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TIPS

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from the Trenches

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Ala. Code § 6-11-20(a)'s Clear and Convincing Evidence Standard Has No Application When Opposing a Motion for Summary Judgment

How often have you read the following in a brief supporting a motion for summary judgment in a fraud or wantonness case?

Plaintiff presents no evidence, much less clear and convincing evidence, to support his claim of [fraud, wantonness, punitive damages].

Defendants often devote pages castigating plaintiff's lawyers for having the audacity to continue to pursue punitive damages when plaintiff's evidence "clearly" cannot meet Ala. Code § 6-11-20(a)'s *clear and convincing evidence* standard.

However, it is a firmly entrenched principle of Alabama law that the clear and convincing evidence standard has no application and is indeed irrelevant at the summary judgment stage.

Section 6-11-20, Ala. Code 1975, states as follows:

Punitive damages not to be awarded other than where clear and convincing evidence proven; definitions.

(a) Punitive damages may not be awarded in any civil action, except civil actions for wrongful death pursuant to Sections 6-5-391 and 6-5-410, other than in a tort action where it is proven by clear and convincing evidence that the defendant consciously or deliberately engaged in oppression, fraud, wantonness, or malice with regard to the plaintiff. Nothing contained in this article is to be construed as creating any claim for punitive damages which is not now present under the law of the State of Alabama.

(b) As used in this article, the following definitions shall apply:

(1) FRAUD. An intentional misrepresentation, deceit, or concealment of a material fact the concealing party had a duty to disclose, which was gross, oppressive, or malicious and committed with the intention on the part of the defendant of thereby depriving a person or entity of property or legal rights or otherwise causing injury.

(2) MALICE. The intentional doing of a wrongful act without just cause or excuse, either:

a. With an intent to injure the person or property of another person or entity, or

b. Under such circumstances that the law will imply an evil intent.

(3) WANTONNESS. Conduct which is carried on with a reckless or conscious disregard of the rights or safety of others.

(4) CLEAR AND CONVINCING EVIDENCE. Evidence that,

when weighed against evidence in opposition, will produce in the mind of the trier of fact a firm conviction as to each essential element of the claim and a high probability as to the correctness of the conclusion. Proof by clear and convincing evidence requires a level of proof greater than a preponderance of the evidence or the substantial weight of the evidence, but less than beyond a reasonable doubt.

(5) OPPRESSION. Subjecting a person to cruel and unjust hardship in conscious disregard of that person's rights.

Acts 1987, No. 87-185, p. 251, § 1.

Several opinions from the Supreme Court and Court of Civil Appeals make plain the statutory clear and convincing evidence standard plays no role in consideration of motions for summary judgment. First, and most notably, the Supreme Court, in *Hines v. Riverside Chevrolet-Olds, Inc.*, 655 So.2d 909, 924-26 (Ala. 1994), *overruled on other grounds, State Farm Fire & Cas. Co. v. Owen*, 729 So.2d 834 (Ala. 1998), took great pains to explain why this is so:

> The third issue is whether the circuit court erred in entering the summary judgment in favor of the defendants on the ground that under § 6-11-20 the plaintiff failed to present "clear and convincing" evidence of an intent on the part of the defendants to deceive or of oppressive, malicious conduct, for the purpose of submitting the issue of punitive damages to the jury.
>
> To resolve this issue, we must interpret two statutes, § 12-21-12 and § 6-11-20(b), Ala. Code 1975. Section 12-21-12 states, in pertinent part:
>
> "(a) In all civil actions brought in any court of the state of Alabama, proof by substantial evidence shall be required to submit an issue of fact to the trier of the facts. Proof by substantial evidence shall be required for purposes of testing the sufficiency of the evidence to support an issue of fact in rulings by the court, including without limitation, motions for summary judgment, motions for directed verdict, motions for judgment notwithstanding the verdict, and other such motions or pleadings respecting the sufficiency of evidence.
>
> "....
>
> "(c) With respect to any issue of fact for which a higher standard of proof is required, whether by statute, or by rule or decision of the courts of the state, substantial evidence shall not be sufficient to carry the burden of proof, and such higher standard of proof shall be required with respect to such issue of fact."
>
> (Emphasis added.)
>
> Section 6-11-20(a) states, in pertinent part:
>
> "(a) Punitive damages may not be awarded in any civil action ... other than in a tort action where it is proven by clear and convincing evidence that the defendant consciously or deliberately engaged in oppression, fraud, wantonness, or malice with regard to the plaintiff."
>
> (Emphasis added.)
>
> The fundamental rule of statutory construction is to ascertain and give effect to the intent of the legislature in enacting the statute. *Gholston v. State*, 620 So.2d 719 (Ala.1993); *Ex parte McCall*, 596 So.2d 4 (Ala.1992). The legislature's intent may be discerned from the language of the act, the reason and necessity for the act, and the goal sought to be obtained. *Gholston*. When a statutory pronouncement is clear and not susceptible to different interpretations, it is a paramount judicial duty to abide by that clear pronouncement. *Macon v. Huntsville Utilities*, 613 So.2d 318 (Ala.1992). If a statute is susceptible to two constructions, one of which is workable and fair and the other unworkable and unjust, the court will assume that the legislature intended that which is workable and fair. *Ex parte Hayes*, 405 So.2d 366 (Ala.1981); *State v. Calumet & Hecla Consol. Copper Co.*, 259 Ala. 225, 66 So.2d 726 (Ala.1953); *State Dep't of Revenue v. Delta Air Lines, Inc.*, 549 So.2d 1352 (Ala. Civ.App.1989); *State Health Planning & Development Agency of Alabama v. Baptist Medical Center*, 446 So.2d 619 (Ala. Civ. App. 1983). See generally 2A Norman J. Singer, *Sutherland Statutory Construction* § 45.12, at 61 (5th ed. 1992).
>
> Citing *Coca-Cola Bottling Co. United, Inc. v. Stripling*, 622 So.2d 882 (Ala.1993), and *Big B, Inc. v. Cottingham*, 634 So.2d 999 (Ala.1993), the defendants argue that the Hineses failed to present evidence, sufficient under the § 6-11-20 "clear and convincing" standard, that the defendants consciously and deliberately engaged in fraud; and they contend, therefore, that the circuit court properly entered the summary judgment on the claims of intentional suppression and fraudulent misrepresentation. The circuit court held, and the defendants now argue, the general proposition that § 6-11-20 requires a plaintiff, seeking both punitive and compensatory damages in an action based on claims of fraud, to present "clear and convincing evidence" that the defendant consciously and deliberately engaged in fraud,

in order to submit a "claim of punitive damages" to the jury.

The language of § 12-21-12(a) and (c) and § 6-11-20(a) belies the construction of § 6-11-20(a) advocated by the defendants. Section 12-21-12(a) establishes the quantum of evidence necessary to submit an issue of fact to the trier of fact, when the sufficiency of the evidence to support an issue of fact is tested. Unless a higher standard is provided by statute, rule, or decision, substantial evidence is required to submit an issue of fact to the trier of fact. § 12-21-12(c). This statute limits the authority of a trial court to submit an issue of fact to the trier of fact.

Section 6-11-20(a), however, limits the authority of the trier of fact to award punitive damages--that is, a trier of fact may not award punitive damages unless the plaintiff proved by "clear and convincing" evidence that the defendant consciously or deliberately engaged in oppression, fraud, wantonness, or malice with regard to the plaintiff. Thus, by its very language, § 6-11-20 does not define the standard for determining whether a genuine issue of fact, material to a claim alleged by the plaintiff, exists for the trial court to submit to the trier of fact; rather, it defines the standard of proof for determining whether the trier of fact has, or had, the authority to award punitive damages. This distinction becomes clearer when viewed in the context of the substantive law of punitive damages and our Rules of Civil Procedure.

If, for example, a plaintiff alleges a claim of wantonness and demands in the ad damnum clause of the complaint only compensatory damages, § 12-21-12 clearly applies, and the plaintiff, to defeat the defendant's summary judgment motion, need only present substantial evidence creating a genuine issue of material fact. If, however, in the complaint the same plaintiff demands punitive, as well as compensatory, damages, does § 6-11-20 now apply, instead of § 12-21-12, to require the plaintiff to present clear and convincing evidence of wantonness to create a genuine issue of fact? The answer is "no."

By its very language, § 6-11-20 does not apply to determine whether, in opposition to a motion for a summary judgment, the plaintiff has presented sufficient evidence creating a genuine issue of fact to submit to the trier of fact as to one or more elements of a claim. Section 12-21-12, not § 6-11-20, governs the question whether the plaintiff has presented sufficient evidence creating a genuine issue as to a fact material to one or more elements of a claim. By contrast, § 6-11-20 establishes the degree of proof necessary to permit the trier of fact to award punitive damages. Just as, for example, a plaintiff must prove wantonness by a preponderance of the evidence to recover compensatory damages, the plaintiff must prove wantonness by clear and convincing evidence to authorize the trier of fact to award punitive damages.

The problem with the construction advocated by the defendants is that the summary judgment procedure of Rule 56, Ala.R.Civ.P., applies to "claims" or causes of action, either in whole or in part, and that, technically speaking, there is no such thing as a "claim of punitive damages." Rather, there are claims on which our law authorizes the trier of fact to impose punitive damages if certain wrongfulness is proved by a sufficient weight of the evidence. The question whether the requisite wrongfulness was proved by clear and convincing evidence to authorize the trier of fact to award punitive damages is not material to any element of a claim.

The question whether a plaintiff proved the requisite wrongfulness by a sufficient weight of the evidence to allow the jury to award punitive damages is but one issue of damages for a trier of fact when it is presented a claim on which the law authorizes the award of punitive as well as compensatory damages. For example, a claim of wantonness is not a "claim of punitive damages"; rather, it is a claim on which, under our law, a trier of fact has the authority in its discretion to impose punitive damages. If sufficiently proved, a claim of wantonness can legally support either an award of compensatory damages or an award of both compensatory and punitive damages. Because punitive damages are awarded on a tort claim that ordinarily may otherwise be submitted to the jury on substantial evidence, the question whether there is clear and convincing evidence of wrongful conduct that will support an award of punitive damages does not arise until the trial, when a defendant objects to the submission to the jury of the question of punitive damages on the ground that clear and convincing evidence of the requisite wrongful conduct has not been presented. To construe §§ 12-21-12 and 6-11-20 to require a circuit court to enter a summary judgment on a claim of wantonness because the plaintiff did not present clear and convincing evidence of wantonness and because the trier

> of fact might in its discretion award punitive damages is simply unworkable and patently unjust, because the question of punitive damages is not the only question of damages for the trier of fact. The question of compensatory damages remains. If, in opposition to a motion for a summary judgment, the plaintiff presented substantial evidence creating a genuine issue of material fact and if the plaintiff proved his claim by at least a preponderance of the evidence, the plaintiff still has the right to have the trier of fact determine whether he is entitled to compensatory damages.

Id. at 924-926 (emphasis added). Despite clearly being "the law" since 1994, we nevertheless still continue to see challenges to the sufficiency of plaintiff's evidence of the defendant's wrongfulness in punitive damages cases at the summary judgment stage.

Hines v. Riverside Olds does not stand alone. In *Knight v. Beverly Healthcare*, 820 So.2d 92, 100, n. 5 (Ala. 2001), the Supreme Court reiterated "that in order for a judge to submit the issue of punitive damages to the jury as the trier of fact, the judge must be satisfied by substantial evidence. Then the jury must be satisfied that the plaintiff has presented clear and convincing evidence to support the punitive-damages award."

Likewise, in *Ex parte Norwood Hodges Motor Co., Inc.*, 680 So.2d 245, 249 (Ala. 1996), the Court held "[t]he trial court should have determined whether the evidence warranted submitting the issue of punitive damages to the jury, i.e., whether there was evidence of such quality and weight that a jury of reasonable and fair-minded persons could find by clear and convincing evidence that the defendant consciously or deliberately engaged in fraud; then the court should have instructed the jury that, to award punitive damages, it must find that Rosa Iliff had proven by clear and convincing evidence that Hodges consciously or deliberately defrauded her."

The Court of Civil Appeals followed suit in *Boudousquie v. Marriott Management Corp.*, 669 So.2d 998, 1001 (Ala. Civ. App. 1995), stating:

> As to Boudousquie's claim of wantonness, Marriott argues that Boudousquie failed to satisfy the burden placed on him by Ala. Code 1975, § 6-11-20. In *Hines v. Riverside Chevrolet-Olds, Inc.*, 655 So.2d 909, 925 (Ala. 1994), our Supreme Court stated that § 6-11-20 is irrelevant in regard to motions for summary judgment; "rather, if defines the standard of proof for determining whether the trier of fact has, or had, the authority to award punitive damages."

Id. at 1001.

In conclusion, do not let our friends from the defense side of the Bar impose any higher evidentiary burden of proof at summary judgment than is required by established law.