Combating Punitive Damages Claims against an Employer

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Under what circumstances can an employer be liable for punitive damages in the absence of direct liability claims, such as negligent hiring, retention, training, and entrustment? Having recently grappled with this question in defending the case of *Gonzalez v. Coastal Industrial Contractors, Inc.*, 316 So. 3d 612 (Miss. 2021), we compiled and studied many Mississippi state and federal cases addressing these issues. Although a cursory analysis of the case law might initially suggest an employer could insulate itself from punitive damages by obtaining a dismissal of direct liability claims such as negligent hiring, retention, training, and entrustment by admitting vicarious liability, a more thorough analysis indicates it is not necessarily that straightforward. We hope that by setting out the general principles and discussing various illustrative cases, you might find some guidance in developing a defense strategy for dealing with punitive damages in your practice. Note that while this article generally discusses these issues in the context of trucking cases, many of these principles would also apply in defending punitive damages claims in any case seeking punitive damages against an employer.

I. Narrowing the Claims

In any case, narrowing the claims at issue and minimizing the parties involved are strategies sure to simplify the proceedings, eliminate extraneous discovery, and, finally, satisfy clients. When defending a trucking case, it is generally possible to have the direct liability claims against the employer defendant dismissed, including claims for negligent hiring, training, supervision, retention, and entrustment. Thereafter, you may also be able to obtain a dismissal of any claim asserted for punitive damages.

Particularly in federal court, certain basic principles are clear. Where plaintiff only alleges vicarious liability against the employer, if the employer admits vicarious liability, any direct liability claims against the employer *for simple negligence* are ripe for dismissal. In this scenario, even if the allegations against the employee might give rise to punitive damages, punitive damages against the employer cannot survive because the employer cannot be vicariously liable for punitive damages. It gets trickier, however, where plaintiff alleges the employer's actions – separate and apart from the acts of its employee – warrant an award of punitive damages against the employer. If the direct liability claims – for negligent hiring, negligent retention, negligent training, negligent entrustment, and the like – are dismissed, you might ponder what claim could remain that would allow plaintiff to recover punitive damages against the employer. As discussed below, Mississippi federal courts have seemingly held the determinative issue in those cases is whether the independent non-*respondeat superior* allegations against the employer amount to simple negligence or gross negligence. Because they should only proceed if they amount to gross negligence, the courts tend to conduct a thorough, fact-intensive analysis of the allegations specific to punitive damages as to each defendant when determining whether such claims are appropriate to dismiss.

A. Dismissal of Direct Liability Claims against the Employer

Where an employer concedes vicarious liability, the Mississippi Court of Appeals and our federal district courts, interpreting Mississippi law, have concluded that a defendant is entitled to dismissal of the claims for negligent entrustment, negligent hiring, failure to train, negligent supervision, and negligent retention. *Carothers v. City of Water Valley*, 242 So. 3d 138, 144-45 (Miss. Ct. App. 2017), *cert. denied*, 246 So. 3d 67 (Miss. 2018) (collecting cases). Finding a paucity of case law on this issue in the state courts, the Mississippi Court of Appeals in *Carothers* adopted the reasoning of the United States District Court for the Southern District of Mississippi in *Davis v. ROCOR Int'l,* 3:00-cv-864, 2001 U.S. Dist. LEXIS 26216, at *17–25 (S.D. Miss. Dec. 19, 2001). The district court in *ROCOR Int'l* found that plaintiff's direct liability claims against ROCOR merged with the claims against the employee, and because the employer had conceded that it had vicarious liability, there was no basis for allowing the plaintiffs to proceed on the direct-liability claims. Allowing such duplicative, merged claims to proceed would be "unduly prejudicial to the defendant as 'permitting proof of previous misconduct of the employee would only serve to inflame.'" *Id.* (quoting *Rocor Int'l,* 2001 U.S. Lexis 26216, at *20).

The Mississippi Supreme Court has not directly answered the question of whether an employer who admits vicarious liability should be entitled to dismissal of the independent negligence claims asserted against it. The Supreme Court has held, however, that it was error to admit testimony relevant to plaintiff's negligent entrustment claim because the defendants had admitted that the employee had been within the scope of his employment at the time of the accident. *Nehi Bottling Co. v. Jefferson*, 226 Miss. 586, 84 So. 2d 684, 686 (Miss.1956).

B. Dismissal of Punitive Damages Claims

As we all know, to recover punitive damages under Mississippi law, the claimant must prove by clear and convincing evidence that the defendant "acted with actual malice, gross negligence which evidences a willful wanton or reckless disregard for the safety of others or committed actual fraud." Miss. Code Ann. §11-1-65(1)(a). "Clear and convincing evidence is "so clear, direct, weighty and convincing as to enable the trier of fact to come to a clear conviction, without hesitancy, of the truth of the precise facts of the case." *Mississippi Commission on Judicial Performance v. Carver,* 107 So. 3d 964, 969-70 (2013). Punitive damages, predictably, are considered an extraordinary remedy and are not generally favored in Mississippi jurisprudence. *Derr Plantation, Inc. v. Swarek,* 14 So. 3d 711, 718 (Miss. 2009) (citing *Bradfield v. Schwartz*, 936 So. 2d 931, 936 (Miss. 2006)). Such damages are reserved for the most egregious cases. *Paracelsus Health Care Corp. v. Willard,* 754 So. 2d 437, 442 (Miss. 1999).

In trucking cases, punitive damages claims against the driver should be dismissed unless plaintiff alleges facts, which, if proven, would amount to more than simple negligence. *See Choctaw Maid Farms v. Hailey,* 822 So. 2d 911, 924 (Miss. 2002), *reversed in part on other grounds* (citing *Pelican Trucking Co. v. Rossetti,* 167 So. 2d 924, 926 (Miss. 1964)) (Simple negligence will not support punitive damages.); *see also Maupin v. Dennis*, 252 Miss. 496, 175 So. 2d 130 (1965) (punitive damages are ordinarily recoverable only in cases where the negligence is so gross as to indicate reckless or wanton disregard for the safety of others, simple negligence is insufficient to warrant imposition of such damages). "In the automobile context, the Supreme Court of Mississippi has been extremely reticent to permit punitive damages in cases involving the mere commission of traffic violations." *Dawson v. Burnette*, 650 F. Supp. 2d 583, 585-86 (S.D. Miss. 2009) (quoting *Walker v. Smitty's Supply, Inc.*, 2008 U.S. Dist. LEXIS 37949, 2008 WL 2487793, at *6 (S.D. Miss. May 8, 2008)) (collecting cases).

Once the direct liability claims against the employer are disposed of, any claims for punitive damages against the employer may also be ripe for dismissal because a punitive damages claim cannot be based on vicarious liability. *Buckalew v. Schneider Nat'l Carriers, Inc.,* No. 3:13-cv-189 LG-JCG, 2014 U.S. Dist. LEXIS 115186, at *7 (S.D. Miss. Aug. 19, 2014); *Francois v. Colonial Freight Sys.*, No. 3:06-cv-434-WHB-LRA, 2007 WL 4459073 at *4 (S.D. Miss. Dec. 14, 2007) ("an employer cannot be liable for punitive damages on the basis of vicarious liability"). However, keep in mind that dismissal of any direct liability claims against the employer will not absolutely foreclose an award of punitive damages against the employer. As discussed herein, if plaintiff alleges negligence on the part of the employer that exceeds that of its employee's imputed negligence, punitive damages may be available against the employer. To proceed on a claim of punitive damages against the employer though, plaintiff must allege specific facts amounting to gross negligence, actual malice, or reckless disregard for the safety of others on the part of the employer.

II. The following illustrative cases highlight the types of fact patterns requiring vigilance by defense counsel in attacking claims for punitive damages.

Although not an exhaustive list, the following cases highlight how the courts have approached the issue of punitive damages claims in recent years in cases where direct liability claims against the employer have been dismissed. These cases shed light on the types of allegations the courts have addressed.

A. *Curd v. Western Exp., Inc.*, 2010 WL 4537936 (S.D. Miss. 2010)

Patrick Guillory was driving a tractor-trailer in the course and scope of his employment with Western Express when he was involved in an accident with a pick-up truck on Interstate 10, driven by Grant Cales. Candice Curd was riding in the passenger seat of Cales' truck. As both vehicles approached a construction zone, a third vehicle pulled in front of Cales, causing him to reduce his speed. Guillory then rear-ended Cales' truck, allegedly causing injuries to both Cales and Curd. Curd and Cales alleged claims for negligent maintenance, training and loading, hiring and entrustment as well as claims for wantonness and gross negligence. Western Express admitted Guillory was acting in the course and scope of his employment at the time of the accident and that was vicariously liable for compensatory damages proximately caused by any negligence on the party of Guillory. Defendants then filed motions for partial summary judgment seeking dismissal of the non-*respondeat superior*, direct liability claims as well as claims for punitive damages.

After dismissing the direct liability claims, the court turned to punitive damages. Plaintiffs argued Guillory was following too closely, particularly because he admitted that construction zones are always hazardous. They further argued Western Express was grossly negligent in hiring and entrusting a vehicle to Guillory when he had received about three speeding tickets and had been involved in about ten accidents, six of which were deemed preventable under the Federal Motor Carrier Safety Regulations. They also pointed to Guillory's testimony that he had received no training in the seven years he worked for Western Express, aside from his initial safety orientation. They further relied on a past DOT audit that found

some log and hour violations on the part of Western Express. Finally, they noted that Guillory was not medically qualified to drive the tractor-trailer under the FMCSR, because vision in his left eye was 20/50. Without much discussion, the court found the conduct of defendants constituted, at most, simple negligence: "The accident at issue was a rear-end accident that contained no aggravating factors that would justify punitive damages. As a result, the Court finds that the defendants are entitled to summary judgment as to the plaintiffs' allegations of gross negligence and wantonness in addition to their demand for punitive damages." *Curd,* 2010 WL 4537936, at *3.

B. *Gaddis v. Hegler,* 2011 WL 2111801 (S.D. Miss. 2011)

R. M. Gaddis alleged Hegler, while in the course and scope of her employment as a delivery person with Essbee, Inc. ("Essbee"), ran a red light and ignored other warning signs immediately prior to the accident because she was talking on her cell phone. She alleged negligence and gross negligence and sought compensatory and punitive damages. When discovery concluded, Essbee moved for summary judgment on the direct liability claims of negligent entrustment, hiring, training, and/or supervision. Essbee and Hegler also sought summary judgment on the claims for punitive damages.

The court first granted summary judgment with respect to plaintiff's negligence claims based on negligent entrustment, negligent hiring, failure to train, negligent supervision, and negligent retention. Turning to punitive damages, the court addressed plaintiff's contention that the employer was liable for its "own grossly negligent conduct." The court discussed plaintiff's arguments that the employer defendants exhibited gross negligence, separate and apart from the negligence of Hegler, including allegations that the employer: forced Hegler to drive with the knowledge that she had vision problems and while she was in a weakened mental and physical condition and routinely ordered her to drive under these conditions; threatened to fire Hegler when she complained she could not drive; and regularly called Hegler while she was on the road to check on the status of deliveries. Plaintiffs further alleged the employer provided no safety training.

Of course, the employer disputed these facts. But for purposes of deciding the summary judgment motion, the court noted plaintiff's contentions shifted the case from the zone of mere negligence to the territory of gross negligence. There were also genuine fact issues concerning whether Hegler was using the cell phone at or near the time of the accident. Importantly, plaintiff alleged at least some of these distractions caused Hegler to speed, caused her not to see two "stop light ahead" warning signs, caused her to run the red light, which was allegedly red for more than 10 seconds prior to impact, and caused her to cross over two northbound lanes of the highway before impact. In light of these genuine issues of material fact, the court determined plaintiff demonstrated she was entitled to a jury instruction on punitive damages on her gross negligence claims. The court noted, however, that its "denial of summary judgment on the issue of punitive damages [did] not foreclose the possibility that the Court might ultimately refuse to submit the question to the jury." *Gaddis,* 2011 WL 2111801, at *5.

C. *Roberts v. Ecuanic Exp., Inc.,* 2012 WL 3052838 (S.D. Miss. July 25, 2012)

Regina Roberts was driving on an interstate highway when her vehicle was struck by a tractor-trailer operated by Alberto Beltran in the course and scope of his employment with Ecuanic Express, Inc. ("Ecuanic"). She alleged multiple theories of liability as to Beltran and Ecuanic and sought actual, compensatory, and punitive damages. Defendants filed a Rule 12(b)(6) motion to dismiss all of plaintiff's independent, non-*respondeat superior* claims against Ecuanic, including claims of negligent hiring, maintenance, entrustment, and retention. Defendants argued dismissal of those claims was appropriate because Ecuanic admitted Beltran was operating his vehicle in the course and scope of his employment. The court noted that "[t]he Courts of this state have consistently dismissed independent negligence claims against an employer who admits vicarious liability for an employee's actions." *Roberts,* 2012 WL 3052838, at *2 (collecting cases). "The reasoning underlying these cases is that once an employer has admitted that it is liable for an employee's actions, evidence pertaining only to issues of negligent hiring, entrustment, supervision, or maintenance becomes superfluous and possibly unfairly prejudicial." *Id.* at *2 (citing *Lee v. Harold David Story, Inc.,* 2011 WL 3047500, at *4 (S.D. Miss. July 25, 2011); *Davis v. ROCOR Int'l,* 2001 U.S. Dist. LEXIS 26216, at *19–*20 (S.D. Miss. Dec. 19, 2001)).

The court then allowed plaintiff to proceed with respect to the gross negligence claims against Ecuanic, finding that plaintiff "asserted independent claims for punitive damages against Ecuanic."

> This Court has previously implied—if not explicitly held—that a plaintiff's independent claims for punitive damages against an employer may proceed despite the employer's admission that its employee was acting in the course and scope of employment. *Lee,* 2011 U.S. Dist. LEXIS 81651 at *8–*9, 2011 WL 3047500 (court conducted punitive damages analysis for employer despite holding that admission of vicarious liability foreclosed negligence claims); *Gaddis v. Hegler,* 2011 U.S. Dist. LEXIS 59027, at *10–*13, 2011 WL 2111801 (S.D. Miss. May 26, 2011) (court conducted punitive damages analysis for employer despite holding that admission of vicarious liability foreclosed negligence claims); *Curd,* 2010 U.S. Dist. LEXIS at *8–*9, 2010 WL 4537936 (court conducted punitive damages analysis for employer despite holding that admission of vicarious liability foreclosed negligence claims). In the opinion of the undersigned judge, this is a reasonable conclusion.

Roberts, 2012 WL 3052838, at *2. The court then reconciled

its dismissal of the direct liability claims against the employer with its determination that certain punitive damages claims could nevertheless proceed, reasoning that

> evidence pertaining to the employer's independent gross negligence would not be superfluous or redundant, as there is no means for a plaintiff to obtain punitive damages against the employer solely through claims against the employee. Accordingly, while dismissal of Plaintiff's simple negligence claims against Ecuanic—for which no punitive damages may be awarded—is appropriate, dismissal of Plaintiff's gross negligence claims against Ecuanic would be inappropriate at this time.

Id. From the opinion, it is not clear precisely what facts plaintiff alleged in support of her claims that Ecuanic was grossly negligent.

D. *Dinger v. Am. Zurich Ins. Co.*, 2014 WL 580889 (N.D. Miss. Feb. 13, 2014)

The Dingers were traveling together in a tractor-trailer and were stopped due to traffic conditions. Marcus Hardin, was operating a tractor-trailer, owned and operated by Pat Salmon & Sons, Inc. ("Salmon"). Hardin crashed into the rear of an intermediate vehicle, which then rear-ended the Dingers' tractor-trailer. Hardin and the driver of the intermediate vehicle were killed. Plaintiffs alleged Hardin was distracted by a handheld electronic device. Defendants filed a Rule 12(b)(6) motion to dismiss plaintiffs' independent negligence claims against the trucking company and the punitive damages claims against the trucking company based on vicarious liability for the acts of its employee. Defendants argued the independent negligence claims against Salmon were ripe for dismissal because Salmon admitted Hardin was driving the tractor-trailer in the course and scope of his employment.

The *Dinger* court, citing a case decided by a federal court in Nevada, stated that "[o]ther districts have noted that this 'rule' overlooks the irreducible proposition that the doctrine of vicarious liability and the tort of negligent hiring and supervision address different conduct." *Dinger, supra* at *2 (citing *Wright v. Watkins & Shepard Trucking, Inc.*, 972 F. Supp. 2d 1218, 1220 (D. Nevada 2013)). The court noted that plaintiffs sought "to show that Salmon's negligence exceeded Hardin's negligence . . .because Salmon knew that Hardin used handheld electronic devices while operating its tractor trailers and did little or nothing to stop it." *Id.* at *3. The court did "not find this argument persuasive enough to overcome the numerous cases in this state that have dismissed the ordinary negligence of the employer, even if the employer itself has a direct involvement in the distracted driver." *Id.* at *3 (discussing *Gaddis v. Hegler,* 2011 WL 2111801 (S.D. Miss. May 26, 2011) ("the court granted summary judgment in favor of the defendants with respect to plaintiff's claims based on negligent entrustment, negligent hiring, failure to train, negligent supervision, and negligent retention even though the plaintiff alleged that the co-owner of the business did not prohibit talking on the phone, knew it was dangerous to talk on the phone while driving, did not provide any safety training regarding deliveries, and the owner called employee's cell phone while employee was on the road.")). After noting it did not find plaintiff's argument persuasive, the court then somewhat perplexingly stated: "Therefore, the independent negligence claims for compensatory damages are dismissed. The gross negligence claims for punitive damages against Salmon remain." *Id.* The court further noted that "[i]]f derivative liability is established, "other avenues—like punitive damages claims—will provide a route for recovery in the event an employer's culpability exceeds that of its employee's imputed negligence." *Id.* at * 3 (quoting *Watkins & Shepard Trucking, Inc.,* 972 F. Supp. 2d at 1220). The *Dinger* court then discussed the *Roberts* and *Gaddis* decisions:

> In *Roberts,* the court refused to dismiss a plaintiff's independent claims for punitive damages against a truck driver's employer even after it had dismissed the plaintiff's independent negligence claims for compensatory damages against that employer. *Roberts v. Ecuanic Exp., Inc.,* 2012 WL 3052838 (S.D. Miss. July 25, 2012) (ruling on motion to dismiss); *See also Gaddis v. Hegler,* 2011 WL 2111801 (court conducted punitive damages analysis for employer despite holding that admission of vicarious liability foreclosed negligence claims).

Id. The court noted that "[a]ny evidence of Salmon's gross negligence shall only be admissible after an award of compensatory damages has been made by the jury and the court determines that the issue of punitive damages is to be submitted to the jury." *Id.* (citing Miss. Code Ann § 11–1–65). The court in *Dinger* then reflected that "[n]umerous federal courts in Mississippi have ruled that punitive damages are not recoverable from the employer based on their employee's actions" *Id.* at *4 (citing *Bradley v. Wal–Mart Stores, Inc.*, 2006 WL 2792338 (S.D. Miss. Sept. 27, 2006) (finding that Wal–Mart did not formulate any policies or direct its employees to push televisions off of shelves at customers; therefore "[a] s Wal–Mart cannot not be held vicariously liable for punitive damages concerning the individual actions of non-policy making employees, plaintiffs' claims for punitive damages must be dismissed.")).

The court ultimately concluded that even if Hardin's actions of using a handheld device in the cab of a tractor-trailer rose to the level necessary to justify punitive damages, "as a matter of Mississippi statutory and case law, Salmon [could not] be held vicariously liable for punitive damages based on his conduct." *Id.* In reaching this conclusion, the court briefly addressed three other cases where an employee's conduct could not render his employer liable for punitive damages. In *Dawson v. Burnette,* 650 F.Supp.2d 583, 586 n. 1 (S.D. Miss. July 20, 2009), the court determined that a driver's attempt to make a U-turn in a tractor-trailer which caused an accident did not rise to the level

necessary to award punitive damages and further noted that the owner of the truck "would be entitled to summary judgment on [the punitive damage] claim in any event, inasmuch as it cannot be held vicariously liable for punitive damages on account of the conduct of its employee." *Id.* Two years later, the same judge, in *Lee v. Harold David Story, Inc.*, 2011 WL 3047500 (S.D. Miss. July 25, 2011) noted that "[e]ven if there may be sufficient evidence of gross negligence by [the truck driver] to support the imposition of punitive damages against [driver], his actions cannot be imputed to [the employer] for purposes of imposing punitive damages."). *Id.* Finally, in *Poe v. Ash Haulers, Inc.*, 2011 WL 2711283, at *n. 2 (N.D. Miss. July 12, 2011), the court found that a tractor-trailer driver's conduct in causing a three vehicle accident did not rise to a level necessary to award punitive damages and also noted that the defendant truck-owner "would be entitled to summary judgment on this claim in any event, as it cannot be held vicariously liable for punitive damages on account of its employee." *Id.*

Ultimately, the court in *Dinger* granted defendants' motion to dismiss plaintiffs' independent negligence claims against the trucking company and the punitive damages claims against the trucking company based on vicarious liability for the acts of its employee. The court noted that even if Hardin's actions of using a handheld device rose to the level necessary to justify punitive damages, as a matter of law, Salmon could not be vicariously liable for punitive damages based on Hardin's conduct. All other claims remained pending.

E. *Bass v. Hirschbach Motor Lines, Inc.*, 2014 WL 5107594 (S.D. Miss. October 10, 2014)

This case arose out of an automobile accident in which a tractor-trailer rig operated by Brown in the course and scope of his employment as an employee of Hirschbach, struck the vehicle operated by plaintiff Judith Bass. Plaintiffs, Judith and her husband, alleged the accident occurred when Brown suddenly moved into the lane of traffic occupied by Judith Bass, striking the rear quarter panel of her vehicle so violently as to knock out all the glass and thrust her vehicle in front of the tractor-trailer, which was traveling approximately 50 to 55 miles per hour. Plaintiffs alleged Brown "was so inattentive at the time of the collision that he not only failed to check for traffic in the outside lane before moving right, but after striking Mrs. Bass's vehicle he pushed it down the interstate an estimated distance of 1/4 mile ... at an estimated speed of 50–55 miles an hour without ever realizing he had struck Mrs. Bass's car."

Plaintiffs alleged claims for negligence against Brown and against Hirschbach on the basis of *respondeat superior*, asserting that Brown failed to keep a proper lookout, failed to maintain the appropriate speed of his vehicle, failed to maintain control of his vehicle, failed to take evasive action to avoid the collision, and was inattentive and drove in a careless and/or reckless manner. Plaintiffs also asserted claims against Hirschbach for direct liability based on its alleged negligent hiring, retention, supervision, and control of Brown, alleging that at the time of hiring, it failed to adequately inquire into Brown's competence as a driver and that it thereafter failed to adequately train, supervise and monitor Brown, failed to adequately service and maintain the subject vehicle, and failed to require Brown to maintain logs and records. Plaintiffs sought compensatory and punitive damages.

Because Hirschbach admitted vicarious liability, the court granted its motion for judgment on the pleadings seeking dismissal of the direct liability claims for negligent hiring, training, entrustment, supervision, retention, control, and the like. Hirschbach then moved for judgment on the pleadings seeking dismissal of plaintiffs' punitive damages claims. As to Brown, the court determined plaintiff's allegations "suggest[ed] an extreme degree of inattention on Brown's part which might be found to constitute gross negligence." *Bass*, 2014 WL 5107594 at *3. Thus, the claims against Brown for punitive damages were not subject to dismissal on the pleadings. Turning to Hirschbach, the court, relying on *Dinger* and *Roberts*, noted that its dismissal of the "independent simple negligence claims against Hirschbach for compensatory damages does not automatically foreclose plaintiffs' punitive damages claims against this defendant." *Id.* The court then confirmed plaintiffs could not recover punitive damages from Hirschbach on a theory of vicarious liability.

The court then clarified that "[t]he question, therefore, is whether plaintiffs have adequately alleged a factual basis on which Hirschbach could be found to have acted 'with actual malice, [or] gross negligence which evidences a willful, wanton, or reckless disregard for the safety of others....'" *Id.* Because plaintiffs' punitive damages allegations against Hirschbach consisted largely of legal conclusions devoid of specific facts, the court characterized them as "naked assertions" that were clearly insufficient to state a viable claim against Hirschbach that would support the recovery of punitive damages. *Id.* The court characterized the following allegations as conclusory and insufficient: Hirschbach "proceeded with conscious indifference to the rights, safety and welfare of Plaintiffs herein," and as such was grossly negligent; and Hirschbach was grossly negligent because it "should have been on notice as to any previous negligent act(s) and/or omission(s) of" Brown, including any previous occasion(s) when Brown may have failed to keep a proper lookout, failed to maintain the appropriate speed of his vehicle, was inattentive while driving, drove in a careless or reckless manner, failed to maintain control of his vehicle, or failed to take evasive action to avoid striking another vehicle. *Id.* at *4. With respect to the latter example, plaintiffs did not allege Brown, in fact, engaged in any of the referenced acts and/or omissions on previous occasions.

In response to plaintiffs' argument that discovery would reveal what Hirschbach knew or should have known about Brown when it hired him, the court admonished that "it is not permissible to file suit and use discovery as the sole means of finding out whether you have a case. Discovery fills in the details, but you must have the outline of a claim at the beginning." Thus, plaintiffs' complaint failed to state a valid claim for relief with respect to punitive damages against Hirschbach as

plaintiffs had not pled "factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id.* at *5 (quoting *Ashcroft v. Iqbal,* 556 U.S. 662, 678 (2009)).

F. *Gonzalez v. Coastal Industrial Contractors, Inc.,* 316 So. 3d 612 (Miss. 2021)

Gonzalez was driving a Honda Civic on Highway 67, approaching an intersection, when her vehicle was struck by an 18-wheeler driven by Coastal Industrial Contractor's employee, who ran a stop sign. Plaintiff alleged negligence and gross negligence against Coastal Industrial and its driver. She argued the trucking company was vicariously liable and directly liable for negligent hiring, training, supervision, and entrustment. Coastal Industrial admitted its driver was an employee acting in the course and scope of his employment at the time of the collision. After stipulating the driver's actions caused the accident, the court granted defendant's motion for summary judgment, dismissing the direct liability claims, including claims for negligent hiring, training, supervision, and entrustment. Plaintiff voluntarily dismissed any claims against the driver. However, the court denied defendant's motion for summary judgment, seeking dismissal of the punitive damages claims. Defendant argued that, as a matter of law, plaintiff was prohibited from recovering punitive damages against Coastal Industrial through vicarious liability and that plaintiff had no avenue to reach the punitive damages phase because the direct liability claims had been dismissed and plaintiff had not alleged any other bases for liability as to Coastal Industrial.

Defendant's position was that Coastal Industrial could not be held liable for punitive damages based on the acts or omissions of its driver because "Mississippi's punitive damages statute focuses on the acts of 'the defendant against whom punitive damages are sought . . . .'" *Cameron v. Werner Enterprises, Inc.,* 2015 U.S. Dist. LEXIS 91981, at *10-11 (S.D. Miss. 2015) (quoting Miss. Code Ann. § 11-1-65(1)(a)). In opposition, Plaintiff's position was essentially that Coastal Industrial should never have hired the involved driver or allowed him to continue to drive. However, the claims against Coastal Industrial for negligent hiring, negligent retention, and negligent entrustment, as well as the claims against the driver individually, had been dismissed for nearly a year at that point. In denying Coastal Industrial's motion for partial summary judgment seeking dismissal of the punitive damages claims, the court cited the *Watkins* decision discussed by the court in *Dinger*. *Dinger, supra,* is often cited for the proposition that claims against the employer for gross negligence can give rise to punitive damages even when direct liability claims have been dismissed.

Ultimately, in *Gonzalez,* a jury trial on damages commenced in Harrison County Circuit Court on August 13, 2019, with Coastal Industrial as the only remaining defendant. Trial was bifurcated and, after the jury awarded compensatory damages, the court allowed plaintiff to present evidence in support of a punitive damages award. After hearing the evidence, the court granted a directed verdict on the issue of punitive damages in favor of defendant.

Because the issues on appeal dealt with whether the directed verdict was properly granted, the issue of whether the punitive damages claim should have been dismissed as a matter of law on defendants' motion for summary judgment was not squarely before the appellate court and thus, was not addressed in its opinion affirming the directed verdict. In fact, according to our research, the Mississippi Supreme Court has not directly addressed this issue in any case. Although the *Gonzalez* opinion does not directly address the issues discussed in this article, what it offers are additional clues regarding the types of evidence that will not support a claim for punitive damages against a trucking company: a driver making misrepresentations or omissions in his employment application, for example. The opinion also offers hints as to what type of evidence might support a claim for punitive damages: if there is evidence a driver was using drugs or alcohol at the time of the accident and his employer knew of his drug or alcohol use; if there was evidence a driver's blood pressure was elevated at the time of the accident and that the crash was caused by his blood pressure being elevated. It also appears that if a driver is qualified to drive under the federal regulations, a claim for punitive damages against the employer for hiring or retaining the driver will not succeed without evidence the federal regulations were insufficient to prevent others from harm.

In two cases decided shortly after the *Gonzalez* case went to trial, the United States District Court for the Southern District of Mississippi has shed some additional light on these issues.

G. *Clark v. Lard Oil Company, Inc.* 2019 WL 5802379 (S.D. Miss. Sept. 6, 2019)

In *Clark.* the court considered whether plaintiff's so-called "direct punitive damages" claim could remain where the plaintiff's only claims against the employer defendant related to hiring, retaining, training, and maintaining and, as such, were dismissed in light of the defendants' admission of vicarious liability. The court noted "there is no such thing as a 'direct punitive damages' [claim] without an underlying claim upon which a plaintiff can be awarded compensatory damages." *Clark,* 2019 WL 5802379, at *4. The *Clark* court further noted that the Mississippi Supreme Court has explained, "'Punitive damages do not exist in a vacuum. Absent a valid claim for compensatory damages, there can be no claim for punitive damages.'" *Id.* (quoting *Union Carbide Corp. v. Nix, Jr.*, 142 So. 3d 374, 392 (Miss. 2014); citing *Rocanova v. Equitable Life Assur. Soc'y of the U.S.*, 83 N.Y.2d 603, 612 N.Y.S. 2d 339, 634 N.E. 2d 940, 945–46 (1994) ("[a] demand or request for punitive damages is parasitic and possesses no viability absent its attachment to a substantive cause of action")). The *Clark* court noted the defendants' "confusion was understandable" in response to the plaintiff's assertion that a punitive damages claim remained despite plaintiff's concession that all direct liability claims should be dismissed. *Id.* at *5. The court addressed the confusion by noting the plaintiff appeared to

concede only that the "simple negligence" claims, as opposed to its "gross negligence" claims should be dismissed. The court then analyzed the "gross negligence" allegations and determined the substantive facts alleged nothing more than simple negligence. Therefore, the court granted the defendants' motion for summary judgment as to all direct negligence claims, be they simple negligence or gross negligence, as well as any claim for punitive damages.

H. *Riggio v. Pruneda,* 2019 WL 6053017 (S.D. Miss. Nov. 15, 2019)

Another recently decided case is *Riggio v. Pruneda*. Kim Wells was injured and killed when the Toyota Prius she was driving rear-ended a tractor-trailer driven by Israel Pruneda. Pruneda, an employee of SMC Transport, LLC ("SMC"), allegedly either slowed dramatically or stopped his tractor-trailer, creating a hazard. The trailer Pruneda was hauling also allegedly lacked adequate safeguards to prevent vehicle-underrun. Plaintiff alleged punitive damages were appropriate because Pruneda was reckless and grossly negligent in stopping his truck on the interstate and failing to inspect and repair the trailer. The court considered the testimony regarding why Pruneda allegedly stopped on the interstate – noticing an accident and emergency responders off the right side of the interstate, he slowed briefly and wanted to move to the left lane but could not because of swiftly moving traffic – and noted that, even considering the evidence in the light most favorable to plaintiff, the jury could only conclude that Pruneda was negligent in stopping in the lane of travel. Pruneda's testimony that he could not move to the left lane was uncontradicted. The court noted that slowing to a stop in the right lane cannot be malicious, reckless, willful, and wanton, or grossly negligent when that action is one of the statutorily mandated responses to approaching an emergency vehicle at the side of the highway. The court further noted plaintiff had not shown defendant's conduct reflected malice or gross negligence by clear and convincing evidence necessary to submit the issue of punitive damages to the jury.

The court also noted that simple negligence cannot support punitive damages unless accompanying facts and circumstances "'show that portion of defendant's conduct which constituted the proximate cause of the accident was willful and wanton or grossly negligent.'" *Riggio,* 2019 WL 6053017 at *2 (quoting *Choctaw Maid Farms, Inc*., 822 So. 2d at 924 (citation omitted)). Thus, Pruneda's alleged failure to inspect the rear impact guard of the trailer could not give rise to punitive damages "because that could not have been a proximate cause of the accident." *Id.* (citing *Choctaw Maid Farms,* 822 So. 2d at 924 (finding that no punitive damage instruction was warranted by evidence of the age and condition of trailer, expired license plate, missing logbook, and painted over reflectors, because these factors did not cause or contribute to the accident)). Therefore, the court disposed of the punitive damages claims against Pruneda.

The court then turned to the direct liability claims of negligent entrustment, hiring, retention, training, and supervision against SMC. Defendants moved for summary judgment on these claims, arguing that their admission of vicarious liability precluded the direct liability claims. Because it was undisputed that Pruneda was acting in the course and scope of his employment at the time of the accident, the court noted that SMC was liable for any potential negligence on behalf of Pruneda under the theory of *respondeat superior*. The court further held that plaintiff "may not also pursue his direct liability claims against SMC since these are mutually exclusive modes of recovery under Mississippi law." *Id.* at *4 (citing *Welch v. Loftus*, 776 F. Supp. 2d 222, 225 (S.D. Miss. 2011) ("Proof of negligent entrustment or the like, then, is unnecessary and duplicitous at best, and at worst could provide unduly prejudicial evidence that is ultimately irrelevant.")). Citing *Dinger* and *Roberts*, the court then addressed plaintiff's argument that the negligent training/retention-type claims should be considered at the punitive damages stage. The court held that, in the event the jury found Pruneda was negligent, SMC could be liable for punitive damages on the independent or direct liability claims. "If derivative liability is established, 'other avenues – like punitive damages claims – will provide a route for recovery in the event an employer's culpability exceeds that of its employee's imputed negligence.'" *Id.* at *5 (quoting *Dinger*, 2014 WL 580889, at *3).

The court then assessed plaintiff's allegations and determined he had only alleged ordinary negligence against SMC. Plaintiff alleged SMC generally did not "act as a reasonably prudent company under the circumstances. Plaintiff's allegations did "not describe any acts by SMC that could be considered malicious, reckless, or grossly negligent." *Id.* Thus, the court granted defendants' motion for partial summary judgment, concluding the jury should not be allowed to consider punitive damages against SMC.

III. Procedural Considerations and Practice Tips

First, as you would do in any other case, thoroughly examine the allegations against the parties. With the goal of eliminating direct liability claims against the employer – and potentially any claims for punitive damages – a primary consideration is whether the employee was acting within the course and scope of his or her employment at the time of the accident. If your analysis and investigation reveal the employee was acting in the course and scope of his or her employment at the time of the loss, establish the employer is vicariously liable for any simple negligence of the driver – either in responsive pleadings or through discovery responses, an affidavit, or stipulation. This will entitle the employer to dismissal of the direct liability claims against it, including negligent hiring, training, supervision, retention, and entrustment.

Turning then to the punitive damages claims, dissect the plaintiff's allegations, separating those specific to the driver from those specific to the employer. As to both the driver and employer, consider whether plaintiff has pled sufficient factual allegations to support claims for punitive damages. *See Bass v.*

Hirschbach Motor Lines, Inc., 2014 WL 5107594, at *5 (S.D. Miss. 2014) (quoting *Ashcroft v. Iqbal,* 556 U.S. 662, 678 (2009) ("the court concludes that plaintiff's complaint fails to state a valid claim for relief with respect to punitive damages against Hirschbach as plaintiffs have not pled 'factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged.'")).

A. Analyze the punitive damages claims against the driver.

Carefully analyze the allegations in plaintiff's Complaint specific to the driver. Does plaintiff allege any facts, which, if proven, would amount to more than simple negligence? In other words, does plaintiff allege any heightened misconduct on the driver's part beyond the typical negligence allegations associated with an automobile accident? If not, claims for punitive damages against the driver will be ripe for dismissal. See e.g., *Hailey*, 822 So. 2d at 924; *Poe, v. Ash Haulers, Inc.*, No. 1:10CV234-SA-JAD, 2011 U.S. Dist. LEXIS 75388, at *13-14 (N.D. Miss. July 12, 2011) (granting summary judgment on plaintiffs' claim for punitive damages because defendant's conduct amounted "only to alleged simple negligence in failing to exercise due care in the operation of a vehicle); *Aldridge v. Johnson,* 318 So. 2d 870, 871-73 (Miss. 1975).

B. Analyze the punitive damages claims against the employer.

Next, consider the allegations specific to the employer. A punitive damages claim cannot be based on vicarious liability alone. Does plaintiff allege the employer is liable for conduct separate and apart from the conduct of its driver? If so, does plaintiff allege any facts, which, if proven, would amount to more than simple negligence on the part of the employer? In other words, has plaintiff alleged the employer is liable for something beyond negligently hiring, retaining, training, or entrusting the driver? To proceed on a claim of punitive damages against the employer, plaintiff must allege factual allegations that the *employer's conduct* amounted to gross negligence, actual malice, or reckless disregard for the safety of others. *See* Section III, *supra,* for a more detailed discussion.

C. Consider the best procedural route for obtaining a dismissal of punitive damages claims.

Pre-trial options include filing a:

1) Rule 12(b)(6) Motion to Dismiss along with your Answer and Affirmative Defenses;

2) Rule 12(c) Motion for Judgment on the Pleadings; or

3) Rule 56 Motion for Partial Summary Judgment.

If plaintiff's allegations in support of claims for punitive damages against the driver and/or the trucking company are insufficient, a Rule 12(b)(6) or Rule 12(c) motion will likely be most advantageous. For example, if plaintiff alleges only simple negligence on the part of the driver, punitive damages should be dismissed. If plaintiff alleges only *respondeat superior* claims against the trucking company, punitive damages should be dismissed once the trucking company admits the driver was operating in the course and scope of his employment at the time of the accident. And if, in support of claims for punitive damages, plaintiff makes only conclusory legal allegations devoid of specific facts, the claims should be dismissed

It is important to bear in mind plaintiffs often employ counter strategy to a Rule 12(b)(6) or Rule 12(c) motion, which is to file a motion for leave to amend the pleadings to make allegations that go beyond simple negligence of the driver and/or trucking company. Before filing a Rule 12(b)(6) Motion to Dismiss, consideration should be given to the fact that plaintiff will have an option to amend once as of right under Rule 15, and, even if plaintiff fails to exercise this right and defendant prevails on the motion to dismiss, plaintiff may be able to refile the complaint with more artfully crafted allegations. Conversely, a benefit of filing a Rule 12(c) Motion for Judgment on the Pleadings is that if plaintiff attempts to amend, it will have to obtain the other parties' consent or move the court for leave to do so. Particularly in federal court, filing a Motion for Judgment on the Pleadings after the deadline for amending the pleadings set forth in the Case Management Order mitigates the risk of plaintiff being able to evade dismissal of these claims. The deadline for amendments to the pleadings is generally before the expert designation and discovery deadlines.

Finally, a Rule 56 Motion for Summary Judgment will be appropriate where plaintiff has made allegations beyond simple negligence. For example, if plaintiff alleges the driver was intoxicated, after sufficient discovery has been conducted, if plaintiff fails to elicit any testimony or evidence in support of the allegation, a Motion for Summary Judgment will be the appropriate tactic to obtain a dismissal of the claim for punitive damages against the driver. Further, if plaintiff alleges the employer's independent conduct amounted to gross negligence or wantonness, a motion for summary judgment will appropriate if plaintiff fails to elicit relevant testimony or evidence sufficient to create a fact issue.

If plaintiff pleads sufficient facts in support of claims for punitive damages against the driver and/or trucking company that require exploration in discovery, keep in mind what you will want to cite in support of your eventual motion for summary judgment, whether it be through written discovery, depositions, or affidavits.

If summary judgment is not granted, ensure the trial is bifurcated and that punitive damages are tried separately. After plaintiff presents evidence in support of punitive damages, move for directed verdict and point out how plaintiff failed to prove by clear and convincing evidence that the defendant acted with "actual malice, gross negligence, which evidences a willful, wanton or reckless disregard for the safety of others,

or committed actual fraud." Miss. Code Ann. §11-1-65(1)(a). "The *court* shall determine whether the issue of punitive damages may be submitted to the trier of fact; and, if so, the trier of fact shall determine whether to award punitive damages and in what amount." Miss. Code Ann. § 11-1-65(1)(d) (emphasis added). "But '[i]f the judge, from the record, should determine, as a matter of law, that the jury should not be allowed to consider the issue of punitive damages, a directed verdict shall be entered in favor of the defendant on the issue of punitive damages, and the case will end.'" *Estate of Gibson v. Magnolia Healthcare, Inc.*, 91 So. 3d 616, 632 (Miss. 2012) (quoting *Bradfield v. Schwartz,* 936 So. 2d 931, 939 (Miss. 2006)).

IV. Conclusion

In initially evaluating a case where plaintiff alleges punitive damages against an employer related to the culpability of its employee, it is critical to carefully assess the various claims and separately analyze the allegations pertaining to the employee's actions versus those pertaining to the employer's independent actions. It is clear – according to Mississippi state and federal case law – that where an employer admits vicarious liability for any simple negligence of its employee, the court should dismiss the direct non-*respondeat superior* claims against the employer, such as negligent hiring, training, retention, and entrustment. After disposing of those claims, claims for punitive damages against the employer may be ripe for dismissal. Although the Mississippi Supreme Court has not directly addressed the issue, numerous federal courts in Mississippi have held that punitive damages are not recoverable from an employer based on their employee's actions. However, even according to these cases, you cannot necessarily conclude that dismissal of direct liability claims against the employer will result in dismissal of punitive damages claims against the employer.

If plaintiff has only alleged the employer is liable because its employee was negligent, claims for punitive damages against the employer should be dismissed because there can be no vicarious liability for punitive damages. And even though the Mississippi Supreme Court has not directly addressed this issue, the argument finds footing in the clear and unambiguous language of the Mississippi punitive damages statute. Thus, even if the allegations against the employee amount to more than simple negligence and could potentially give rise to an award of punitive damages against the employee, if the only basis for liability against the employer is *respondeat superior*, punitive damages cannot be recovered against the employer because there can be no vicarious liability for punitive damages. If, however, plaintiff alleges the employer is liable for acts or omissions separate and apart from the acts or omissions of its employee, consider whether those allegations go beyond the realm of simple negligence. If they do amount to gross negligence, wantonness, or malice, such that they cannot be preliminarily dismissed on a motion to dismiss or motion for judgment on the pleadings, be mindful of eliciting evidence in the discovery process in support of an eventual motion for partial summary judgment on the issue of punitive damages. ■