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Insurance and Punitive Damages - The Public Policy Rationale from an Alternative Viewpoint - Anthony v. Frith

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INSURANCE AND PUNITIVE DAMAGES—The Public Policy Rationale from an Alternative Viewpoint—*Anthony v. Frith*, 394 So. 2d 867 (Miss. 1981)

Carol Ann Anthony was injured when struck by an automobile as she was walking in a shopping center parking lot. The driver of the automobile, Clayton Frith, was intoxicated at the time. In a suit to recover for the personal injuries sustained by Miss Anthony, a jury awarded a judgment against Frith for $1,500 in compensatory damages and $3,500 in punitive damages.[1]

Mr. Frith was insured by State Farm Mutual Automobile Insurance Company under a typical automobile liability insurance policy.[2] State Farm proceeded to pay the compensatory damages but refused to pay the portion of the judgment assessed as punitive damages.[3] Miss Anthony obtained a writ of garnishment against the insurer which was subsequently dismissed in circuit court.[4] The circuit judge ruled punitive damages were within the coverage of the policy in question; however, public policy prevented requiring the insurer to pay amounts assessed as punitive damages.[5]

The Mississippi Supreme Court reversed the lower court. After first agreeing that punitive damages were covered by the policy *as issued*,[6] the supreme court went on to hold that public policy did not prohibit requiring the insurer to pay punitive damages.[7]

There is a split of authority among the jurisdictions that have

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1. Anthony v. Frith, 394 So. 2d 867 (Miss. 1981).
2. The relevant portion of the policy provided:

   COVERAGE A - BODILY INJURY LIABILITY

   To pay on behalf of *insured* all sums which the insured shall become legally obligated to pay as *damages* because of

   (A) bodily injury sustained by other persons, and . . . caused by accident . . . (emphasis in policy).

Id. at 868.
3. *Id.* at 867-68.
4. *Id.* at 868.
5. *Id.*
6. *Id.* (emphasis added).
7. *Id.*

considered the issue of the insurability of punitive damages.[8] The Mississippi Supreme Court was first confronted with this issue in the instant case. The ruling of the supreme court aligned Mississippi with the jurisdictions that allow punitive damages to be recovered from an insurer. However, the supreme court adopted this posture without fully disclosing its rationale.[9]

The purpose of this note is to present a brief comparison of the opposing lines of analysis and then to pursue a closer examination of the amorphous public policy rationale. The scope of this note is limited to situations in which recovery is sought against a tortfeasor for his own misdeeds.[10]

BACKGROUND

Punitive damages[11] are generally viewed as a class of money damages awarded separate from and in addition to the actual or compensatory damages sustained by an injured plaintiff.[12] However, some jurisdictions view punitive damages as compensatory in nature. In Connecticut, for instance, an award for punitive damages may not exceed the plaintiff's expense of litigation, less taxable costs.[13] Punitive damages are also awarded to compensate the

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8. *See generally* Comment, *Punitive Damages and Liability Insurance: Theory, Reality and Practicality*, 9 CUM. L. REV. 487 (1978); Comment, *Insurance for Punitive Damages: A Reevaluation*, 28 HASTINGS L. J. 431 (1976).

9. The court cited various authorities on both sides of the issue and summarily concluded that allowing recovery of punitive damages from an insurer "in this case" was "the better reasoned view." 394 So. 2d at 868.

10. Various other considerations become relevant when a plaintiff seeks recovery from a party based upon vicarious liability. For a general discussion of insurance coverage in the context of vicarious liability, see Comment, *Insurance for Punitive Damages: A Reevaluation*, 28 HASTINGS L. J. 431 (1976). *See also* Comment, *Punitive Damages and Liability Insurance: Theory, Reality and Practicality*, 9 CUM. L. REV. 487, 500 (1978).

11. Punitive damages are also known as "exemplary" damages, "vindictive" damages, and "smart money." Fowler Butane Gas Co. v. Varner, 244 Miss. 130, 150, 141 So. 2d 226, 233 (1962).

12. *E.g.*, Nicholson v. American Fire and Casualty Ins. Co., 177 So. 2d 52 (Fla. 1965); Fowler Butane Gas Co. v. Varner, 244 Miss. 130, 141 So. 2d 226 (1962); Esmond v. Liscio, 209 Pa. Super. 200, 224 A.2d 793 (1967); W. PROSSER, HANDBOOK OF THE LAW OF TORTS § 2 (4th ed. 1971).

The RESTATEMENT (SECOND) OF TORTS § 908 (1977) defines punitive damages as follows: "(1) Punitive damages are damages, other than compensatory or nominal damages, awarded against a person to punish him for his outrageous conduct and to deter him and others from similar conduct in the future."

Punitive damages are distinguished from compensatory damages in that "[c]ompensatory damages are such as will compensate the injured party for the injury sustained, and nothing more; such as will simply make good or replace the loss caused by the wrong or injury." BLACK'S LAW DICTIONARY 352 (rev. 5th ed. 1979).

13. Hanna v. Sweeney, 78 Conn. 492, 62 A. 785 (1906). The Connecticut courts also recognize that the orthodox common law rule of punitive damages is not applicable in their jurisdiction. Craney v. Donovan, 92 Conn. 236, 102 A. 640 (1917).

plaintiff for mental suffering as distinguished from actual pecuniary losses in Iowa,[14] Michigan,[15] and New Hampshire.[16]

The overwhelming majority of states allow punitive damages for the express purpose of punishment and deterrence.[17] Case law and commentators reveal other rationales that may be found standing alone or intertwined with various other approaches.[18]

Despite some very sharp criticism that has been levied against punitive damages[19] the concept has persisted.[20] A leading treatise on torts has indicated that only four states entirely reject the notion of punitive damages.[21]

Liability insurance has so permeated our society that a great amount of litigation has developed surrounding the issue of an insurer's liability for punitive damages assessed against its insured. However, there has been a great division among the jurisdictions confronted with this issue.[22]

The various courts that have given full consideration to the issue have developed a two-fold analysis: (1) whether punitive damages are covered under the policy in question; and (2) whether public policy prohibits recovery of punitive damages from an insurer. Some courts have circumvented part of the inquiry by concluding that punitive damages are not covered by the policy and hence further investigation is unnecessary.[23] An adequate understanding of the court's concerns when faced with the issue of insurance for punitive damages may be gained from an examina-

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14. Brause v. Brause, 190 Iowa 329, 177 N.W. 65 (1920).

15. Wise v. Daniel, 221 Mich. 229, 190 N.W. 746 (1922).

16. Bixby v. Dunlap, 56 N.H. 456 (1876).

17. *See, e.g.*, Hartford Acc. & Indem. Co. v. United States Concrete Pipe, 369 So. 2d 451, 452 (Fla. Dist. Ct. App. 1979) ("[P]unitive damages are imposed against a defendant as punishment to the defendant and as a deterrent to the defendant and others."). *See also* 22 AM. JUR. 2D *Damages* § 236 (1965).

18. One commentator has advanced four theories for the imposition of punitive damages: (1) revenge; (2) public justice; (3) compensation; and (4) punishment and deterrence. Belli, *Punitive Damages: Their History, Their Use, and Their Worth in Present-Day Society*, 49 UMKC L. REV. 1, 5-7 (1980).

Mississippi views punitive damages as a reward to the plaintiff for pursuing an action against the wrongdoer as well as a punishment and deterrent. Snowden v. Osborne, 269 So. 2d 358 (Miss. 1972).

19. "The idea is wrong. It is a monstrous heresy. It is an unsightly and unhealthy excrescence, deforming the symmetry and body of the law." Fay v. Parker, 53 N.H. 343, 382 (1873).

20. W. PROSSER, *supra* note 12, § 2. The orthodox view of punitive damages as a punishment and deterrent has also been noted as an aberration in civil litigation, the purpose of which is compensation to an injured party. *Id.*

21. *Id.* at 9, n.61.

22. For the most current compilation of the jurisdictions faced with this issue, *see* Annot., 16 A.L.R. 4th 11 (1981).

23. Brown v. Western Casualty and Sur. Co., 484 P.2d 1252 (Colo. App. 1971).

tion of the leading cases of *Northwestern National Casualty Co. v. McNulty*[24] and *Lazenby v. Universal Underwriters Ins. Co.*,[25] which represent the polar positions on the issue.

PUBLIC POLICY PROHIBITS COVERAGE: THE *McNulty* VIEW

In 1962, *Northwestern National Casualty Co. v. McNulty*[26] presented the Fifth Circuit Court of Appeals with the issue of an insurance company's liability for a judgment of punitive damages against an insured party. The court held that "under Florida law public policy prohibits insurance against liability for punitive damages."[27]

The plaintiff in *McNulty* suffered severe injuries when his car was struck from the rear by the insured party on a Florida highway. The insured was intoxicated at the time of the accident.[28]

The plaintiff brought suit in a Florida state court and a jury awarded the plaintiff $37,500 in compensatory damages and $20,000 in punitive damages. The insurance company disclaimed any liability for punitive damages, and a garnishment action was brought in federal district court to recover up to the policy limit of $50,000.[29] The plaintiff was granted summary judgment and the insurance company appealed.

The Fifth Circuit found it unnecessary to pass upon contract considerations offered by the insurer and instead focused upon public policy considerations.[30] The court noted that Florida followed the orthodox view that punitive damages are imposed as a punishment and deterrent[31] and found very strong public policy reasons for preventing irresponsible drivers from escaping punishment through insurance.[32] The court sympathized with the position of the injured plaintiff but considered the public interest in

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24. 307 F.2d 432 (5th Cir. 1962).
25. 214 Tenn. 639, 383 S.W.2d 1 (1964).
26. 307 F.2d 432 (5th Cir. 1962).
27. *Id.* at 433. The court noted the various meanings assigned to "punitive damages" and limited their holding to situations where they are "awarded with a view to punish the defendant for irresponsible conduct and to deter the defendant and others from similar misconduct." *Id.* at 442.
28. *Id.* at 433.
29. *Id.* The policy provided: "To pay on behalf of the insured all sums which the insured shall become legally obligated to pay as damages because of: 'A. *bodily injury*, sickness or disease, including death resulting therefrom' . . . ." *Id.*
30. *Id.* at 434.
31. *Id.* at 435.
32. *Id.* at 441. "Where a person is able to insure himself against punishment he gains a freedom of misconduct inconsistent with the establishment of sanctions against such misconduct." *Id.* at 440.

punishing wrongdoers and deterring others from similar conduct more important.[33]

The essence of the *McNulty* holding, which was later adopted by the Florida courts as the law of the jurisdiction,[34] and by other jurisdictions by virtue of its persuasiveness, can be summarized in the following excerpt from the opinion:

> If that person were permitted to shift the burden to an insurance company, punitive damages would serve no useful purpose. Such damages do not compensate the plaintiff for his injury, since compensatory damages already have made the plaintiff whole. And there is no point in punishing the insurance company; it has done no wrong.[35]

PUBLIC POLICY DOES NOT PROHIBIT COVERAGE: THE *Lazenby* VIEW

Two years after *McNulty*, the Tennessee Supreme Court had opportunity to rule on a similar situation. In *Lazenby v. Universal Underwriters Insurance Co.*,[36] the plaintiff was awarded compensatory and punitive damages as a result of injuries arising from the negligent operation of an automobile by the insured who was intoxicated at the time. The insurance company agreed to pay the compensatory damages but claimed that punitive damages were not covered by the contract.[37] The court rejected the insurance company's contract argument[38] and held it liable for the full amount of the judgment.[39]

The public policy argument of *McNulty* was not persuasive with the Tennessee Supreme Court although Tennessee, like Florida, views punitive damages as a punishment and deterrent.[40] "Public policy is practically synonymous with public good and un-

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33. *Id.* at 442.

34. *E.g.*, Hartford Acc. & Indem. Co. v. United States Concrete Pipe Co., 369 So. 2d 451 (Fla. Dist. Ct. App. 1979).

35. 307 F.2d at 440. *Accord, e.g.*, Gleason v. Fryer, 30 Colo. App. 106, 491 P.2d 85 (1971); Nicholson v. American Fire and Casualty Ins. Co., 177 So. 2d 52 (Fla. Dist. Ct. App. 1965).

36. 214 Tenn. 639, 383 S.W.2d 1 (1964).

37. The policy provided: "To pay on behalf of the insured all sums which the insured shall become legally obligated to pay as damages . . . ." *Id.* at 642, 383 S.W.2d at 2.

38. The court stated: "[w]e think the average policy holder reading this language would expect to be protected against all claims, not intentionally inflicted." *Id.* at 648, 383 S.W.2d at 5. *See infra* notes 50-54 and accompanying text. *See also* Price v. Hartford Acc. and Indem. Co., 108 Ariz. 485, 502 P.2d 522 (1972).

39. 214 Tenn. at 647, 383 S.W.2d at 4-5.

40. *Id.* at 646, 383 S.W.2d at 4.

less the private contract is in terms of such a character as to tend to harm or injure the public good . . . it is not violative of public policy nor void on that account."[41] The court was influenced in its public policy determination by the questionable result of denying recovery of punitive damages from an insurer.

> This State, in regard to the proper operation of motor vehicles, has a great many detailed criminal sanctions, which apparently have not deterred this slaughter on our highways and streets. Then to say the closing of the insurance market, in the payment of punitive damages, would act to deter guilty drivers would in our opinion contain some matter of speculation.[42]

ANALYSIS

As noted earlier, the Mississippi Supreme Court did not give any rationale for its holding in *Frith*, only stating that it was the "better reasoned view."[43] One commentator has noted that the foundation for the decision might be found in the fact that Mississippi views punitive damages as both a reward to the plaintiff for pursuing the action and as a punishment of and deterrent to the defendant.[44] While it is true that the *McNulty* approach would require additional analysis under Mississippi case law, which allows punitive damages for reasons other than punishment and deterrence, the simple extension of the principle would not require great effort.[45]

Frith may also be seen as a statement of the judicial attitude toward declaring private contracts void on public policy grounds.[46] Looking at *Frith* as a statement about the propriety of partially

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41. *Id.* at 648, 383 S.W.2d at 5.

42. *Id. But see* American Sur. Co. of New York v. Gold, 375 F.2d 523 (10th Cir. 1966).

> [W]e may as well say criminal sanctions serve no useful purpose just because they are constantly violated. The question is not so much the efficacy of the policy underlying punitive damages; rather it is a question of the implementation of that policy. Permitting the penalty for the misdeed to be levied on one other than he [sic] who committed it cannot possibly implement the policy.

Id. at 527.

43. *Frith*, 394 So. 2d at 868.

44. Supreme Court Review, *Payment of a Tortfeasor's Punitive Damages by His Insurance Company*, 52 MISS. L. J. 445, 447 (1982).

45. *Id. McNulty* was limited to situations where punitive damages were awarded for punishment and deterrence. *McNulty*, 307 F.2d at 442.

46. *See generally* 17 AM. JUR. 2D *Contracts* § 178 (1964).

voiding a private contract by judicial action, it must first be remembered that the courts are dealing with a contract.[47] This observation may seem quite unnecessary, but the vast majority of the literature written about the insurability of punitive damages focuses on the public policy theme with very little emphasis on contract considerations.

The emphasis on public policy appears to be a direct result of *stare decisis*. As soon as *McNulty* was decided, the stage was set. When the insurability issue arose in another court, *McNulty* would inevitably be cited as persuasive authority, thereby engendering yet another judicial excursion into the public policy realm as espoused in *McNulty*. The courts felt compelled either to accept or explain away the conclusions of *McNulty*.

The court in *McNulty* found it unnecessary to pass on contract arguments presented by the insurer, stating that should a policy provide specifically for coverage of punitive damages "it would contravene public policy."[48] Specific case law in Mississippi may well require a contract analysis prior to considering public policy.[49] The public policy questions would be a part of the contract question — a balance between the right to contract and public policy considerations.

There is some disagreement on the threshold matter of whether punitive damages are included under the language of the contract.[50] In a contract setting, the doctrine of *contra proferentem* (ambiguous terms are to be construed against the party who selected the language)[51] would probably place punitive damages within the scope of the policy language.[52]

Mississippi case law specifically dealing with insurance poli-

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47. "The insurance contract in the case at bar is a private contract . . . to hold assured, as a matter of public policy, is not protected by the policy on a claim for punitive damages would have the effect to partially void the contract." *Lazenby*, 383 S.W.2d at 5.

48. 307 F.2d at 434.

49. *See infra* notes 53-58 and accompanying text.

50. *Compare* Brown v. Western Cas. & Sur. Co., 484 P.2d 1252 (Colo. Ct. App. 1971) *and Lazenby*, *supra* note 38 (coverage denied) *with* Southern Farm Bureau Ins. Co. v. Daniel, 246 Ark. 849, 440 S.W.2d 582 (1969) (coverage allowed). *See generally* Sprentall, *Insurance Coverage of Punitive Damages*, 84 DICK. L. REV. 221, 223-27 (1980).

51. BLACK'S LAW DICTIONARY 296 (rev. 5th ed. 1979).

52. One insurance treatise has suggested that courts should not aid insurers that do not insert an exclusion clause. 6B APPLEMAN, INSURANCE LAW AND PRACTICE (Buckley ed.) § 4312 (1979). There does not appear to be any impediment to prevent an insurer from excluding punitive damages from the policy. *See* Comment, *The Exclusion Clause: A Simple and Genuine Solution to the Insurance for Punitive Damages Controversy*, 12 U.S.F.L. REV. 743 (1978).

cies is replete with examples.[53] "[W]here a policy of insurance is prepared by the insurance company, its terms must be considered most favorably toward the insured . . . provisions of doubtful meaning must be construed most strongly *toward liability*."[54]

The Mississippi courts have recognized their duty and power to declare contracts void when made contrary to law or public policy,[55] but they have also recognized that "[t]he right to contract and have contracts enforced is a basic one guaranteed by the Constitutions. The function of the courts is to enforce contracts rather than enable parties to escape their obligation *upon the pretext of public policy*."[56] Courts seem to favor the rights of parties to freely contract and are averse to holding contracts void on public policy absent a clear showing of illegality.[57] The Mississippi court has also noted the invasive nature of voiding contracts on public policy grounds.[58]

A question that is often overlooked surrounds the source of public policy.[59] The holding in *Frith* may be more clearly understood when it is seen that Mississippi courts first look for enunciations of public policy in the constitutions and statutes before looking to judicial decisions.[60] The Mississippi Supreme Court may have been heavily persuaded by the fact that when the Legislature enumerated what could *not* be covered by a motor vehicle liability policy, punitive damages were *not* mentioned.[61] By implication it appears that punitive damages may be covered by a motor vehicle liability policy. The actual truth may be that the Legislature never even thought about punitive damages, but if so, the analysis goes back to a balancing approach between the sanctity of contract rights and public policy. In 1904, the Mississippi Supreme Court expressed the judicial attitude toward the sanctity of contract when it stated "contracts are not in violation of the public policy . . . unless prohibited by express terms or the fair implica-

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53. *See, e.g.*, Bellefonte Ins. Co. v. Griffin, 358 So. 2d 387 (Miss. 1978); State Farm Mut. Auto. Ins. Co. v. Taylor, 233 So. 2d 805 (Miss. 1970) (ambiguous terms are construed against the drafter).

54. Lumberman's Mut. Cas. Co. v. Broadus, 237 Miss. 387, 388, 115 So. 2d 130, 132 (1959) (emphasis added).

55. Smith v. Simon, 224 So. 2d 565, 566 (Miss. 1969).

56. *Id.* (emphasis added).

57. National Mill Supply Co. v. State, 211 Ind. 243, 6 N.E.2d 543 (1937); Wallehan v. Hughs, 196 Va. 117, 82 S.E.2d 553 (1954); 17 AM. JUR. 2D *Contracts* § 178 (1964).

58. State v. Edward Hines Lumber Co., 150 Miss. 1, 48, 115 So. 598, 605 (1928).

59. "Public policy" does not carry a fixed meaning and escapes a clear definition and rigid rule. 17 AM. JUR. 2D *Contracts* § 175 (1964).

60. 150 Miss. at 48, 115 So. at 605.

61. MISS. CODE ANN. § 63-15-43(5) (Supp. 1982).

tion of a statute, or condemned by some decision of the courts construing the subject matter."[62]

CONCLUSION

In summary, *Anthony v. Frith* will in all likelihood be cited by future courts as authority for the proposition that punitive damages may be recovered from an insurer, but nothing more. Since the issue was first raised in a court of law, the debate over public policy has continued. It is quite possible that the original seed of controversy was sowed by an ingenious (or desperate) defense attorney who realized he had a weak contract argument. The result of the public policy emphasis is to place otherwise all-important contract issues in a role of secondary importance.

Beyond all of the literature written in this area it appears that except for the cases of first impression the point is probably moot in practical application.[63] Once a jurisdiction has set the ground rules counsel for either side will know how to proceed—thus the game will continue. Although there are many interesting legal doctrines involved in this area, in most instances homage will continue to be paid to "public policy" and the prior decisions in this area will be viewed as mere marks to be tallied on opposite sides of a ledger sheet.

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62. Orrell v. Bay Mfg. Co., 83 Miss. 800, 824, 36 So. 561, 564 (1904). *See also* Commonwealth v. Hall, 291 Pa. 341, 140 A. 626 (1928) (It is the domain of the legislature to define what agreements and acts contravene public policy). *But see* Woodson v. Hopkins, 85 Miss. 171, 181, 37 So. 1000, 1001 (1905) ("[T]he courts should not hesitate to declare a contract illegal merely because no statute or precedent prohibiting it can be found.").

63. See the general discussion found at note 52 *supra*.