



# PHILADELPHIA TRIAL LAWYERS ASSOCIATION

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June 15, 2012

## VIA HAND DELIVERY

The Honorable John W. Herron  
Administrative Judge  
First Judicial District of Pennsylvania  
Philadelphia Court of Common Pleas  
Room 300, City Hall  
Philadelphia, Pennsylvania 19107

Re: Punitive Damages Protocol

Dear Judge Herron,

Please accept this letter as the comment related to the Court's proposed protocol related to the deferral of punitive damages.

Your Honor has made clear that General Regulation 2012-01 reflects the Court's concern regarding the number of cases being filed in the mass tort program and the Court's ability to manage the volume of cases with the available judicial resources. Respectful of this concern, the Plaintiffs' Bar is agreeable to Judge Moss' suggestion that plaintiffs demonstrate proof of use when filing a complaint in a Prescription Drug case. The Plaintiffs' Bar is also agreeable to Your Honor's suggestion that the Coordinating Judge should make pre-trial rulings on the sufficiency of a plaintiff's punitive damages claim. With respect to Your Honor's suggestion, we propose the following language to be included in the Regulation:

In a pharmaceutical liability case, the mass tort coordinating judge shall decide any motion to amend a complaint to add a claim for punitive damages and any motion for summary judgment on a punitive damages claim.

The Defense Bar has rejected both of these suggestions. Instead, after months of discussion and with only two days remaining in the comment period, it has submitted a 915-word proposed rule that does not even purport to address the Court's concerns related to the number of filings or the speed at which cases are resolved. Rather than promote efficiency, the Defense Bar proposes to supplant and abrogate a broad range of substantive law and both procedural and evidentiary rules, all through a suggested local rule that by definition cannot be inconsistent with Pennsylvania law or practice. Although defendants uncivilly present this proposal at the close of the comment period, we herein respond to it on short notice. We first offer some comments on the Court's protocol.

COMMENTS REGARDING THE ORIGINAL PROPOSED PROTOCOL

The protocol originally published by the Court would require the indefinite deferral of punitive damages in all mass tort actions. This means that if the issue of punitive damages is ever tried, the trial will be before a different jury from the jury that decided basic liability and compensatory damages. Because of the nature of the evidence relevant to prove punitive damages, the trial of the issue of punitive damages will require a retrial of the entire case presented to the first jury on the issue of basic liability and compensatory damages, including the same evidence as to the conduct of the defendant, the same evidence as to causation, and the same evidence as to damages. This will be unduly costly and time-consuming. As a practical matter, deferral of a claim means that the case can never culminate in a final order that will fully resolve the litigation and permit appellate practice to commence. Deferral, therefore, will not promote case resolution, but unequivocally slow it down.

To the extent that protocol simply provides for the bifurcation of punitive damage claims, it is invalid in that it directly conflicts with Pa.R.C.P. 213(b) on bifurcation.<sup>1</sup> Rule 213(b) provides:

(b) The court, in furtherance of convenience or to avoid prejudice, may, on its own motion or on motion of any party, order a separate trial of any cause of action, claim, or counterclaim, set-off, or cross-suit, or of any separate issue, or of any number of causes of action, claims, counterclaims, set-offs, cross-suits, or issues.

Rule 213 makes clear that a decision whether to bifurcate must be made on a case-by-case basis as a matter of trial court discretion.<sup>2</sup> This statewide Rule of Civil Procedure cannot be superseded by local rule. Yet that is exactly what the bifurcation proposal threatens to accomplish. In doing so, it not only goes beyond the proper scope of a local rule, but also gives too little consideration to the sound reasons that support the exercise of judicial discretion. It is well settled substantive law that bifurcation is improper if the issues to be determined in the separated trials are interwoven and the evidence bearing upon the issues is commingled and overlapping. See, *Stevenson v. General Motors Corp.*, 513 Pa. 411, 422-23, 521 A.2d 413, 419 (1987) (explaining that bifurcation "should be carefully and cautiously applied and be utilized only in a case and at a juncture where informed judgment impels the court to conclude that application of the rule will manifestly promote convenience and/or actually avoid prejudice.") *Stevenson* warns particularly against bifurcation in the personal injury context, "where the issues of liability and damages are generally

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<sup>1</sup>. A local rule of court is invalid if it conflicts with the provisions of a Pennsylvania Rule of Civil Procedure. *Warner v. Pollack*, 434 Pa. Super. 551, 557, 644 A.2d 747, 750 (1994); *Davidson v. John W. Harper, Inc.*, 342 Pa. Super. 560, 563, 493 A.2d 732, 734 (1985); *Ricci v. Ricci*, 318 Pa. Super. 445, 448, 465 A.2d 38, 39 (1983).

<sup>2</sup>. See *Donohue v. Lincoln Electric Co.*, 936 A.2d 52, 72 (2007); *Santartas v. Leaseqay Motorcar Transport Co.*, 456 Pa. Super. 34, 689 A.2d 311 (1997); *Ptak v. Masontown Men's Softball League*, 414 Pa. Super. 425, 429, 607 A.2d 297, 299-300 (1992).]

interwoven and the evidence bearing upon the respective issues overlaps." *Id.* By providing for the automatic deferral of the issue of punitive damages in all mass tort claims, without the exercise of trial court discretion in individual cases, the Court's bifurcation proposal not only disregards state procedural rules but its substantive law as well. The suggestion should be withdrawn on both accounts.

#### COMMENTS REGARDING THE DEFENDANTS' PROPOSED PROTOCOL

We now offer some thoughts on the proposal propounded by the Defense Bar. This 915-word proposed rule suggests a complicated approach to punitive damages that is contrary to Pennsylvania law or practice. Once again, while the Defense Bar has had months to offer a proposal regarding punitive damages, it waited until only two days before the close of comments to transmit this complicated and rambling plan for review by the Plaintiffs' Bar. This approach is fundamentally unfair both to the Plaintiffs' Bar and the Court but given the time-constraints, we offer only the following general comments to the punitive damages proposal.

First, the proposal runs contrary to our common law as well as numerous rules of evidence and procedure; contrary to Pa.R.C.P. 239. For example:

- It creates a complicated procedural framework that reverses the burdens of proof in pre-trial litigation. The proposal relieves the defendant of demonstrating an entitlement to summary judgment in its favor. It also relieves the defendant of the burden of moving for relief, allowing it to answer rather than act affirmatively.
- It creates new substantive standards for evaluating the sufficiency of evidence to support a punitive damages claim. Pennsylvania has a well-settled framework for the evidence that can support punitive liability: the defendant's behavior must have been outrageous, extreme, or egregious and it acted with evil motive or reckless indifference to the rights of others. See, e.g., *Hutchinson v. Penske Truck Leasing Co.*, 876 A.2d 978 (Pa. 2005). The proposal would supersede or at least substantively limit the availability of punitive damages by introducing a new concept – that punitive damages are available only upon evidence of a "direct causal nexus" between the conduct that supports punitive liability and the plaintiff's injury. This direct causal nexus is not found in Pennsylvania law, and cannot be created by the Court of Common Pleas through the enactment of a local rule. Likewise, no local rules may run afoul of the existing substantive law.
- The proposal also fashions a new standard of reviewing the sufficiency of a plaintiff's evidence. Customarily, a defendant seeking summary judgment on a punitive damages claim must demonstrate that "there is no genuine issue of material fact and the moving party is entitled to relief as a matter of law." *Evans v. Sodexho*, 946 A.2d 733, 737 (Pa. Super. 2008). In assessing the motion, the trial court must view the record "in the light most favorable to the

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non-moving party, and all doubts as to the existence of a genuine issue of material fact must be resolved against the moving party.” Id. The proposal abandons that well-settled construct in favor of a “reasonable basis” standard. Under their proposal the defendant is entitled to judgment if “plaintiff has not established there is a reasonable basis for the recovery of punitive damages.” Thus, defendants propose that even where the evidence would overcome a summary judgment motion and the issue would have been decided by a jury they may be entitled to summary judgment under an alternate standard that has no existence anywhere in Pennsylvania law.

- The proposal incorporates a new evidentiary standard. Under the defendants’ proposal evidence considered by the trial court in connection with summary judgment must not only be “admissible” but also “reliable.” This would subject every piece of evidence relevant to punitive damages to an evidentiary analysis akin to Frye or Daubert, where the judge supplants the jury on the threshold questions of credibility. General Regulation 2012-01 was promulgated in part to promote efficiency. This new evidentiary standard promotes just the opposite, not to mention that it is a complete fabrication with no support in Pennsylvania law.

- The proposal establishes a complicated procedural framework that has no counterpart in the Civil Rules and that will only complicate mass tort cases. The idea is that a plaintiff seeking punitive damages should file a “notice” of their intention in this regard. Currently notice of a punitive damage claim is alleged in the complaint. Pennsylvania has a comprehensive body of law which addresses the fact-pleading or evidence necessary to support a threshold claim for punitive damages. In turn, if a defendant wishes to oppose a motion to amend a complaint, or to seek judgment in its favor on punitive damages, it need simply do what the Civil Rules already allow: oppose plaintiff’s motion, or file a motion of its own. There is no need to create an awkward and duplicative procedural framework that will do poorly what the Civil Rules already do well.

- The proposal’s suggestion regarding net worth seeks to supplant an existing Rule of Civil Procedure, which already makes clear that net worth discovery can proceed only upon a court order setting forth appropriate restrictions. The proposal serves to accomplish nothing that Pa.R.C.P. 4003.7 does not already provide. Again, it is well established that a local rule cannot conflict with a Rule of Civil Procedure.

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- The proposal would supersede and abrogate well-settled Pennsylvania law on the bifurcation of trials. The law says that a trial court has discretion to bifurcate trials in furtherance of convenience or to avoid prejudice. Pa.R.C.P. 213(b); *Pascale v. Hechinger Co.*, 627 A.2d 750, 756 (Pa. Super. 1993). The proposal would nullify this framework by reposing discretion to bifurcate entirely within the defendants. As it would supersede a promulgated rule, the proposal is illegal under Pennsylvania law. Once again, the disdain for Pennsylvania practice is palpable.

- The proposal would overturn Pennsylvania common-law and federal constitutional law by prohibiting a punitive damages award if the jury awards zero or only nominal compensatory damages, even if the jury otherwise were to find that the defendant's conduct deserves punitive liability. See, e.g., *Kirkbridge v. Lisbon Contractors, Inc.*, 555 A.2d 800 (Pa. 1989) (making clear that a jury can award punitive damages even when awarding only nominal compensatory damages).

- The proposal would give defendants multiple opportunities to summarily dismiss a punitive claim. In particular, the proposal contemplates that defendants be able to test the sufficiency of plaintiff's evidence not only before trial through what amounts to a summary judgment motion, but also at the close of the first stage of a bifurcated trial – after the jury has rendered a plaintiff's verdict on punitive liability but before the amount of damages have been assessed. It is all well and good for a defendant to seek directed verdict during trial. But this proposal is for something different – a new dispositive motion that does not exist anywhere else in Pennsylvania practice. A defendant may move for summary judgment, directed verdict, and even j.n.o.v. These opportunities are ample, customarily, and well-established in our rules and practice. Defendants' proposal for yet more motion practice is a recipe for delay and increased burden on judicial resources.

- The proposal fashions a duplicative and confusing standard for the remittitur of jury verdicts, requiring remittitur unless the verdict is "reasonable" and "justified." Both the Pennsylvania and federal courts have long-established standards for evaluating the size of jury verdicts, including verdicts for punitive liability. That case law stands on its own and may not be modified or superseded by local rule. Even an attempt to summarize the law is unwise, as the law in this area has evolved in recent years and any local rule may soon be outdated. The further point, repeated above, is that local rules by definition may not change substantive law. Philadelphia judges handle remittitur routinely and hardly need a local rule to advise them of the applicable standards.

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Second, defense counsel has stated that the above proposal “represents best practices” in other states. Whether or not that is actually true, the proposal clearly does not “represent” Pennsylvania law or practice. It instead disregards well-settled Pennsylvania law which provides a well-settled road map for the management of punitive liability and replaces it with entirely new procedures and concepts.

Third, defense counsel has stated that there are some defense counsel “who believe that the Court should retain the provision deferring punitive damages and not implement any alternative proposal at this time.” It is apparent that the proposal does not reflect a unified position of the Defense Bar. Indeed, it is not clear who actually supports the proposal. This further undermines the proposal’s suitability for consideration by this Court.

For the forgoing reasons, the Plaintiffs' Bar respectfully requests that (a) the protocol relating to the deferral of punitive damages be amended to include Judge Moss' Proposal and Your Honor's Proposal; (b) the protocol be further amended to eliminate deferral; and (c) the Defense Bar's recent proposal be rejected in its entirety.

Very truly yours,

A handwritten signature in black ink, appearing to read 'Laura Feldman', written over the typed name and title.

Laura Feldman, Esquire  
President

LF/P

cc: The Honorable Sandra Mazer Moss  
The Honorable Arnold L. New  
Robert C. Heim, Esquire (by email)  
Joseph E. O'Neil, Esquire (by email)