

## 11 PUNITIVE DAMAGES

Punitive damages are disfavored at law and they are to be allowed with caution and only within narrow limits.<sup>1</sup> In order to recover punitive damages, it must be shown that the wrongdoer was guilty of a gross breach of accepted practices of conduct -- one that might be characterized as outrageous or malicious.<sup>2</sup> Mere negligence is insufficient to justify an award of punitive damages.<sup>3</sup> AS 09.17.020(b) requires that plaintiff prove a punitive damages claim by clear and convincing evidence, and not merely by a preponderance of the evidence. Consequently, several jury awards of punitive damages have been set aside on appeal, including the \$1 million awarded against State Farm in the *Weiford* case, and the Supreme Court has affirmed lower court decisions not to submit punitive damages to the jury in the absence of clear and convincing evidence that the defendant's conduct was outrageous.<sup>4</sup> In addition, a punitive damages claim cannot stand alone from a compensatory damages claim.<sup>5</sup>

Nevertheless, other decisions by the Alaska Supreme Court have encouraged the filing and pursuit of punitive damage claims. In *Alaskan Village, Inc. v. Smalley*, the court held that an employer can be held vicariously liable for punitive damages based on the outrageous conduct of one of its employees, so long as the employee in question was acting within the scope of employment, regardless of whether the employer ratified or authorized the employee's conduct and regardless of the employee's rank.<sup>6</sup> However, the Alaska Supreme Court has stated that it may consider in a future case whether this rule should be replaced by the "complicity" rule.<sup>7</sup> The complicity rule would confine the *Alaskan Village* rule to vicarious liability for the conduct of managerial employees only and require "at least some degree of employer complicity [such as reckless employment of an unfit employee] before vicarious liability attaches for punitive damages arising from the conduct of a non-managerial employee in the scope of employment."<sup>8</sup>

<sup>1</sup> *Tommy's Elbow Room, Inc. v. Kavorkian*, 727 P.2d 1038, 1048 (Alaska 1986).

<sup>2</sup> *State Farm Mut. Auto Ins. Co. v. Weiford*, 831 P.2d 1264 (Alaska 1992).

<sup>3</sup> *Johnson & Higgins of Alaska Inc. v. Blomfield*, 907 P.2d 1371, 1376 (Alaska 1995).

<sup>4</sup> *Hayes v. Xerox Corp.*, 718 P.2d 929, 934 (Alaska 1986).

<sup>5</sup> *DeNardo v. GCI Communications Corp.*, 983 P.2d 1288, 1292 (Alaska 1999).

<sup>6</sup> 720 P.2d 945, 948-49 (Alaska 1986).

<sup>7</sup> *Laidlaw Transit, Inc. v. Crouse*, 53 P.3d 1093 (Alaska 2002).

<sup>8</sup> *Id.* at 1098, n.8.

In addition, the court has refused to prescribe a definite ratio between compensatory and punitive damages. Although comparing punitive and actual damage awards is one way to determine if the punitive damages are excessive, other factors, such as the magnitude and flagrancy of the offense, the importance of the policy violated, and defendant's wealth, are equally important.<sup>9</sup> While the wealth of a defendant is a relevant inquiry on the issue of punitive damages, it is not a mandatory element; and a defendant who presents no evidence of his financial worth cannot later complain the jury did not have such evidence.<sup>10</sup> The existence of insurance is relevant to the defendant's wealth, which is a factor in determining punitive damages, even if the policy only covers the compensatory damage award.<sup>11</sup>

Alaska is among the "overwhelming majority of jurisdictions" which endorses the rule that punitive damages may not be awarded against governmental entities in the absence of explicit statutory authorization.<sup>12</sup> Additionally, Alaska's general tort claims act specifically excludes awards of punitive damages against the State.<sup>13</sup> Nor may punitive damages be obtained from a decedent's estate,<sup>14</sup> but they may be recovered in a wrongful death action,<sup>15</sup> and they may also be awarded against an insurer in a first-party bad faith claim.<sup>16</sup> In this last regard, the Alaska Supreme Court rejected the argument that Alaska's statutory scheme regulating the insurance industry and imposing civil penalties for unfair claim settlement practices indicated a legislative intent to alter a private party's right to seek punitive damages from an insurer. Alaska also follows the rule that punitive damages may not be recovered for a breach of contract unless the conduct constituting the breach is also a tort involving outrageous conduct for which punitive damages are recoverable.<sup>17</sup>

<sup>9</sup> *International Bd. of Elec. Workers, Local 1547 v. Alaska Util. Constr., Inc.*, 976 P.2d 852, 859 (Alaska 1999); *Cameron v. Beard*, 864 P.2d 538 (Alaska 1993).

<sup>10</sup> *Pluid v. B.K.*, 948 P.2d 981, 986 (Alaska 1997).

<sup>11</sup> *Fleegel v. Estate of Boyles*, 61 P.3d 1267 (Alaska 2002).

<sup>12</sup> *Alaska Housing Fin. Corp. v. Salvucci*, 950 P.2d 1116, 1123 (Alaska 1997).

<sup>13</sup> *Id.* See also *Hazen v. Municipality of Anchorage*, 718 P.2d 456, 465 (Alaska 1986) (in the absence of statutory authorization, punitive damages are not available against a municipality, irrespective of nature of conduct involved).

<sup>14</sup> *Doe v. Colligan*, 753 P.2d 144 (Alaska 1988).

<sup>15</sup> *Tommy's Elbow Room, Inc. v. Kavorkian*, 727 P.2d 1038 (Alaska 1986).

<sup>16</sup> *State Farm Fire & Cas. Co. v. Nicholson*, 777 P.2d 1152, 1157 (Alaska 1989).

<sup>17</sup> *Reeves v. Alyeska*, 56 P.3d 660, 671 (Alaska 2002).

With regard to insurance coverage, the U.S. District Court has held that if a policy does not expressly exclude coverage for punitive damages, public policy will not prohibit coverage for punitive damages resulting from unintentional torts (e.g., gross negligence or reckless indifference).<sup>18</sup> In a series of decisions, the Alaska Supreme Court has indicated that, in the absence of an express exclusion in the policy for punitive damages, public policy does not forbid insurance coverage for punitive damages.<sup>19</sup> In *Lawrence*, the court held that the insureds' UM/UIM coverage included coverage for the punitive damages assessed against an underinsured driver because the UM/UIM coverage must "mirror" the insureds' liability coverage which had no exclusion for punitive damages.

Under Alaska law, the presence of a punitive damages claim does not, without more, require an insurer to provide independent "CHI" counsel.<sup>20</sup>

Effective August 7, 1997, the Alaska Legislature enacted broad tort reform legislation, including restrictions and procedural guidelines relating to punitive damages for causes of action accruing on or after August 7, 1997. Punitive damages are now subject to a statutory cap in most cases of three (3) times the compensatory damage award or \$500,000, whichever is greater.<sup>21</sup> In cases where the jury determines that the defendant actually knew the consequences of its conduct and was motivated by financial gain, the amount of punitive damages cannot exceed four (4) times the amount of compensatory damages, four (4) times the defendant's financial gain from the misconduct, or \$7,000,000, whichever is greater.<sup>22</sup> In employment cases alleging violations of Alaska's Human Rights Act, punitive damages are limited between \$200,000 and \$500,000, depending on the size of the employer.<sup>23</sup>

<sup>18</sup> *LeDoux v. Continental Ins. Co., Inc.*, 666 F. Supp. 178, 180 (D. Alaska 1987).

<sup>19</sup> *Providence Wash. Ins. Co. of Alaska v. City of Valdez*, 684 P.2d 861 (Alaska 1984); *Shane v. Rhines*, 672 P.2d 895 (Alaska 1983); *State Farm Mut. Ins. Co. v. Lawrence*, 26 P.3d 1074, 1079-81 (Alaska 2001).

<sup>20</sup> See Tab 6.

<sup>21</sup> AS 09.17.020(f).

<sup>22</sup> AS 09.17.020(g).

<sup>23</sup> AS 09.17.020(h).

The Alaska Supreme Court has concluded, in a 3-2 decision, that the statutory caps on punitive damages found in AS 09.17.020 are constitutional.<sup>24</sup> In a prior decision, in which one of the justices did not participate, the court had been evenly divided on the issue of whether AS 09.17.020(j), which allocates one-half of the punitive damage award to the State of Alaska, is constitutional.<sup>25</sup> The court's 3-2 decision in *Reust* resolved this issue by holding that the allocation provision does not violate substantive due process<sup>26</sup> or amount to an unconstitutional taking.<sup>27</sup> The court previously decided that, under AS 09.60.080, a portion of the contingent attorney's fees incurred by a plaintiff in obtaining a punitive damage award must be deducted pro rata from the State's portion of the award.<sup>28</sup>

The amount of punitive damages to be awarded is determined at a separate proceeding held after the jury finds that punitive damages are warranted.<sup>29</sup> There is no discovery of evidence relevant to the amount of financial gain to the defendant from the improper conduct or concerning the financial condition of the defendant until after the jury determines that punitive damages are warranted. There is an exception to this discovery rule if the subjects in question (e.g., the wealth of a defendant) are relevant to another issue in the case.<sup>30</sup>

The Supreme Court has held that punitive damages will be reviewed under a *de novo* standard to determine whether the award is "grossly excessive" and therefore in violation of the due process clause of the Fourteenth Amendment.<sup>31</sup> The court has upheld the assessment of punitive damages awards of \$400,000 and \$200,000 (respectively, approximately 8:1 and 4:1 ratios of punitive to compensatory damages),

<sup>24</sup> See *Reust v. Alaska Petroleum Contractors, Inc.* 127 P.3d 807, 821, re-affirming the holding of *Evans ex rel. Hutch v. State*, 56 P.3d 1046 (Alaska 2002), that the statutory punitive damages caps do not violate the equal protection clause or right to jury trial.

<sup>25</sup> *Anderson v. State ex rel. Cent. Bering Sea Fishermen's Ass'n*, 78 P.3d 710 (Alaska 2003) (Fabe, J., not participating); see also *Evans ex rel. Hutch*, 56 P.3d 1046 (Matthews, J., not participating).

<sup>26</sup> *Ruest*, 127 P.3d 807, 821.

<sup>27</sup> *Id.* at 34-35.

<sup>28</sup> *Anderson*, 78 P.3d at 720-722.

<sup>29</sup> AS 09.17.020(a).

<sup>30</sup> AS 09.17.020(e).

<sup>31</sup> *Central Bering Sea Fishermen's Assoc. v. Anderson*, 54 P.3d 271, 284 n.38 (Alaska 2002).

observing that both the ratios and magnitude of the awards here were well in line with both the new legislation and cases decided under the prior law.<sup>32</sup>

Legislative amendments provide that, for causes of action accruing after September 11, 2003, punitive damages may not be awarded against employers held to be vicariously responsible for the acts of an employee, unless (1) the employer or the employer's managerial agent a) authorized the act or omission and the manner in which the act was performed or omission occurred; or b) ratified or approved the act or omission after the act or omission occurred; or (2) the employee a) was unfit to perform the act or avoid the omission and the employer or the employer's managerial agent acted recklessly in employing or retaining the employee; or b) was employed in a managerial capacity and was acting within the scope of employment.<sup>33</sup> A "managerial agent" is considered to be a management level employee with the stature and authority to exercise control, discretion, and independent judgment over a certain area of the employer's business and with some power to set policy for the employer.<sup>34</sup>

A defendant who is convicted of a serious criminal offense, such as drunk driving, cannot relitigate in the related civil action any of the elements of that criminal charge.<sup>35</sup> This is true even if the defendant pled no contest to the criminal charge.<sup>36</sup> Such a conviction does not mandate an award of punitive damages in the related civil action, but it does collaterally estop the defendant from denying the "outrageous or reckless conduct" element needed for the imposition of punitive damages.<sup>37</sup>

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<sup>32</sup> *Id.* at 285 (citing, *inter alia*, *Norcon, Inc. v. Katowski*, 971 P.2d 158 (Alaska 1999), for both comparable magnitude and ratios).

<sup>33</sup> AS 09.17.020(k)

<sup>34</sup> *Id.*

<sup>35</sup> *Lamb v. Anderson*, 147 P.3d 736, 745 (Alaska 2006)

<sup>36</sup> *Id.*

<sup>37</sup> *Id.*

Appendices:

AS 09.17.020

**Sec. 09.17.020. Punitive damages.** (a) In an action in which a claim of punitive damages is presented to the fact finder, the fact finder shall determine, concurrently with all other issues presented, whether punitive damages shall be allowed by using the standards set out in (b) of this section. If punitive damages are allowed, a separate proceeding under (c) of this section shall be conducted before the same fact finder to determine the amount of punitive damages to be awarded.

(b) The fact finder may make an award of punitive damages only if the plaintiff proves by clear and convincing evidence that the defendant's conduct

- (1) was outrageous, including acts done with malice or bad motives; or
- (2) evidenced reckless indifference to the interest of another person.

(c) At the separate proceeding to determine the amount of punitive damages to be awarded, the fact finder may consider

(1) the likelihood at the time of the conduct that serious harm would arise from the defendant's conduct;

(2) the degree of the defendant's awareness of the likelihood described in (1) of this subsection;

(3) the amount of financial gain the defendant gained or expected to gain as a result of the defendant's conduct;

(4) the duration of the conduct and any intentional concealment of the conduct;

(5) the attitude and conduct of the defendant upon discovery of the conduct;

(6) the financial condition of the defendant; and

(7) the total deterrence of other damages and punishment imposed on the defendant as a result of the conduct, including compensatory and punitive damages awards to persons in situations similar to those of the plaintiff and the severity of the criminal penalties to which the defendant has been or may be subjected.

(d) At the conclusion of the separate proceeding under (c) of this section, the fact finder shall determine the amount of punitive damages to be awarded, and the court shall enter judgment for that amount.

(e) Unless that evidence is relevant to another issue in the case, discovery of evidence that is relevant to the amount of punitive damages to be determined under (c)(3) or (6) of this section may not be conducted until after the fact finder has determined that an award of punitive damages is allowed under (a) and (b) of this section. The court may issue orders as necessary, including directing the parties to have the information relevant to the amount of punitive damages to be determined under (c)(3) or (6) of this section available for production immediately at the close of the initial trial in order to minimize the delay between the initial trial and the separate proceeding to determine the amount of punitive damages.

(f) Except as provided in (g) and (h) of this section, an award of punitive damages may not exceed the greater of

(1) three times the amount of compensatory damages awarded to the plaintiff in the action; or

(2) the sum of \$500,000.

(g) Except as provided in (h) of this section, if the fact finder determines that the conduct proven under (b) of this section was motivated by financial gain and the adverse consequences of the conduct were actually known by the defendant or the person responsible for making policy decisions on behalf of the defendant, it may award an amount of punitive damages not to exceed the greatest of

(1) four times the amount of compensatory damages awarded to the plaintiff in the action;

(2) four times the aggregate amount of financial gain that the defendant received as a result of the defendant's misconduct; or

(3) the sum of \$7,000,000.

(h) Notwithstanding any other provision of law, in an action against an employer to recover damages for an unlawful employment practice prohibited by AS 18.80.220, the amount of punitive damages awarded by the court or jury may not exceed

- (1) \$200,000 if the employer has less than 100 employees in this state;
  - (2) \$300,000 if the employer has 100 or more but less than 200 employees in this state;
  - (3) \$400,000 if the employer has 200 or more but less than 500 employees in this state;
- and

(4) \$500,000 if the employer has 500 or more employees in this state.

(i) Subsection (h) of this section may not be construed to allow an award of punitive damages against the state or a person immune under another provision of law. In (h) of this section, "employees" means persons employed in each of 20 or more calendar weeks in the current or preceding calendar year.

(j) If a person receives an award of punitive damages, the court shall require that 50 percent of the award be deposited into the general fund of the state. This subsection does not grant the state the right to file or join a civil action to recover punitive damages. (§ 1 ch 139 SLA 1986; am § 10 ch 26 SLA 1997)

**Cross references.** — For prohibition on recovery of punitive damages against the state, see AS 09.50.280.

For provisions relating to the effect of 1997 addition of subsections (e) and (j) on Rules 26 and 58, Alaska Rules of Civil Procedure, respectively, see §§ 48 and 49, ch. 26, SLA 1997 in the 1997 Temporary and Special Acts.

For a statement of legislative intent relating to the provisions of ch. 26, SLA 1997, see § 1, ch. 26, SLA

1997 in the 1997 Temporary and Special Acts. For severability of the provisions of ch. 26, SLA 1997, see § 56, ch. 26, SLA 1997 in the 1997 Temporary and Special Acts.

**Effect of amendments.** — The 1997 amendment, effective August 7, 1997, rewrote this section.

**Editor's notes.** — Section 55, ch. 26, SLA 1997 provides that the provisions of ch. 26, SLA 1997 apply "to all causes of action accruing on or after August 7, 1997."

#### NOTES TO DECISIONS

**Applicability of section.** — This section applies to all cases accruing after its effective date, August 7, 1997, and cannot be applied to cases accruing before that date, because of express legislative intent to the contrary. *Norcon, Inc. v. Kotowski*, 971 P.2d 158 (Alaska 1999).

**Burden of proof.** — In an instruction on punitive damages, failure to instruct the jury on the clear and convincing evidence burden of proof was plain error. *Alaska Marine Pilots v. Hendsch*, 950 P.2d 98 (Alaska 1997).

**Clear and convincing evidence.** — While peaceful picketing is a protected form of speech, threats of bodily harm, personal assaults, and property destruc-

tion on a picket line are not constitutionally protected, and such actions provided ample evidence of conduct which justified a punitive damage award under the clear and convincing standard. *International Bhd. of Elec. Workers, Local 1547 v. Alaska Util. Constr., Inc.*, 976 P.2d 852 (Alaska 1999).

Quoted in *State Farm Mut. Auto. Ins. Co. v. Weiford*, 831 P.2d 1264 (Alaska 1992); *Ace v. Aetna Life Ins. Co.*, 139 F.3d 1241 (9th Cir. 1998), cert. denied, 525 U.S. 930, 119 S. Ct. 338, 142 L. Ed. 2d 279 (1998).

Cited in *Johnson & Higgins of Alaska, Inc. v. Blomfield*, 907 P.2d 1371 (Alaska 1995).

*Sec. 09.17.030. [Renumbered as AS 09.65.210.]*