STATE OF VERMONT
WINDSOR COUNTY, SS

Jeannette Eicks Oblio Leitch Plaintiff v. Wilma Stender Defendant	SUPERIOR COURT Docket No. 623-9-08 Wrcv

DECISION ON MOTION TO DISMISS PUNITIVE DAMAGES CLAIM

This case arises out of a pedestrian-motor vehicle accident which took place on December 2, 2005 in South Royalton, Vt. Plaintiff Eicks was allegedly injured when struck by a motor vehicle driven by the Defendant. It is alleged that Eicks was in a crosswalk when struck by the car. She has brought a claim for personal injuries. Her husband, Plaintiff Leitch, has brought a claim for loss of consortium. Included in Plaintiffs' complaint is a demand for punitive damages. Plaintiffs' complaint alleges negligence by Defendant in the operation of her automobile and gross negligence for violation of 23 V.S.A. § 1051, the pedestrians right-of-way in crosswalks statute.

Defendant seeks dismissal of the claim for punitive damages, asserting that punitive damages are not available under the circumstances alleged here, the negligence, or even gross negligence, in the operation of a motor vehicle resulting in an accident. Plaintiffs assert that punitive damages are recoverable asserting that violation of the crosswalk statute in a crime.

In determining a motion to dismiss, the Court must accept all well-pleaded facts and inferences drawn there from as being true. *Jones v. Keough*, 137 Vt. 562 (1979). The Court should not grant a motion to dismiss unless there are no facts and circumstances upon which Plaintiff might recover. *Richards v. Town of Norwich*, 169 Vt. 44 (1999). The purpose of a motion to dismiss is to test the law of a case, not the facts which underlie it. *Levinsky v. Diamond*, 140 Vt. 595 (1980), overruled on other grounds in *Muzzy v. State*, 155 Vt. 279 (1990).

Plaintiffs' claim for punitive damages in this case is premised upon negligence in the operation of a motor vehicle. Whether the negligence is characterized as ordinary negligence or gross negligence is not determinative to the instant motion.

In Vermont, punitive damages are predicated upon a showing of malice "[w]here the defendant's wrongdoing has been intentional and deliberate, and has the character of outrage frequently associated with crime." *Brueckner v. Norwich University*, 169 Vt. 118 at 129 (1999) (quoting W. Keeton et al., Prosser and Keeton on the Law of Torts § 2 (5th ed. 1984)). The law with respect to whether recklessness can rise to the level of malice is somewhat confusing. In *Bruckner*, the court stated "actual malice may be shown by conduct manifesting personal ill will or carried out under circumstances evincing insult or oppression, or conduct showing a reckless disregard to the rights of others." 169 Vt. at 129 (emphahsis added). Later in *Bruckner* the Court stated that mere negligence or recklessness is insufficient for the imposition of punitive damages absent a bad motive. 169 Vt. at 130. It appears, therefore, that in addition to recklessness, there must be an additional showing of bad motive or wrongful spirit for recklessness to rise to the level of actual malice necessary to support a punitive damages award. *Bolsta v. Johnson*, 176 Vt. 602 (2004).

What is clear is that negligence, or even gross negligence is an insufficient basis for a punitive damages award. In *Bolsta*, the Supreme Court held that repeated drunken driving was insufficient evidence of "actual malice" to support punitive damages. In rejecting the plaintiff's assertion that drunken driving constitutes actual malice, per se, the Court stated:

> Appellant argues that punitive damages are warranted when a repeat drank driver or a person who repeatedly drives with a suspended license injures another driver through negligent driving. Appellant asserts that to purposefully and repeatedly commit these crimes requires a bad spirit or wrong intention, because the driver consciously chooses to pursue a course of conduct knowing that it creates a substantial risk of significant harm to others. According to appellant, the reasoning used to deny punitive damages to the plaintiff in *Brueckner* is inapposite in this case, as the conduct at issue is distinguishable. Appellant argues that unlike defendant Norwich University in *Brueckner*, defendant Johnson willfully committed criminal acts. In essence, defendant would have us adopt a rule that drunk driving is per se evidence of malice sufficient to impose punitive damages in every case in which the negligent act of a drunk driver causes injury. We are unwilling to do so because such a rule would be inconsistent with our standard for imposing punitive damages.
>
> We have previously rejected the contention that violation of the law is sufficient evidence of malice. Willful violation of the law is insufficient evidence of malice, if not accompanied by "a showing of bad faith." See *Bruntaeger v. Zeller*, 147 Vt. 247, 254, 515 A.2d 123, 127 (1986). 176 Vt. at 603.

Negligence, or even gross negligence is insufficient to give rise to a claim for punitive damages. *Brueckner v. Norwich University*, 169 Vt. 118 (1999). The Maine Supreme Court addressed this issue in *Tuttle v. Raymond*, 494 A. 2d 1353 (Me. 1985) (cited with approval in *Brueckner*) stating:

> Whatever qualitative difference exists between mere negligence and "gross" negligence, it is insufficient to justify allowing punitive damages based upon the latter class of conduct. See W. Prosser, supra, at 10 ("mere negligence ..., even though it is so extreme in degree as to be characterized as 'gross,' an unhappy term of ill-defined content," is insufficient to support punitive damages); Ellis, supra note 4, at 36-37. "Gross" negligence simply covers too broad and too vague an area of behavior, resulting in an unfair and inefficient use of the doctrine of punitive damages. [citing case]. A similar problem exists with allowing punitive damages based merely upon "reckless" conduct. "To sanction punitive damages solely upon the basis of conduct characterized as 'heedless disregard of the consequences' would be to allow virtually limitless imposition of punitive damages." *Miller Pipeline Corp. v. Broeker*, 460 N.E.2d 177, 185 (Ind.Ct.App.1984). A standard that allows exemplary awards based upon gross negligence or mere reckless disregard of the circumstances overextends the availability of punitive damages, and dulls the potentially keen edge of the doctrine as an effective deterrent of truly reprehensible conduct.
>
> We therefore determine that a new standard is needed in Maine. "If one were to select a single word or term to describe [the] essence [of conduct warranting punitive damages], it would be 'malice.' " *Miller Pipeline Corp.*, 460 N.E.2d at 180 (quoting *Hibschman Pontiac, Inc. v. Batchelor*, 340 N.E.2d 377, 385 (Ind.Ct.App.1976) (Garrard, J., concurring)). 494 A. 2d at 1361.

The "malice" standard adopted in Maine is the same as employed in Vermont. See, e.g. *Bolsta v. Johnson*, 176 Vt. 602 (2004) (punitive damages are designed to address malicious intentional acts and require a showing of malice). Even willful violation of the law, without a showing of bad faith is insufficient evidence of malice. *Id* at 603.

Tuttle involved a claim by a woman who was injured when her car was sheared in half by a vehicle operating in excess of the 25 m.p.h. speed limit and which ran a red light. The Maine Supreme Court found those facts did not evidence the ill-will required for malice. The facts in *Tuttle* are far more egregious than collision within the cross walk alleged here.

Vermont has long held that negligence from the operation of motor vehicles is not a proper basis for a punitive damages claim. *Walsh v. Segale*, 70 F. 2d 698 (2d.Cir. 1934) (exemplary damages may not be recovered due to ordinary negligence resulting in a motor vehicle accident). Simply stated, a motor vehicle accident, even one resulting from a willful violation of the rules of the road, does not show malice absent some intent to injure or bad spirit on the part of the defendant.

Plaintiffs here have alleged that the Defendant acted negligently or even grossly negligently in causing the collision within the cross walk. Even if true, there is no suggestion in Plaintiffs' complaint that Defendant acted with the actual malice required to support a punitive damages claim under Vermont law. That Defendant may have

committed a civil violation of the pedestrian right-of-way statute, been negligent, or even grossly negligent, does not make her actions those which demonstrate malice. Even under the exacting standard applied to motions to dismiss, and taking the well-pleaded allegations of Plaintiffs' complaint as true, these allegations fall far short of the requisite allegations of malice to allow for recovery of punitive damages.

For the foregoing reasons, the claim for punitive damages is **DISMISSED**.

Dated at Woodstock this 29th day of September, 2008.

Harold E. Eaton, Jr.
Superior Court Judge

FILED

SEP 29 2008

WINDSOR COUNTY CLERK