defendant's net worth or that punitive damages had been awarded in prior cases. Id. The intermediate appellate court suggested that Grace could use the fact that it had previously been assessed punitive damages as mitigation before the jury, although the supreme court believed that doing so would actually prejudice Grace. Id. at 506. Recognizing that the then-standard procedure placed defendants like Grace at a disadvantage, the court announced a new procedure to be followed in such cases, which bifurcated the amount of punitive damages from the remaining issues at trial. Id. While the lawyers could still inquire about a juror's view on the award of punitive damages, discussion of such prejudicial topics like net worth and prior awards of punitive damages would be inappropriate. Id. Cases are not intended to be tried during voir dire.

The dissent in Coucher made a persuasive argument that Grace did not control because "it dealt with bifurcation of the determination of punitive damages from the remaining issues at trial where only the defendant wrongdoer was sued." Coucher, 837 So. 2d at 490 (Cobb, J., dissenting). Grace was not intended for and simply does not work in the instant case. The underlying goal in Grace was to eliminate, not countenance, the interjection of prejudicial evidence and issues into the trial of a compensatory damages claim.

There are two potential ways to avoid interjecting the issue of a defendant's intoxication into the compensatory phase when liability and entitlement to punitive damages have been conceded. Either the parties agree not to interject the issue of the

defendant's intoxication into the voir dire process, or the compensatory and punitive damage claims should be tried before separate juries. If separate trials are not conducted, it will be critical for trial judges to perform their function as the gatekeepers and not allow voir dire to be used in a manner to circumvent the decisions in this line of cases.