SUCCESSFUL DEFENSE OF PUNITIVE DAMAGES

I. Statutory Requirements

Minnesota punitive damages claims are established per statute at MSA 549.191 and 549.20. Per MSA 549.191, upon commencement of civil action the complaint must not seek punitive damages. After filing the lawsuit, a party may make a motion to amend in order to claim punitive damages. MSA 2549.191 also requires that one or more affidavits showing the factual basis for the claim shall be included. A hearing is required, if the court finds prima facie evidence in support of the motion, the court shall grant the moving party permission to amend the pleadings to claim punitive damages. MSA 549.191 provides that the prima facie evidence is established by affidavit.

A. The first line of defense in claims involving punitive damages is the motion to amend. A motion for punitive damages proceeds only after filing the lawsuit. Even with the new filing rules, a lawsuit may proceed without filing for at least one year. Throughout discovery, in a case involving some element of reckless or grossly negligent behavior, the defense attorney should be dealing with any potential punitive damages issues even if liability is clear. For example, in cases involving a Defendant driver's use of alcohol, elements of not only the intoxication but also the nature of the accident itself should be thoroughly explored to defeat any potential affidavits submitted by the Plaintiff in support of punitive damages. Driving conduct may defeat an affidavit presented for purposes of an amendment to include punitive damages. The facts of the accident should be thoroughly investigated to identify for the court the lack of any significant connection between the driving conduct and the intoxication. Often times Plaintiffs rely solely on the fact of intoxication and ignore the accident itself. While MSA 169A.76(a)(1) provides that is sufficient for the trier fact to consider an award of punitive damages if evidence the accident was caused by a driver with an alcohol concentration of .08 or more, MSA 549.19 and 549.20 provides significant discretion with the court. Even with intoxication, arguments do exist that can refute the imposition of punitive damages by the court.

B. 549.20 PUNITIVE DAMAGES

Subdivision 1. **Standard.** (a) Punitive damages shall be allowed in civil actions only upon clear and convincing evidence that the acts of the defendant show deliberate disregard for the rights or safety of others.

(b) A defendant has acted with deliberate disregard for the right or safety of others if the defendant has knowledge of facts or intentionally disregards facts that create a high probability of injury to the rights or safety of others and:

(1) deliberately proceeds to act in conscious or intentional disregard of the high degree of probability of injury to the rights or safety of others; or

(2) deliberately proceeds to act with indifference to the high probability of injury to the rights or safety of others.

Subd. 2. **Master and principal.** Punitive damages can properly be awarded against a maser or principal because of an act done by an agent only if:

(1) the principal authorized the doing and the manner of the act;

(2) the agent was unfit and the principal deliberately disregarded a high probability that the agent was unfit;

(3) the agent was employed in a managerial capacity with authority to establish policy and make planning level decisions for the principal and was acting in the scope of that employment; or

(4) the principal or a managerial agent of the principal, described in clause (3), ratified or approved the act while knowing of its character and probable consequences.

Subd. 3. **Factors.** Any award of punitive damages shall be measured by those factors which justly bear upon the purpose of punitive damages, including the seriousness of hazard to the public arising from the defendant's misconduct, the profitability of the misconduct to the defendant, the duration of the misconduct and any concealment of it, the degree of the defendant's awareness of the hazard and of its excessiveness, the attitude and conduct of the defendant upon discovery of the misconduct, the number and level of employees involved in causing or concealing the misconduct, the financial condition of the defendant, and the total effect of other punishment likely to be imposed upon the defendant as a result of the misconduct, including compensatory and punitive damage awards to the plaintiff and other similarly situated persons, and the severity of any criminal penalty to which the defendant may be subject.

Subd. 4. **Separate proceeding.** In a civil action in which punitive damages are sought, the trier of fact shall, if requested by any of the parties, first determine whether compensatory damages are to the awarded. Evidence of the financial condition of the defendant and other evidence relevant only to punitive damages is not admissible in that proceeding. After a determination has been made, the trier of fact shall, in a separate proceeding, determine whether and in what amount punitive damages will be awarded.

Subd. 5. **Judicial review.** The court shall specifically review the punitive damages award in light of the factors set forth in subdivision 3 and shall make specific findings with respect to them. The appellate court, if any, also shall review the award in light of the factors set forth in that subdivision. Nothing in this section may be construed to restrict either court's authority to limit punitive damages.

In applying the standards under sections 549.191 and 549.20, the Supreme Court of Minnesota has indicated that the procedure is to be more than a "rubber stamp" of the allegations

in the motion papers. In Shetka v. Keppers et al., 454 N.W.2nd 916 (Minn. 1990), the court stated that the judge must ascertain "whether there exists prima facie evidence that the defendants acted with 'willful difference.'" While an amendment to the statute changed willful indifference to deliberate disregard, the evidence supporting punitive damages must be clear and convincing. MacKenzie v. Northern States Power Company, 440 N.W.2nd 183 (Minn.Ct.App. 1989). Minnesota Civ Jig 94.10 sets out the definition of clear and convincing evidence as: "the evidence must convince you that defendant acted with deliberate disregard for the rights or safety of others."

"You must have a firm belief or be convinced there is a high probability that defendant acted this way." Minn. Civ. Jig 94.10.

Accordingly, the arguments made by the defense contesting an amendment for punitive damages should include any factors that exist within the case that can refute the clear and convincing standard.

Minn. Civ. Jig 94.10 sets forth the definition of deliberate disregard:

1. Defendant knew about facts or intentionally ignored facts that created a high probability of injury to the rights or safety or others, and

2. deliberately acted (a) with conscious or intentional disregards, or

(b) with indifference to the high probability of injury to the rights or safety of others.

In order for deliberate disregard to be present, the defendant must know about facts or intentionally ignore facts which create a high probability of injury and with that knowledge deliberately act with conscious or intentional disregard or with indifference to the high probability of injury to the rights or safety of others. This is a high standard which requires knowledge by the defendant. In many cases, such knowledge may be difficult to prove and accordingly defense counsel should attempt to refute such claims by presenting evidence of the defendants lack of knowledge of his condition. While an intoxicated defendant can be shown to know about the dangers of drinking and driving, this is still an element that must be established by plaintiff in his motion to amend. The inability of obtaining that type of admission from defendant by way of deposition testimony or statement can be used in defeating motions to amend for punitive damages. For example, in a case where the defendant has no memory of the accident, or what happened prior to the accident arguably it cannot be shown that the defendant had the knowledge necessary to create a deliberate disregard. Each element of deliberate disregard should be defended during the motion.

Discovery either prior to or subsequent to the motion to amend should also specifically include the factors in subdivision 3 at MSA 549.20 which include the seriousness of the hazard to the public caused by the alleged misconduct, profit made by the defendant, length of time of

the misconduct and any attempt by diffident to hide it, the amount defendant knew about the hazard, the attitude in conduct of defendant when the misconduct was discovered, number and level of employees involved in causing or hiding the misconduct, financial state of defendant and total effect of other punishment likely to be imposed on defendant including compensatory damages. Finally the severity of any criminal penalty must be included as well. All of these factors should be explored in the discovery portion of the case.

In defending your clients in punitive damages cases, these factors should be reviewed prior to their providing testimony or answering questions in interrogatories. Prior to providing testimony, your clients must have an understanding as to the factors that are considered for punitive damages. Often times, defense counsel may try to avoid providing responses to some of these questions as they may be deemed inappropriate on relevance grounds. However if your client has been punished criminally with significant incarceration and/or loss of driving privileges, this type of fact should be provided during discovery as it can weigh the jury's decision on punitive damages as well as a judges decision to grant the amendment. Motions have been successful where the judges have determined that the defendant was adequately punished by the criminal penalties imposed for particular incident. This factor should be explored thoroughly upon defending motions for punitive damages.

The hearing for amending plaintiffs complaint to include punitive damages can be successful. A defense must include a focus on the lack of the factors set forth in 549.20. While there is an assumption that judges routinely grant the amendment for punitive damages upon presentation of facts such as intoxication while driving, or other types of egregious conduct, the amendment should never be seen as automatic. In fact, the judicial discretion provided on motions for punitive damages is significant. If the defense attorney is able to show in the motion to amend that Plaintiffs affidavits are insufficient in terms of the clear and convincing evidentiary requirement, a denial of the amendment is probable. Instead of attempting to strongly defend punitive damages claims only after the amendment is achieved, a prudent defense attorney recognizes facts that may lead to punitive damages and works throughout discovery to reduce the likely hood of a judge permitting an amendment.

II. Practical Considerations in Defending Punitive Damages Claims

C. From an ethical standpoint punitive damages claims provides unique challenges for defense counsel. Unless a claim for punitive damages is brought against a well funded corporation or an individual with significant assets, the vast majority of such claims are intended to place pressure on the defendants insurer. While there is no coverage for punitive damages claims on automobile and homeowners insurance policies, the clear intent of most plaintiffs attorneys in amending for punitive damages is to increase the value of settlement. Insurance companies resist the pressure of punitive damages claims however as a practical matter they must consider that element as far as their duty to protect their insured. At present, no Minnesota cases provide a bad faith claim specifically for failure to protect an insured from a punitive

damages claim. However, if a demand for settlement is made for complete dismissal, the insurance company needs to consider the existence of punitive damages. While the existence of punitive damages should not change a case where little compensatory damages exist, the punitive damages factor must always be considered.

In representing of the insured, the defense attorney is placed in a difficult position. First, their obligation is to defend their client for all claims, including those that are not covered by insurance. Immediately upon representation, any facts the attorney feels may lead to an amendment for punitive damages should be brought to the attention of the client. While it is customary to include language within every initial retainer letter that the client does have the ability to retain their own counsel, that needs to be repeated immediately upon an amendment for punitive damages. At all times, defendant must be made aware that they have the ability to retain their own counsel and this should never be discouraged. As practical matter, most clients understand the benefits of having insurer retained counsel represent them. Sufficient communication will prevent any significant obstacles to your representation.

Defense counsel should respect the ethical boundaries that exist between the representation of their client and their retention by an insurance carrier. While in the setting of a mediation, discussions relative to the value of compensatory damages may vary. While it is expected that defense counsel will provide an evaluation to claims relative to compensatory damages, the client needs to recognize that it is the insurance carriers sole right to indemnify and settle the matter based upon their evaluation, not their defense attorneys. It is recommended that defense counsel on cases where punitive damages are present not provide a "line in the sand" to the mediator. Offers should be communicated by the claim representatives so that the client is fully aware that any discussions relative to settlement are based upon the claim representative's authority. Defense counsels representations to the mediator should certainly advocate for the client on both compensatory and punitive damages, however the conversation should never leave the client with any doubts relative to their representation.

D. Trial of Punitive Damages Claims

In a bifurcated action involving punitive damages, defense counsel must take advantage of the rules that permits them to proceed with. At this point the defense counsel controls the information provided to the respective panel. Questions to the jurors relative to their experiences with drunk driving or specific acts involved in the punitive damages aspect of the case can eliminate those jurors that tend to be extreme in their willingness to punish a defendant. Focus on finding jurors with significant education or business experience, as they will be more likely to consider the factors of the statute which can limit the arguments of plaintiffs relative to punitive damages. In particular, jurors who have had relatives or friends with DUI convictions or other criminal issues can be excellent jurors for the defense on matters involving punitive damages. They may be less likely to punish an individual, and also be more receptive in the theory of

redemption that may become more difficult with a punitive damages judgment which takes a lifetime to pay.

In jury selection, the question should always acknowledge the wrong doing and never try to avoid or minimize the act. The focus instead should be on considering punishment without emotion. Throughout jury selection, the defense should focus on Plaintiff's injuries and on eliminating those individuals that may have experienced similar issues.

During the compensatory damages phase of the trial, defense counsel must focus on "reasonable" value of injuries. While it may be tempting to attack plaintiff on credibility and other issues, if causation is relatively clear, defense counsel needs to avoid extreme positions that could be used by a jury to increase the amount of punitive damages awarded. The easiest way for a punitive damages verdict to get out of hand, is by having defense counsel in the compensatory damages phase of trial overstep their arguments and anger a jury by a perceived failure to accept responsibility. It's not necessary to accept responsibility of the plaintiffs version of the injuries, however extreme defense as such as malingering, denial that any injury took place, etc. can increase the punitive damages aspect of the case.

Careful control of the evidence presented to the jury can prevent such occurrences, in particular the testimony of the IME doctor. The IME doctor should be cautioned on cases where punitive damages claims exist, to avoid harsh positions and significantly focus on the medical records and other corroborating evidence for the IME doctors opinions. Sloppiness by the IME doctor and taking harsh positions unsupported by the record can result in a more significant punitive damages award. Defense counsel must acknowledge that a rejection of their arguments by a jury may not only serve to provide a larger compensatory damages award, but also reflect on the punitive damages as well. Cases solely dependent on compensatory damages often times justify an aggressive defense. Such a defense in a trial on punitive damages can result in a higher punitive damages award. On any case involving punitive damages, the goal should not be a zero verdict, but instead a verdict within the policy limits and a denial by the jury to award any punitive damages. Refocusing goals during trial will significantly reduce the chance of a large punitive damages award caused by a jury's perception of avoiding responsibility.

In the trial aspect on punitive damages, Civ.Jig 94.10 provides the guidelines that need to be established by the plaintiff. Defense counsel should also focus on these specific factors that must be present to award punitive damages:

1. Seriousness of hazard to the public

2. The profit defendant made as a result of the misconduct

3. The length of time of the misconduct and if defendant hid it

4. The amount defendant knew about the hazard and of its danger

5. The attitude and conduct of defendant when the misconduct was discovered

6. Number and level of employees involved in causing or hiding the misconduct

7. The financial state of defendant

8. Total effect of other punishment likely to imposed on defendant as a result of the misconduct. This includes the compensatory damage award.

9. The severity of criminal penalty imposed on defendant. Minnesota Practice 4A Civ.Jig 94.10(2014).

All of these elements are important for the jury to consider. The seriousness of hazard to the public may differ with each case. Cases involving an individual driving while intoxicated can arguably involve a hazard to a significant number of the public on the road. However, it is unlikely that the defendant made any type of profit related to this activity. If the defendant was arrested for DUI and admitted to it, the third factor of how long the misconduct occurred and whether the defendant hid it will be satisfied. How much the defendant knew about the hazard and of its danger is also an issue for purposes of trial. An inexperienced driver with their first DUI may arguably have less knowledge about the hazard than an individual who has been driving for many years and has multiple DUIs. Clearly the facts will dictate whether a defense on this issue exists, however it should not be ignored in preparation for trial.

Perhaps the most important element the jury uses to consider punitive damages is the attitude and conduct of defendant when the misconduct was discovered. If the defendant resisted the police, refused any drug or alcohol testing, tried to drive away from the scene, etc. punitive damages awards tend to be much higher. The fact that the defendant admitted his wrong doing immediately, showed regret and for the plaintiff, all of those factors will make a difference with the punitive damages claims.

In cases involving corporate misconduct, clearly the number and level of employees involved in causing or hiding the misconduct is relevant. The profit issues obviously are more significant in these types of cases, and there likely will be proof presented as to profit. In cases involving the employees, the level of employee is of significant relevance. Clearly, employees who are managers or executives are much more likely to have punitive damages awarded against their activities, than lower level employees. For example, an award of punitive damages is typically higher in cases where a vice president may have ignored prior misconduct on an employee without any type of training or discipline. However, if the employee maybe subject to an award for punitive damages, lack of knowledge may insulate a punitive damages claim as against the manager or executive.

A significant defense at trial is focused on proving the financial state of the defendant. Clearly, a jury's perception that the defendant is unable to pay for a judgment at any time

including the future will work to reduce the amount awarded for punitive damages. Ultimately, jurors on punitive damages award tend to be practical, and will award damages that are likely to be paid. Most jurors understand that an award that might never be paid due to the lack of finances by the defendant is considered impractical by many jurors. Family responsibilities, financial status and earning capacity are all issues that the defendant needs to consider while presenting their case to the jury.

Finally, the severity of criminal penalties that have been applied are also relevant. A defendant that is incarcerated as a result of their action, is likely to face a significant punitive damages award, in part because of the penalty they have already incurred. Punitive damages are designed to punish wrongful conduct. An individual who has already lost their driver's license as a result of a DUI or even been incarcerated for vehicular homicide has already been significantly punished for their actions. Argue that further punishment by way of a monetary award will not serve to advance the interest of punitive damages, which ultimately are intended to conform societal behavior. In cases where a juror believes that the criminal penalty was insufficient or inadequate in some way, this element may serve to increase the amount of damages awarded. Accordingly, counsel should use this argument carefully, and avoid a juror believing that the defendant somehow received a light criminal penalty.

E. Appeal

Minn.Stat.MSA 549.20 specifically provides for a careful review of a punitive damages award. In addition, the court has wide latitude pursuant to MSA 549.20 in reducing the verdict provided by the jury. Accordingly, a motion to reduce the amount of punitive damages based upon the lack of any of the factors identified in subdivision 3 may be brought after the issuance of a punitive damages award by the jury. The defense should focus on all of the factors identified in MSA 549.20 subd.3 as well as the appropriate jury instructions. While it may be rare for compensatory damages to be reduced by the court following a jury decision, in punitive damages claims it is not uncommon for the verdict to be significantly reduced as many of these awards are based upon passion or prejudice. Given the wide latitude that the statute provides the court in reducing such awards, a focus on post trial motions may reduce a punitive damages award to nominal amounts. Depending upon the judge, the wide latitude provided by statute makes it very difficult to appeal such a reduction.