

PUNITIVE DAMAGE DEVELOPMENTS

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PUNITIVE DAMAGE DEVELOPMENTS

Exemplary damages are always a hot button issue because these awards can be very large, costly and are prone to being favorites of the media, damaging a defendant's reputation. Texas courts have addressed the issue of exemplary damages several times over the past year. In particular, courts have wrestled with the burden of proof needed for an award of exemplary damages. Courts have also analyzed how parties must plead exemplary damages before being allowed to recover them. Constitutionality arguments have been addressed, and courts have examined the effect that statutory exemplary damage caps have on jury awards along with their method of calculation. Below is a summary of the latest developments in the recovery of exemplary damages under Texas law.

I. EVIDENTIARY ISSUES

The Court in *Lambert* discussed the evidentiary procedure for Defendants attempting to argue that a punitive award was excessive.¹ *Lambert* involved a suit by the husband's ex-wife claiming intentional infliction of emotional distress.² The trial court awarded \$100,000.00 in exemplary damages to the wife.³

The husband challenged the award's amount relying on an inventory that he filed during the divorce proceedings. He argued that his net worth had declined to \$176,147.32.⁴ The Court, however, did not accept his argument because none of the net worth evidence was presented during the

trial where the exemplary damages were awarded.⁵ The Court drove home the point that during trial a defendant needs to present all evidence relevant to the award of exemplary damages, otherwise it will be waived when the judgment goes to appeal.

On a similar issue, a court has held that the plaintiff is not required to present any evidence during trial regarding the specific amount of exemplary damages.⁶ The Court in *Hyde-Way, Inc.* held that evidence concerning a proper amount of exemplary damages is not among the six statutory factors enumerated in Chapter 41 of the Civil Practice and Remedies Code that jurors must consider.⁷ In fact, even if there is an absence of evidence about one of the six statutory factors it does not render an exemplary award invalid.⁸

In the *Ruttiger* case, the Court analyzed the evidentiary standards for proving that an insurance company knowingly committed an Insurance Code violation.⁹ It is important to note that this case was recently argued in front of the Texas Supreme Court on April 14, 2010.¹⁰ The Texas Insurance Code only allows extra-contractual damages if the insurer knew its actions were false, deceptive or unfair.¹¹ The Court reviewed the legal sufficiency of the evidence to support the jury's finding that the defendant insurance

¹ *Lambert v. Lambert*, 2009 Tex. App. LEXIS 4007 (Tex. App.- Dallas 2009)

² *Id.* at *1.

³ *Id.*

⁴ *Id.*

⁵ *Id.*

⁶ *Hyde-Way, Inc. v. Davis*, 2009 Tex. App. LEXIS 6299 (Tex. App.- Ft. Worth 2009).

⁷ *Id.* at *45-46.

⁸ *Id.*

⁹ *Texas Mutual Insurance Company v. Ruttiger*, 265 S.W.3d 651 (Tex. App.- Houston [1st] 2008).

¹⁰ Texas Supreme Court Cause No. 08-0751, *Texas Mutual Insurance Company v. Ruttiger*.

¹¹ *Ruttiger*, *supra* note 9, at 667.

company knowingly violated the Insurance Code.¹²

Most notable among the evidence was: (1) the insurance company deliberately refused to speak with the insured regarding the insured's version of the story; (2) the insurance company made little effort to contact the treating doctors prior to disputing the claim; and (3) the evidence the insurance company relied on to deny the insured's claim was an unverified rumor.¹³ The Court upheld the jury's finding that the defendant knowingly violated the Texas Insurance Code.¹⁴ In making its decision, the Court believed that the jury could have reasonably concluded that the insurance company knowingly failed to attempt in good faith to effectuate a settlement of the claim with respect to which its liability had become reasonably clear, and it had refused to pay a claim without conducting a reasonable investigation.¹⁵ It remains to be seen whether the Texas Supreme Court will alter this decision.

II. PLEADING ISSUES

The most significant development in the area of pleading requirements occurred when Houston's 14th District Court of Appeals clarified that the Workers' Compensation Act did not create an independent cause of action for exemplary damages.¹⁶ *Sbrusch v. Dow Chem. Co.*, a Texas federal district court case, suggested that the Act created an independent cause of action for exemplary damages.¹⁷ This

reasoning was based on *Wright*, a Texas Supreme Court case, where the issue was whether a workers' compensation claimant was precluded from recovering exemplary damages in the absence of a jury finding on the amount of actual damages.¹⁸ The Court decided that a plaintiff in a workers' compensation case cannot recover actual damages and, therefore, it is a waste of the jury's time to require a finding of an amount of actual damages.¹⁹ However, the *Ross* Court stated that the *Wright* Court did not hold that the Workers' Compensation Act created an independent cause of action for exemplary damages.²⁰

In making its decision, the *Ross* Court overruled *Perez v. Todd Shipyards Corp.*²¹ Appellants argued that *Perez* created an independent, non-derivative cause of action for exemplary damages.²² However, the Court held that *Perez* was unsupported and an unsustainable departure from precedent.²³ The Court overruled *Perez* in an effort to obtain uniformity in its decisions.²⁴ Essentially, the Court relied on the statute's plain meaning.²⁵ The Labor Code states, "it does not prohibit the recovery of exemplary damages"²⁶ The plain meaning is that it does not prohibit exemplary damages, but the language falls short of creating an independent cause of action.²⁷

¹² *Id.* at 666-668.

¹³ *Id.* at 668.

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ *Ross v. Union Carbide Corporation*, 296 S.W.3d 206, 216-17 (Tex.App.- Houston[14th] 2009).

¹⁷ *Sbrusch v. Dow Chem. Co.*, 124 F.Supp.2d 1090, 1092 (S.D. Tex. 2000).

¹⁸ *Wright v. Gifford-Hill & Co.*, 725 S.W.2d 712, 713-14 (Tex. 1987).

¹⁹ *Id.*

²⁰ *Ross*, *supra* note 16, at 216-17.

²¹ *Id.* at 216.

²² *Id.* at 214.

²³ *Id.* at 216.

²⁴ *Id.*

²⁵ *Id.* at 214.

²⁶ *Id.*; TEX. LAB. CODE § 408.001(b).

²⁷ *Ross*, *supra* note 16, at 214.

The Court in *Marin* addressed the issue of whether a Plaintiff must affirmatively plead that they will attempt to “bust” the statutory exemplary damages cap.²⁸ Chapter 41’s exemplary damages cap can be exceeded for certain kinds of enumerated conduct such as forgery or certain types of fraudulent conduct.²⁹ The Defendant in *Marin* argued that the Plaintiff was required to specifically plead the intent to exceed the limit on exemplary damages imposed by Chapter 41.³⁰ The Court acknowledged that other cases have held that the cap is an affirmative defense and must be specifically pleaded by the Defendant.³¹ However, there is no authority requiring the Plaintiff to specifically plead any intention to “bust the cap.”³² The Court declined to create a new pleading requirement in exemplary damages cases.³³

III. CONSTITUTIONALITY

Again in *Lambert*, the Court took on the constitutionality of exemplary damages.³⁴ The Due Process Clause of the Fourteenth Amendment prohibits the imposition of grossly excessive or arbitrary punishments on a tortfeasor.³⁵ The Courts analyze three guideposts when addressing exemplary damages: (1) the degree of reprehensibility of the defendant’s misconduct, (2) the disparity between the actual or potential harm suffered by the plaintiff and the size of the award, and (3)

the difference between the award and the civil penalties authorized or imposed in comparable cases.³⁶

The Court re-iterated that the first guidepost is the most important.³⁷ Courts will consider such matters as whether the harm was physical or merely economic, whether there was reckless disregard for the health and safety of others and whether the conduct was an isolated incident or was a series of repeated actions.³⁸ Courts will also take into account whether the conduct involves malice or deceit.³⁹ In *Lambert* the Court considered the intentional infliction of emotional distress caused by the husband’s burglary of the ex-wife’s home as physical harm.⁴⁰ Further, the husband’s burglary was certainly done with malice and was intentional conduct.⁴¹ Among the items stolen during the burglary were family photographs and videos of high sentimental value.⁴² The husband left notes including one that accused his ex-wife of being a liar.⁴³ The key to the gun safe was stolen and a door lock was tampered with to make it appear as though it was still effective when in fact it was not.⁴⁴ The Court concluded that such conduct was reprehensible enough.⁴⁵

When the Court analyzed the second guidepost, it looked at the ratio of the exemplary award to the actual damage award.⁴⁶ The trial court originally awarded

²⁸ *Marin v. IESI TX Corp.*, 2010 Tex. App. LEXIS 981 *43-44 (Tex. App.- Houston [1st] 2010).

²⁹ *Id.* at *38; TEX. CIV. PRAC. REM. CODE § 41.008(c).

³⁰ *Marin*, *supra* note 20, at * 43-44.

³¹ *Id.* at *44.

³² *Id.* at *46.

³³ *Id.* at *44.

³⁴ *Lambert*, *supra* note 1, at *20.

³⁵ *Id.* at 20; *see also State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 416 (2003).

³⁶ *Id.*

³⁷ *Lambert*, *supra* note 1, at *20.

³⁸ *Id.*

³⁹ *Id.*

⁴⁰ *Id.*

⁴¹ *Id.*

⁴² *Id.* at *17.

⁴³ *Id.*

⁴⁴ *Id.* at *17-18.

⁴⁵ *Id.* at *20.

⁴⁶ *Id.* at *22.

\$31,132.57 in actual damages and \$200,000.00 in exemplary damages.⁴⁷ However, the trial court amended its judgment to \$100,000.00 in exemplary damages and \$131,132.57 in actual damages.⁴⁸ The Defendant argued that the appeals court should look at the original finding by the trial court when determining the acceptable ratio for exemplary damages.⁴⁹ The appeals court disagreed and affirmed that the trial court can amend the judgment freely during its plenary power.⁵⁰ Because of this reasoning, the exemplary damages were actually lower than the actual damages and completely acceptable.⁵¹

The Court concluded that the exemplary award was not alarming with regard to the third guidepost, the difference between the award and civil penalties.⁵² One important note is that the Court stated it will take into account the exemplary damages cap under Chapter 41 of the Civil Practice and Remedies Code when addressing the third guidepost.⁵³

The Court also addressed the constitutionality of the uninsured/underinsured motorist (“UM”) prohibition against coverage of exemplary damages against a third party tortfeasor.⁵⁴ The insured in *Laine* argued that her inability to recover exemplary damages under the UM policy violated her right to equal protection under the Texas Constitution because other similarly situated claimants could collect

under an insured tortfeasor’s policy.⁵⁵ The Texas Supreme Court, however, reasoned that the purpose of exemplary damages, punishing wrongdoers, may not be achieved by penalizing those who obtain the insurance required by law for the wrongful acts of those who do not.⁵⁶

Regardless of whether an insured’s policy grants coverage of exemplary damages assessed against a third party tortfeasor, Texas public policy prohibits it.⁵⁷ Neither deterrence of wrongful conduct nor punishment of the wrongdoer is achieved by imposing an obligation on the insurance carrier to cover exemplary damages.⁵⁸ The punishment sought through exemplary damages must be directed at the wrongdoer.⁵⁹ By requiring UM coverage, the Texas Legislature ensured that persons injured by uninsured motorists would be compensated for their actual injuries.⁶⁰

IV. CALCULATION

When calculating punitive damages with the Civil Practice and Remedies Code Chapter 41 cap, the Court will take into account any portion of the judgment that is reversed on appeal.⁶¹ The *In Re Columbia Medical Center of Las Colinas* decision articulated this principle.⁶² During the case, a portion of the trial court’s award was vacated on appeal and the defendant attempted to render payment after recalculating the payment of exemplary

⁴⁷ *Id.*

⁴⁸ *Id.*

⁴⁹ *Id.*

⁵⁰ *Id.*

⁵¹ *Id.*

⁵² *Id.* at *23.

⁵³ *Id.*

⁵⁴ *Laine v. Farmers Insurance Exch.*, 2010 Tex. App. LEXIS 768 (Tex. App.- Houston [1st] 2010).

⁵⁵ *Id.* at *14.

⁵⁶ *Id.*

⁵⁷ *Id.* at *10.

⁵⁸ *Id.* at *14.

⁵⁹ *Id.*

⁶⁰ *Id.* at *14-15.

⁶¹ *In Re Columbia Medical Center of Las Colinas*, 2010 Tex. LEXIS 208 *5 (Tex. 2010).

⁶² *Id.*

damages.⁶³ The plaintiff, however, refused payment.⁶⁴

Without taking into account the vacated judgment, the punitive award would exceed two times the economic damages awarded.⁶⁵ The Texas Supreme Court declared that the trial court must give effect to statutory caps on damages when the parties raise the issue, and give full effect to the judgment vacating a portion of the economic damages.⁶⁶ The trial court was forced to reduce the punitive damages award in compliance with the statutory cap.⁶⁷

The Court in *Centocor, Inc.*, addressed issues concerning multiple Defendants and situations involving comparative liability. The Court gave the following example. A plaintiff is awarded \$100,000 in actual damages but is twenty percent responsible. Defendant A is thirty percent responsible and defendant B is fifty percent responsible. The Court held that exemplary damages are calculated on a per defendant basis.⁶⁸ In other words, in the above scenario the entire actual damages of \$100,000 will be used to calculate the exemplary damages under the statutory cap, disregarding any proportioned responsibility.⁶⁹ The point of this case is that a lesser percentage of responsibility assessed by the trial court will not lower the cap for the defendant on exemplary damages.⁷⁰

To conclude, Texas courts have been active in reviewing exemplary damage awards over the past year. In some areas courts have re-affirmed the existing law, such as disallowing the recovery of exemplary damages under a UM policy, and refusing to alter current pleading standards for plaintiffs with regard to punitive damages. In other areas, courts have cleared up ambiguous decisions and unclear law, such as whether the Texas Labor Code created an independent cause of action for exemplary damages. With regard to evidentiary standards, parties must present all their evidence relevant to exemplary damages at the trial phase, but plaintiffs do not have to set forth evidence as to the specific amount desired.

⁶³ *Id.* at *2-3.

⁶⁴ *Id.*

⁶⁵ *Id.*

⁶⁶ *Id.* at *4-5.

⁶⁷ *Id.*

⁶⁸ *Centocor, Inc. v. Hamilton*, 2010 Tex. App. LEXIS 1623 (Tex. App.- Corpus Christi 2010).

⁶⁹ *Id.* at *123-124.

⁷⁰ *Id.*