Touro Law Review

Volume 25
Number 2 *TWENTIETH ANNUAL SUPREME COURT REVIEW*

Article 11

2009

Ascertaining the Burden of Proof for an Award for Punitive Damages in New York? Consult Your Local Appellate Division

Leon D. Lazer
Touro Law Center, llazer@tourolaw.edu

John R. Higgitt

Ascertaining the Burden of Proof for an Award for Punitive Damages in New York? Consult Your Local Appellate Division

Cover Page Footnote
25-2

ASCERTAINING THE BURDEN OF PROOF FOR AN AWARD FOR PUNITIVE DAMAGES IN NEW YORK? CONSULT YOUR LOCAL APPELLATE DIVISION

Leon D. Lazer[*]
John R. Higgitt[**]

INTRODUCTION

The subject of punitive damages is a hot topic these days. The United States Supreme Court's interest in the subject is apparent from a continuous series of decisions it has rendered over the past fourteen years imposing due process constraints on punitive damages awards;[1] the New York State Court of Appeals has recently provided extensive guidance concerning the conduct that will give rise to an award of punitive damages;[2] and both the Appellate Division and the trial courts routinely address whether punitive damages may be awarded in particular cases and whether such awards are excessive. Despite the proliferation of case law regarding punitive damages in this state, an important question remains unresolved: what is the ap-

[*] Leon D. Lazer is a retired associate justice of the Appellate Division, Second Department and professor of law at Touro College, Jacob D. Fuchsberg Law Center.

[**] John R. Higgitt is the law clerk to Associate Justice James M. McGuire of the Appellate Division, First Department, and an adjunct assistant professor of law at Benjamin N. Cardozo School of Law.

This Article originally appeared in the *New York Law Journal* on December 4, 2008.

[1] *See, e.g.*, Philip Morris USA v. Williams, 549 U.S. 346 (2007); State Farm Mut. Auto Ins. Co. v. Campbell, 538 U.S. 408 (2003); Cooper Indus. v. Leatherman Tool Group, Inc., 532 U.S. 424 (2001); BMW of N. Am. v. Gore, 517 U.S. 559 (1996); Honda Motor Co. v. Oberg, 512 U.S. 415 (1994).

[2] Ross v. Louise Wise Servs., 868 N.E.2d 189 (2007).

propriate burden of proof for establishing an award of punitive damages? Whether the burden is "preponderance of the evidence," the general evidentiary standard of proof in civil actions, or "clear and convincing evidence," the heightened standard of proof that applies to certain issues in civil actions, courts remain mired in disagreement between the upstate and downstate departments of the Appellate Division.[3] Two apparently conflicting Court of Appeals decisions on the issue are respectively 134 and eighty-eight years old.[4] In this Article we will briefly review punitive damages jurisprudence and the existing case law on the burden of proof issue, and leave it to the reader to take sides.

I. PUNITIVE DAMAGES GENERALLY

Compensatory damages are intended to make whole or indemnify a party who has suffered a loss.[5] Punitive damages are imposed to punish a party that engaged in certain types of wrongdoing

---

[3] *Compare* Seventh Judicial Dist. Asbestos Litig. v. Armstrong World Indus., Inc., 593 N.Y.S.2d 685, 686-87 (App. Div. 4th Dep't 1993) (stating the standard for proving punitive damages is preponderance of the evidence), *and* Frechette v. Special Magazines, Inc., 136 N.Y.S.2d 448, 451 (App. Div. 3d Dep't 1954) (noting a plaintiff has the burden of proving punitive damages by a preponderance of the evidence), *with* Munoz v. Puretz, 753 N.Y.S.2d 463, 466 (App. Div. 1st Dep't 2003) (holding the standard for recovering punitive damages is clear and convincing evidence), *and* Randi A. J. v. Long Island Surgi-Ctr., 842 N.Y.S.2d 558, 568 (App. Div. 2d Dep't 2007) (holding the standard of proof for punitive damages is clear and convincing evidence).

[4] *See* Corrigan v. Bobbs-Merrill Co., 126 N.E. 260, 263 (N.Y. 1920) (applying preponderance of evidence standard for punitive damages); Cleghorn v. New York Cent. & Hudson River R.R. Co., 56 N.Y. 44, 48 (1874) (stating punitive damages must be clearly established).

[5] *Ross*, 868 N.E.2d at 196. In a tort action, compensatory damages are meant to provide the injured party with fair and just compensation for the injuries the party sustained as a result of the tortuous conduct. *See id.* In a breach of contract action, compensatory damages are designed to place the non-breaching party in as good a position as it would have been had the contract been performed. Brushton-Moira Cent. Sch. Dist. v. Fred H. Thomas Assoc., 692 N.E.2d 551, 553 (N.Y. 1998).

and to deter that party and others similarly situated from engaging in the same wrongdoing in the future.[6] Since punitive damages are a species of damages award, no independent cause of action exists in New York for such damages: "a demand or request for punitive damages is parasitic and possesses no viability absent its attachment to a substantive cause of action."[7]

Punitive damages are only available in narrow classes of actions. In its last major decision regarding punitive damages, the Court of Appeals stated that:

> Punitive damages are permitted when the defendant's wrongdoing is not simply intentional but evince[s] a high degree of moral turpitude and demonstrate[s] such wanton dishonesty as to imply a criminal indifference to civil obligations. . . . [We previously] wrote that punitive damages may be sought when the wrongdoing was deliberate and has the character of outrage frequently associated with crime. The misconduct must be exceptional, as when the wrongdoer has acted maliciously, wantonly, or with a recklessness that betokens an improper motive or vindictiveness . . . or has engaged in outrageous or oppressive intentional misconduct or with reckless or wanton disregard of safety or rights.[8]

In tort actions, punitive damages are allowable where this threshold

---

[6] *Ross*, 868 N.E.2d at 196. *See* Exxon Shipping Co. v. Baker, 128 S. Ct. 2605, 2621 (2008) (citing N.Y. PATTERN JURY INSTRUCTIONS—CIVIL PUNITIVE DAMAGES 2:278 (2008)).

[7] *Randi A. J.*, 842 N.Y.S.2d at 564 (quoting Rocanova v. Equitable Life Assurance of U.S., 634 N.E.2d 940, 945 (N.Y. 1994)).

[8] *Ross*, 868 N.E.2d at 196 (internal quotations omitted). *See Randi A. J.*, 842 N.Y.S.2d at 564 (holding that punitive damages may be imposed absent evidence that misconduct was done with evil motive or in bad faith; evidence that defendant engaged in grossly negligent or reckless conduct evincing an utter disregard for the safety or rights of others can provide basis for award of punitive damages).

of moral culpability and blameworthiness is satisfied.[9] In breach of contract actions, however, the party seeking punitive damages must make additional showings. A party seeking punitive damages in a breach of contract action must demonstrate that: (1) the defendant's conduct is actionable as an independent tort; (2) the tortious conduct is sufficiently egregious to satisfy the moral culpability and blameworthiness threshold; (3) the egregious conduct was directed at the plaintiff; and (4) the conduct was part of a pattern aimed at the public generally.[10] According to Court of Appeals case law, the aimed-at-the-public requirement is imposed in breach of contract actions because punitive damages, unlike breach of contract actions, are meant to vindicate public rights.[11]

II. BURDEN OF PROOF

While the law is relatively settled with respect to the type of conduct giving rise to a punitive damages award, "New York law on burden of proof [for establishing] punitive damages is unclear,"[12] and

---

[9] Giblin v. Murphy, 532 N.E.2d 1282, 1284 (N.Y. 1988). The particular type of conduct giving rise to a punitive damages award may vary depending upon the nature of the action (e.g., defamation, automobile accidents, and medical malpractice). For a discussion of the nuances in the type of conduct required to sustain an award of punitive damages in these and other actions, see the comments to N.Y. PATTERN JURY INSTRUCTIONS—CIVIL PUNITIVE DAMAGES 2:278.

[10] New York Univ. v. Cont'l Ins. Co., 662 N.E.2d 763, 767 (N.Y. 1995).

[11] *Rocanova*, 634 N.E.2d at 943-44

> Punitive damages are not recoverable for an ordinary breach of contract as their purpose is not to remedy private wrongs but to vindicate public rights. . . . Thus, a private party seeking to recover punitive damages [in a breach of contract action] must not only demonstrate egregious tortuous conduct by which he or she was aggrieved, but also that such conduct was part of a pattern of similar conduct directed at the public generally.

Id.

[12] Greenbaum v. Svenska Handelsbanken, N.Y., 979 F. Supp. 973, 975 (S.D.N.Y. 1997) (quoting Geressy v. Digital Equip. Corp., 950 F. Supp. 519, 522 (E.D.N.Y. 1997)).

currently is dependent on the venue of the action. The lack of clarity flows not only from the previously noted north-south split among the departments of the Appellate Division, but also from the lack of discussion in the cases supporting each standard. This split is important because the issue of burden of proof is entirely a question of state law. Despite the many substantive and procedural due process constraints placed on punitive damages awards by the United States Supreme Court in recent years,[13] the Court has expressly rejected the assertion that the Due Process Clause of the federal Constitution requires a burden of proof higher than preponderance of the evidence.[14] Therefore, this issue of New York law will finally be resolved if and when it reaches the Court of Appeals again.

The function of a burden of proof "is to 'instruct the fact-finder concerning the degree of confidence our society thinks he [or she] should have in the correctness of factual conclusions for a particular type of adjudication.' "[15] The typical burden of proof in a

---

[13] *Philip Morris*, 549 U.S. at 353 (stating the Due Process Clause prohibits punitive damages awards from being based, in any part, upon the fact-finder's desire to punish a defendant for harming persons who are not before the court); *State Farm*, 538 U.S. at 425-26 (holding the Due Process Clause prohibits grossly excessive punitive damages awards). In *State Farm*, a punitive damages award of $145 million, in light of $1 million in compensatory damages, was neither reasonable nor proportionate to the wrong committed by defendant. *Id. Cooper Indus.*, 532 U.S. at 436 (concluding the Due Process Clause demands that appellate courts review, de novo, lower courts' determinations of the constitutionality of punitive damages awards); *BMW*, 517 U.S. at 574-85 (ruling the Due Process Clause prohibits grossly excessive punitive damages awards). The excessiveness determination depends upon review of punitive damages awards in light of three guideposts, the reprehensibility of defendant's conduct; whether the award bears a reasonable relationship to actual and potential harm caused by the defendant to the plaintiff; and, the difference between the award and the civil penalties authorized or imposed in comparable cases. *Id. Honda Motor Co.*, 512 U.S. at 418 (holding the Due Process Clause requires judicial review of the size of punitive damages awards).

[14] Pac. Mut. Life Ins. Co. v. Haslip, 499 U.S. 1, 23 n.11 (1991).

[15] Addington v. Texas, 441 U.S. 418, 423 (1979) (quoting *In re* Winship, 397 U.S. 358, 370 (1970) (Harlan, J., concurring)).

civil action between private parties for damages is preponderance of the evidence.[16] Preponderance of the evidence means "the greater part" of the evidence before the trier of fact, and the trier of fact may find for the plaintiff if "the evidence favoring the plaintiff's claim outweighs the evidence opposed to it."[17] The preponderance of the evidence standard endorsed by the Third and Fourth Departments ultimately draws its strength from an eighty-eight year old Court of Appeals decision.[18]

A. Preponderance Standard—The *Corrigan* Case

In 1920, the Court of Appeals declared, in *Corrigan v. Bobbs-Merrill Co.*,[19] that "[i]n order to recover punitive damages, plaintiff was bound to satisfy the jury by a fair preponderance of evidence" that the defendant engaged in certain conduct in defaming the plaintiff.[20] Remarkably, the court did not mention its 1874 precedent, *Cleghorn v. New York Central & Hudson River Railroad Co.*,[21] which, as discussed below, went the other way. Thirty-four years after *Corrigan* was decided, in *Frechette v. Special Magazines, Inc.*,[22] the Appellate Division, Third Department, without citing *Corrigan*, specifically endorsed a charge that asserted "before you can find a verdict of exemplary damages th[e] plaintiff must establish to you by

---

[16] *Id.*

[17] N.Y. PATTERN JURY INSTRUCTIONS—CIVIL BURDEN OF PROOF—PREPONDERANCE OF THE EVIDENCE 1:23.

[18] *Corrigan*, 126 N.E. at 263.

[19] *Id.* at 260.

[20] *Id.* at 263.

[21] *Cleghorn*, 56 N.Y. at 44.

[22] 136 N.Y.S.2d at 448.

a fair preponderance of the evidence that the defendant [engaged in certain types of conduct]."[23] In *Seventh Judicial District Asbestos Litigation v. Armstrong World Industries*,[24] the Fourth Department followed *Corrigan* and concluded that preponderance of the evidence is the correct standard.[25]

Thus, on the preponderance side of the ledger there is an eighty-eight year old Court of Appeals case and one decision from each of the upstate departments. With respect to federal case law, even if not authoritative, there is a 1990 United States Court of Appeals for the Second Circuit case that endorses the preponderance standard;[26] however, that 1990 case is the only one of several Second Circuit opinions on the issue that comes down on that side.[27] Additionally, multiple district court decisions have endorsed the preponderance standard.[28]

B. Clear and Convincing Standard

The clear and convincing standard is less commonly used in civil cases than the preponderance standard, but it is particularly appropriate in civil actions involving allegations of fraud or other quasi-criminal conduct.[29] Clear and convincing evidence is evidence that

---

[23] *Id.* at 451.

[24] 593 N.Y.S.2d at 685.

[25] *Id.* at 686-87.

[26] Simpson v. Pittsburgh Corning Corp., 901 F.2d 277, 282-83 (2d Cir. 1990).

[27] Roginsky v. Richardson-Merrell, Inc., 378 F.2d 832, 850-51 (2d Cir. 1967). *See also* Johnson v. Celotex Corp., 899 F.2d 1281, 1288 (2d Cir. 1990); Racich v. Celotex Corp., 887 F.2d 393, 398 (2d Cir. 1989); Aldrich v. Thomson McKinnon Sec., Inc., 756 F.2d 243, 247 (2d Cir. 1985); Brink's, Inc. v. City of New York, 717 F.2d 700, 706 (2d Cir. 1983).

[28] *See, e.g.*, *Greenbaum*, 979 F. Supp. at 978; *Geressy*, 950 F. Supp. at 522; United States v. Hooker Chem. & Plastics Corp., 850 F. Supp. 993, 1003 (W.D.N.Y. 1994).

[29] *Addington*, 441 U.S. at 423.

satisfies the fact-finder that there is a high degree of probability the defendant engaged in exceptional misconduct.[30]

In 1874, in the course of reviewing a jury instruction regarding punitive damages, the Court of Appeals in *Cleghorn* declared that "something more than ordinary negligence is requisite; [the conduct] must be reckless and of a criminal nature, and clearly established."[31] As previously noted, when the Court reached the opposite conclusion forty-six years later in *Corrigan* it failed to mention *Cleghorn*.[32] Both the First and Second Departments have consistently held that the correct standard is "clear and convincing" evidence, although it took them approximately 120 years to adopt the standard endorsed by *Cleghorn*. Indeed, in *Camillo v. Geer*,[33] the leading First Department case on the issue, the primary citation was to a Second Circuit case with *Cleghorn* listed as a "see also."[34] There is no extensive discussion of the burden of proof issue in any of the five First and Second Department decisions enumerating or sustaining the "clear and convincing" concept, and none of those decisions cite *Corrigan*.[35]

Notably, however, the standard endorsed by the First and Second Departments—clear and convincing evidence—is also the

---

[30] *See* N.Y. PATTERN JURY INSTRUCTIONS—CIVIL BURDEN OF PROOF—CLEAR AND CONVINCING EVIDENCE 1:64.

[31] *Cleghorn*, 56 N.Y. at 48.

[32] *See Corrigan*, 126 N.E. at 263.

[33] 587 N.Y.S.2d 306 (App. Div. 1st Dep't 1992).

[34] *Id.* at 309 (citing *Roginsky*, 378 F.2d at 850-51; *Cleghorn*, 56 N.Y. at 48). The panel in *Roginsky*, quoting the "clearly established" language from *Cleghorn*, essentially prophesized that the Court of Appeals would determine, as a matter of New York law, that punitive damages must be established by clear and convincing evidence.

[35] *Randi A.J.*, 842 N.Y.S.2d at 568; *Munoz*, 753 N.Y.S.2d at 466; Orange & Rockland Util. v. Muggs Pub, Inc., 739 N.Y.S.2d 610 (App. Div. 2d Dep't 2002); Sladick v. Hudson Gen. Corp., 641 N.Y.S.2d 270, 271 (App. Div. 1st Dep't 1996); *Camillo*, 587 N.Y.S.2d at 309.

standard applied by the majority of New York's sister states. In fact, twenty-three states have statutes requiring awards of punitive damages to be supported by clear and convincing evidence;[36] several others require such evidence pursuant to judicial decisions.[37]

---

[36] *See* ALA. CODE § 6-11-20 (2009); ALASKA STAT. § 09.17.020(b) (2009); CAL. CIV. CODE § 3294(a) (West 2009); FLA. STAT. ANN. § 768.725 (West 2009); GA. CODE ANN. § 51-12-5.1(b) (West 2009); IDAHO CODE ANN. § 6-1604(1) (2008); IND. CODE ANN. § 34-51-3-2 (West 2009); IOWA CODE ANN. § 668A.1(1)(a) (West 2009) ("preponderance of clear, convincing, and satisfactory evidence"); KAN. STAT. ANN. § 60-3702(c) (2009); KY. REV. STAT. ANN. § 411.184(2) (West 2009); MINN. STAT. ANN. § 549.20(1)(a) (West 2009); MISS. CODE ANN. § 11-1-65(1)(a) (West 2008); MONT. CODE ANN. § 27-1-221(5) (West 2008); NEV. REV. STAT. ANN. § 42.005(1) (West 2009); N.J. STAT. ANN. § 2A:15-5.12(a) (West 2009); N.C. GEN. STAT. ANN. § 1D-15(b) (West 2009); N.D. CENT. CODE § 32-03.2-11(1) (2008); OHIO REV. CODE ANN. § 2315.21(D)(4) (West 2009); OKLA. STAT. ANN. tit. 23, § 9.1.B-D (West 2009); OR. REV. STAT. ANN. § 31.730(1) (West 2008); S.C. CODE ANN. § 15-33-135 (2009); TEX. CIV. PRAC. & REM. CODE ANN. § 41.003(a) (Vernon 2009); UTAH CODE ANN. § 78B-8-201(1)(a) (West 2009); *cf.* COLO. REV. STAT. ANN. § 13-25-127(2) (West 2009) (punitive damages must be established beyond a reasonable doubt).

Congress has determined that clear and convincing evidence must support awards of punitive damages under certain federal causes of action it has recently created or refined. *See* 15 U.S.C. § 6604(a) (2006) ("Y2K" actions under 15 U.S.C. § 6601, *et seq.*); 20 U.S.C. § 6736(c)(1) (2006) (claims for punitive damages against certain teachers in public and private kindergarten, elementary and secondary schools); 42 U.S.C. § 14503(e)(1) (2006) (claims for punitive damages against certain volunteers covered by the Volunteer Protection Act); 49 U.S.C. § 28103(a)(1) (2006) (claims for punitive damages against certain railroad owners and operators).

[37] *See* Tritschler v. Allstate Ins. Co., 144 P.3d 519, 531 (Ariz. 2006); Orsini v. Larry Moyer Trucking, Inc., 833 S.W.2d 366 (Ark. 1992); Ass'n of Apartment Owners of Newton Meadows v. Venture 15, Inc., 167 P.3d 225, 290 (Haw. 2007); Spengler v. Sears, Roebuck & Co., 878 A.2d 628, 644 (Md. Ct. Spec. App. 2005); Morgan v. Kooistra, 941 A.2d 447, 455 (Me. 2008); Hoaas v. Griffiths, 714 N.W.2d 61, 66 (S.D. 2006); Culbreath v. First Tenn. Bank. Nat'l Ass'n, 44 S.W.3d 518, 527 (Tenn. 2001); Flippo v. CSC Assoc. III, 547 S.E.2d 216, 227 (Va. 2001); Hennig v. Ahearn, 601 N.W.2d 14, 29-30 (Wis. Ct. App. 1999). *See also* Dist. Cablevision, Ltd. v. Bassin, 828 A.2d 714, 726 (D.C. 2003) (applying District of Columbia law); *In re* Tutu Water Wells Contamination Litig., 42 V.I. 299, 313 (D.V.I. 1999) (applying Virgin Islands law).

The following states utilize a preponderance of the evidence standard: Freeman v. Alamo Mgmt. Co., 607 A.2d 370, 371 (Conn. 1992); Simon v. Beebe Med. Ctr., No. Civ.A.02C01133SCD (Del. Super. Ct. Mar. 15, 2004), 2004 WL 692647, at *1; Rivera v. United Gas Pipeline Co., 697 So. 2d 327, 335 (La. Ct. App. 1997); Santos v. Chrysler Corp., No. 921039 (Mass. Super. Ct. Sept. 18, 1996), 1996 WL 1186818, at *3; Jessen v. Nat'l Excess Ins. Co., 776 P.2d 1244, 1251 (N.M. 1989); Dodson v. Ford Motor Co., No. PC 96-1331 (R.I. Super. Ct. Sept. 5, 2006), 2006 WL 2642199, at *9; Kline v. Sec. Guards, Inc., 159 F. Supp. 2d 848, 850 (E.D. Pa. 2001) (applying Pennsylvania law); Coleman v. Sopher, 499 S.E.2d 592, 613 (W. Va. 1997); Campen v. Stone, 635 P.2d 1121, 1127 (Wyo. 1981).

Punitive damages are not permitted in Nebraska. *See* Distinctive Printing & Packaging Co. v. Cox, 443 N.W.2d 566, 574 (Neb. 1989). In New Hampshire, punitive damages

The elevated burden of proof entailed by the clear and convincing standard may have its best rationale in the fact that claims for punitive damages, which are designed to punish and deter wrongdoers, involve allegations of exceptional misconduct. As discussed above, punitive damages may be awarded only where a party's conduct:

> evince[s] a high degree of moral turpitude and demonstrate[s] such wanton dishonesty as to imply a criminal indifference to civil obligations . . . . [W]hen the wrongdoing was deliberate and has the character of outrage frequently associated with crime . . . . [W]hen the wrongdoer has acted maliciously, wantonly, or with a recklessness that betokens an improper motive or vindictiveness . . . or has engaged in outrageous or oppressive intentional misconduct or with reckless or wanton disregard of safety or rights.[38]

---

cannot be awarded unless a statute expressly allows for their imposition. N.H. REV. STAT. ANN. § 507:16 (2008). Similarly, punitive damages are not available in Massachusetts or Washington absent express statutory authorization. *See, e.g.*, *Santos*, 1996 WL 1186818, at *3, Dailey v. N. Coast Life Ins. Co., 919 P.2d 589, 590 (Wash. 1996).

Our research uncovered no authority regarding the appropriate burden of proof for an award of punitive damages in the following jurisdictions: Illinois, Michigan (but compare Green v. Evans, 401 N.W.2d 250, 253 (Mich. Ct. App. 1985) (approving jury instruction using preponderance standard without discussing burden of proof issue)), New Hampshire, Vermont, and Washington.

Federal courts have held that, where compensatory damages are awarded pursuant to certain causes of action created by federal law, the appropriate burden of proof for an award of punitive damages is preponderance of the evidence. *See* Dang v. Cross, 422 F.3d 800, 807 (9th Cir. 2005) (involving a cause of action under 42 U.S.C. § 1983); Tisdale v. Fed. Exp. Corp., 415 F.3d 516, 531 (6th Cir. 2005) (involving a claim under Title VII of the Civil Rights Act of 1991); Karnes v. SCI Colo. Funeral Serv., Inc., 162 F.3d 1077, 1081-82 (10th Cir. 1998) (involving a claim under Title II of the Civil Rights Act of 1991); Turner v. Sheriff of Marion County, 94 F. Supp. 2d 966, 983 (S.D. Ind. 2000) (involving a cause of action under 42 U.S.C. § 1983); Hopkins v. City of Wilmington, 615 F. Supp. 1455, 1465 (D. Del. 1985) (involving a cause of action under 42 U.S.C. § 1983).

[38] *Ross*, 868 N.E.2d at 196 (citing Walker v. Sheldon, 179 N.E.2d 497, 499 (N.Y. 1961), Prozeralik v. Capital Cities Commc'ns, Inc., 626 N.E.2d 34, 41-42 (N.Y. 1993), *and* Sharapata v. Town of Islip, 437 N.E.2d 1104, 1106 (N.Y. 1982)) (internal citations omitted).

The interests of the party against whom punitive damages are sought are "more substantial than mere loss of money" since that party's reputation could be tarnished if a fact-finder determined the party engaged in exceptional misconduct.[39] A heightened burden of proof, such as clear and convincing evidence, serves to reduce the risk that the party against whom punitive damages are sought will have its reputation erroneously tarnished.

C. The "Parasitic" Theory

As if the debate regarding the appropriate burden of proof for an award of punitive damages is not complicated enough, another burden of proof has been suggested, one that attempts to place the burden of proof in harmony with the parasitic nature of punitive damages. In *Greenbaum v. Svenska Handelsbanken, N.Y.*,[40] then-District Judge Sonya Sotomayor observed that her conclusion, based principally on *Corrigan* and a Second Circuit decision,[41] that preponderance of the evidence was the appropriate burden of proof for an award of punitive damages was bolstered by the facts that punitive damages are not a separate cause of action and are inextricably linked to an underlying, substantive cause of action, and the burden of proof on the plaintiff's substantive causes of action was preponderance of the evidence.[42] She further observed that "it is more reasonable to apply the same burden of proof with respect to [an award of punitive

---

[39] *Addington*, 441 U.S. at 424. *See* Storar v. Dillon, 420 N.E.2d 64 (N.Y. 1981).
[40] 979 F. Supp. at 973.
[41] *Id.* at 981-82 (citing *Corrigan*, 126 N.E. at 263; *Simpson*, 901 F.2d at 282).
[42] *Greenbaum*, 979 F. Supp. at 982.

damages] as is applied to other aspects of the claim."[43] Thus, *Greenbaum* articulated a new theory concerning the burden of proof on an award of punitive damages—the "parasitic" theory. The "parasitic" theory suggests that the same burden of proof on the substantive cause of action should be applied to the claim for punitive damages.[44] This theory has some appeal since it recognizes the inextricable nature of the relationship between a substantive cause of action and punitive damages.[45] However, no New York appellate court has embraced it.[46]

III. CONCLUSION

The appropriate burden of proof for an award of punitive damages remains an unsettled issue that awaits resolution by the Court of Appeals. In the meantime, a lawyer confronted with the issue must look to the law in his or her judicial department. Although the possibility of change can never be discounted, the decisions of the downstate departments are relatively recent and there is nothing to indicate the upstate departments are inclined to alter their less-recent views. Thus, it is more likely that all departments will, pursuant to stare decisis, adhere to their own precedents. Therefore, resolution of the issue, if it does occur, will flow at the onset from the efforts of a

---

[43] *Id.*

[44] *Id.*

[45] The utility of the parasitic theory is limited in New York since the burden of proof for the overwhelming majority of causes of action is preponderance of the evidence. Two notable exceptions are causes of action for fraud and certain claims for defamation, both of which require clear and convincing evidence.

[46] *Cf.* Rose v. Brown & Williamson Tobacco Corp., 809 N.Y.S.2d 784 (Sup. Ct. New York County 2005) (applying parasitic theory), *rev'd on other grounds* 855 N.Y.S.2d 119 (App. Div. 1st Dep't 2008).

diligent practitioner who, by appropriate objection and request to charge,[47] creates the path to the Court of Appeals.[48]

[47] While a trial court will presumably follow the law established by the Appellate Division department in which the trial court is cited, Ross Bicycles, Inc. v. Citibank, N.A., 539 N.Y.S.2d 906, 907 (App. Div. 1st Dep't 1989) ("The doctrine of stare decisis requires that courts of original jurisdiction follow the decisions and precedents of the Appellate Division . . . ."), a timely and specific objection is required before the trial court can preserve an issue for appellate review. *See* N.Y. C.P.L.R. 4110-b (McKinney 2008); Up-Front Indus., Inc. v. U.S. Indus. Inc., 473 N.E. 2d 733, 734 (N.Y. 1984) (indicating a charge to which no objection is lodged becomes the law applicable to the determination of the case).

[48] *See* N.Y. COMP. CODES R. & REGS. tit. 22, § 500.22(b)(4) (2009).