Warnings and Punitive Damages

Friday, February 24, 2012

In our recent post describing Salvio v. Amgen Inc., 2012 WL 517446 (W.D. Pa. Feb. 15, 2012), we mentioned the standard for punitive damages that the court applied – "punitive damages are unfounded where a manufacturer-defendant warns of the potential danger that resulted in injury to a plaintiff." 2012 WL 517446, at *8. Under this view, even if the warning is inadequate in some way, the fact that the defendant gave some warning about the risk defeated the "conscious indifference" (or worse) mental state required for punitive damages:

> *"[E]ven if Plaintiff could show that "[m]ore could have been done or said," the Defendants did not display indifference toward the public's safety and therefore punitive damages are not warranted. Defendants' Motion to Dismiss Plaintiff's claim for punitive damages will be GRANTED.*

Id. The court observed that "Pennsylvania courts have not addressed this issue," id., and thus relied on several federal court of appeals decisions.

We think the principle is an interesting one, so we've decided to examine it in more depth. One thing we found was that Salvio had overlooked prior Pennsylvania decisions that made more or less the same rulings. One such decision is Richetta v. Stanley Fastening Systems, L.P., 661 F. Supp.2d 500 (E.D. Pa. 2009), which involved a nail gun, not a prescription medical product. Like Salvio, Richetta held that the defendant's efforts to warn precluded the mental state necessary for punitive damages:

> *"[T]he existence of this warning language substantially undercuts Plaintiffs' argument and indicates that Defendant was, if anything, attempting to minimize the risk of accidents through this warning language. As the state of mind of the actor is vital in determining whether punitive damages are appropriate, this conduct cannot be considered recklessly indifferent.*

661 F. Supp.2d at 514 (citation and quotation marks omitted).

Then there is Ferguson v. Valero Energy Corp., 2009 WL 1676154 (E.D. Pa. June 15, 2009), which wasn't a products case at all, but involved injuries to an employee of an independent contractor. A property owner (and other related defendants) could not have been "recklessly indifferent" because "the defendants undertook several steps to warn against the dangers." Id. at *14.

The cases Salvio cited are also on point. Toole v. McClintock, 999 F.2d 1430, 1436 (11th Cir. 1993), was decided under Alabama law. Alabama follows a "conscious indifference/deliberate" intent standard for punitive damages. Id. at 1435. In Toole, a breast implant case, the defendant had warned about the particular injury that the plaintiff experienced. The warning might not have been adequate, but it demonstrated that the defendant was not acting consciously or deliberately as required for punitive damages:

> *"[T]he issue of punitive damages should not go to the jury when a manufacturer took steps to warn plaintiff of the potential danger that injured him; those facts bar a finding that defendant was "consciously indifferent." The [defendant's] warning describes the main harms that [plaintiff] has actually suffered . . . and the warning forecasted the way she came to suffer these harms. . . . More could have been done or said, but [defendant] did not exhibit indifference toward safety. [Defendant's] conduct shows regard for recipients of its implants and cannot be viewed as "wanton." We conclude that there was insufficient evidence of wantonness in this case to permit the jury to award punitive damages.*

Id. at 1436 (citation omitted). Accord Toole v. Baxter Healthcare Corp., 235 F.3d 1307, 1317 (11th Cir. 2000) ("reaffirming" prior decision concerning warnings and punitive damages); Richards v. Michelin Tire Corp., 21 F.3d 1048, 1059 (11th Cir. 1994) (tire manufacturer's warnings precluded finding of "wantonness") (applying Alabama law).

Toole relied on an older decision, Kritser v. Beech Aircraft Corp., 479 F.2d 1089 (5th Cir. 1973) (obviously not involving a prescription medical product) of the Fifth Circuit, applying Texas law, that reached the same result. Texas also defined the mental state required for punitive damages as "conscious indifference." Id. at 1097. Kritser determined that the trial court properly withheld punitive damages from the jury because:

> *"[Defendant] gave [plaintiff] notice of [the risk] under some circumstances and warned him against [it]. The fact that the company took such steps to inform [plaintiff] of potential danger absolved [it] of liability only for punitive but not compensatory damages. The defendant did not exhibit the conscious indifference toward the public which generally typifies gross negligence, and there is no evidence that it committed any willful act or omission.*

Id. (citation omitted).

The third case Salvio cited, Dudley v. Bungee International Manufacturing Corp., 1996 WL 36977 (4th Cir. 1996) (in table at 76 F.3d 372), is an unpublished (and therefore non-precedential) decision under Virginia law. The fact pattern was the same – the defendant gave a warning, albeit inadequate, of the risk involved. The court held that, while inadequate, that warning precluded a finding of "willful and wanton negligence" sufficient to support punitive damages:

> *"This warning, at least in general terms, warned others of the dangers. . . . Thus, since [defendant] warned of the potential danger that injured [plaintiff], it exhibited some care for his safety. Because [defendant]. exercised some care for the safety of others, an award of punitive damages was not warranted under a failure to warn theory*

Id. at *3.

Dudley cited another case for this proposition, the Missouri Supreme Court decision in Bhagvandoss v. Beiersdorf, Inc., 723 S.W.2d 392 (Mo. 1987). Bhagvandoss involved a non-prescription medical device (a bandage). The defendant's warnings precluded a conclusion of "complete indifference" or "conscious disregard of the rights of others" needed for punitive damages:

> *"[Defendant] sought to warn users that the product should not be used in sterile intensive procedures. We have held that the jury might well find that the letter did not give sufficient warning. . . . But **inadequate communication cannot be equated to conscious disregard**. . . . Here the defendant gave serious attention to the problem and issued a warning. Even if there are grounds for criticizing its procedures, the finding of complete indifference is not supported by the record.*

Id. at 398 (citations and footnote omitted) (emphasis added). See Drabik v. Stanley-Bostitch, Inc., 997 F.2d 496, 510 (8th Cir. 1993) (warnings negated intent under Missouri law); Jackson v. Leland Health Care LLC, 2008 WL 6049187, at *4 (Mo. App. Nov. 12, 2008) ("not enough to justify submitting a claim for punitive damages to a jury that a defendant inadequately communicated a warning"), transfer denied (Mo. Dec. 18, 2008); Jone v. Coleman Corp., 183 S.W.3d 600, 610-11 (Mo. App. 2005) ("warning indicate[d] that [defendant] did not willfully or consciously disregard the safety of the consumers"), transfer denied (Mo. Feb. 28, 2006).

We went looking to see if we could find anything else. We found the Texas Supreme Court ruling (in a non drug/device case) that an inadequate warning precluded a finding of the mental state necessary for punitive damages:

> *"The issue in gross negligence is not whether [defendant] developed and used the best warning imaginable. We believe this warning, standing alone, does not provide a reasonable basis upon which to infer conscious indifference. After reviewing the evidence . . . we hold the evidence of conscious indifference is not legally sufficient.*

General Motors Corp. v. Sanchez, 997 S.W.2d 584, 597-98 (Tex. 1999). See Agrium U.S., Inc. v. Clark, 179 S.W.3d 765, 767 (Tex. App. 2005) ("an actor's failure to pursue the safest course available or provide the best warnings imaginable does not necessarily equate to a want of caring") (reversing punitive damages award), review denied (Tex. April 21, 2006).

There was also law next-door in Arkansas. In DeLuryea v. Winthrop Laboratories, 697 F.2d 222 (8th Cir. 1983) (applying Arkansas law), a prescription drug case, the court agreed that the defendant "failed to adequately warn of these dangers." However, the "evidence establishe[d]" that because "warnings were given," "there was no evidence to support punitive damages" and "no indication of malice, wantonness, or reckless indifference to the consequences from which malice could be inferred." See Lockley v. Deere & Co., 933 F.2d 1378, 1390 (8th Cir. 1991) (belated addition of warning decals may "very well have supported a finding of negligence" but "even gross negligence is not sufficient to justify punitive damages under Arkansas law").

We also found law in Illinois. In Tyler Enterprises of Elwood, Inc. v. Skiver, 633 N.E.2d 1331 (Ill. App. 1994), the court affirmed dismissal of punitive damages in light of arguably inadequate warnings:

> *"There is a fact question as to the adequacy of the warnings supplied by [defendant]. Nevertheless, [it] did advise [plaintiff] not to [do what the plaintiff did]. In light of the above facts, we cannot conclude that [dft] acted with a conscious disregard for, or indifference to, the safety of [plaintiff].*

Id. at 1339.

In a non-precedential decision, the Ninth Circuit, interpreting California law, also held that warnings, "albeit inadequate," precluded a jury from finding the mental state needed to award punitive damages:

> *"Under California law, punitive damages may be awarded when a plaintiff proves by clear and convincing evidence that a defendant acted with such a conscious and deliberate disregard of the interests of others that his conduct may be called willful or wanton. Here, [defendant] made efforts, albeit insufficiently, to warn its customers about the risks. . . . While this may amount to negligence, it does not rise to the level willful or wanton conduct.*

Heston v. Taser International, Inc., 431 Fed. Appx. 586, 589 (9th Cir. 2011) (applying California law).

Finally, in Turner v. Adaltis U.S.A., Inc., 2005 WL 3335425 (D. Md. Dec. 7, 2005), the court held:

> *"that no reasonable juror could rationally find by clear and convincing evidence that [defendant] acted with "actual malice" such that an award of punitive damages could be sustained . . . because the facts of record, including but not limited to the warning contained in the [product's] user's manual, affirmatively undermines any such claim of "actual malice."*

Id. at *4.

There may be more such cases. Our research was little more than some Shepardizing (tracking cases that cite to one another), and one computer search. It's enough, however, to tell us that the defense is a valid one in the punitive damages context and that the Salvio court was on solid ground in making its ruling.

Labels: Punitive Damages