

rel: November 3, 2017

Notice: This opinion is subject to formal revision before publication in the advance sheets of Southern Reporter. Readers are requested to notify the **Reporter of Decisions**, Alabama Appellate Courts, 300 Dexter Avenue, Montgomery, Alabama 36104-3741 ((334) 229-0649), of any typographical or other errors, in order that corrections may be made before the opinion is printed in Southern Reporter.

SUPREME COURT OF ALABAMA

OCTOBER TERM, 2017-2018

1150118

Timothy Joel Thomas

v.

Randell Heard and Donna Heard

Appeal from Geneva Circuit Court
(CV-14-900015)

1150119

Timothy Joel Thomas

v.

Laura Wells, as guardian ad litem and next friend of M.A., a
minor

**Appeal from Geneva Circuit Court
(CV-13-900145)**

On Return to Remand

PER CURIAM.

Timothy Joel Thomas appealed from judgments entered in favor of Randell Heard and Donna Heard and in favor of Laura Wells, as guardian ad litem and next friend of M.A., a minor. The Heards and Wells had separately sued Thomas alleging negligence and wantonness and seeking to recover damages for injuries the Heards and M.A. had suffered as the result of an automobile accident. A jury returned verdicts in favor of Randell Heard, awarding compensatory damages of \$850,000 and punitive damages of \$750,000; in favor of Donna Heard, awarding compensatory damages of \$450,000 and punitive damages of \$750,000; and in favor of Wells, awarding compensatory damages of \$500,000 and punitive damages of \$500,000. The trial court entered judgments on the jury's verdicts. Thomas argued that the jury's punitive-damages awards were excessive under the guideposts set out by the United States Supreme Court in BMW of North America, Inc. v. Gore, 517 U.S. 559 (1996), and the factors set out by this Court in Hammond v. City of Gadsden, 493 So. 2d 1374 (Ala. 1986), and Green Oil

1150118, 1150119

Co. v. Hornsby, 539 So. 2d 218 (Ala. 1989), and requested a remittitur. The trial court denied Thomas's request for a remittitur without explaining its reasoning for doing so.

On appeal, this Court affirmed the judgments as to the compensatory-damages awards but remanded the cases with instructions for the trial court to enter orders in compliance with Hammond, 493 So. 2d at 1379 ("[I]t is not only appropriate, but indeed our duty, to require the trial courts to reflect in the record the reasons for interfering with a jury verdict, or refusing to do so, on grounds of excessiveness of the [punitive] damages."). See Thomas v. Heard, [Ms. 1150118, March 24, 2017] ___ So. 3d ___ (Ala. 2017). Pursuant to our instructions, the trial court, on May 24, 2017, after conducting a Hammond/Green Oil hearing, entered identical orders in both cases reaffirming the punitive-damages awards. The trial court made its return to this Court. The only issue now before this Court is whether the punitive-damages awards are, as Thomas contends, excessive. For the reasons given, we conclude that they are not.

Standard of Review

1150118, 1150119

This Court reviews de novo an award of punitive damages. National Ins. Ass'n v. Sockwell, 829 So. 2d 111, 135 (Ala. 2002).

Discussion

In reviewing a punitive-damages award, we apply the factors outlined in Green Oil, supra, and Hammond, supra, within the guideposts set out in Gore, supra, as restated in State Farm Mutual Automobile Insurance Co. v. Campbell, 538 U.S. 408 (2003).

The Gore guideposts are: "(1) the degree of reprehensibility of the defendant's misconduct; (2) the disparity between the actual or potential harm suffered by the plaintiff and the punitive damages award; and (3) the difference between the punitive damages awarded by the jury and the civil penalties authorized or imposed in comparable cases." State Farm, 538 U.S. at 418 (citing Gore, 517 U.S. at 575). The Hammond/Green Oil factors are:

"(1) the reprehensibility of [the defendant's] conduct; (2) the relationship of the punitive-damages award to the harm that actually occurred, or is likely to occur, from [the defendant's] conduct; (3) [the defendant's] profit from [his] misconduct; (4) [the defendant's] financial position; (5) the cost to [the plaintiff] of the litigation; (6) whether [the defendant] has

1150118, 1150119

been subject to criminal sanctions for similar conduct; and (7) other civil actions [the defendant] has been involved in arising out of similar conduct.'"

Ross v. Rosen-Rager, 67 So. 3d 29, 41-42 (Ala. 2010) (quoting Shiv-Ram, Inc. v. McCaleb, 892 So. 2d 299, 317 (Ala. 2003) (paraphrasing the Hammond/Green Oil factors)).

In the present case, the trial court stated in its orders denying Thomas's motion for a remittitur:

"The parties agreed that there were basically three Hammond issues that applied to this case and one was not in dispute. The parties agreed that the difference between compensatory and punitive damages awarded by the jury was not a significant difference, and therefore, this factor is an indicator that the punitive damage[s] award was reasonable.

"The two issues counsel focused on in oral argument were:

"1) The degree of reprehensibility of the defendant's conduct.

"2) The financial position of the defendant."

The trial court considered all the Gore and Hammond/Green Oil factors but determined that only three were applicable. Thomas has not disputed this aspect of the trial court's orders. In making his argument that the punitive-damages awards should be remitted, Thomas addresses only the factors

1150118, 1150119

concerning the degree of reprehensibility of his conduct and his financial position. Accordingly, we will limit our analysis to the factors identified by the trial court as applicable in determining whether the awards of punitive damages were reasonable; nevertheless, our conclusion that no remittitur is warranted is ultimately based upon a review of all the relevant factors. See CNH America, LLC v. Ligon Capital, LLC, 160 So. 3d 1195, 1211 (Ala. 2013) (setting forth analysis concerning only those Gore and Hammond/Green Oil factors addressed by the appellant).

First, this Court has recognized that the degree of reprehensibility of a defendant's conduct "is the single most important factor in the remittitur analysis." Pensacola Motor Sales, Inc. v. Daphne Auto., LLC, 155 So. 3d 930, 949 (Ala. 2013) (citing BMW of North America, Inc. v. Gore, 517 U.S. 559, 576 (1996)). The trial court determined that Thomas's conduct was "extremely reprehensible" because of his voluntary intoxication. As noted in our opinion on original submission, there is a presumption under Alabama law that a person will not consciously do something that will cause himself or herself harm. See Ex parte Essary, 992 So. 2d 5, 12 (Ala.

1150118, 1150119

2007) (citing Griffin Lumber Co. v. Harper, 252 Ala. 93, 95, 39 So. 2d 399, 401 (1949)). However, this self-preservation presumption may be rebutted by, among other things, evidence indicating that the actor did not have possession of his or her normal faculties such that he or she did not appreciate the danger the actor's actions posed to himself or herself. Id. In the present case, clear and convincing evidence was presented that indicated that Thomas was voluntarily intoxicated to the point that he could not appreciate the danger his actions posed to himself; the self-preservation presumption in favor of Thomas was rebutted by the clear and convincing evidence of Thomas's voluntary intoxication presented by the Heard and Wells.¹ Thomas drove his vehicle, with a minor as a passenger, while he was voluntarily intoxicated to the point that he could not appreciate the

¹Thomas disagrees with this interpretation of the evidence. Essentially, Thomas is simply reasserting his argument on original submission that the Heard and Wells failed to present clear and convincing evidence that his conduct was wanton. Those arguments were considered and addressed on original submission and present nothing new for our consideration at this point in the proceedings. Other than arguing that there is no clear and convincing evidence of his wantonness, Thomas has presented no argument challenging the trial court's conclusion that his conduct was extremely reprehensible.

1150118, 1150119

danger to which this activity exposed him and all those around him. This conduct resulted in serious injuries to Thomas and three other people. Thomas's conduct evinces indifference and a reckless disregard for the health and safety of others. See Gore, 517 U.S. at 576 (noting, in considering the reprehensibility factor, that the defendant's conduct in that case "evinced no indifference to or reckless disregard for the health and safety of others"). Accordingly, the trial court properly found that Thomas's conduct was reprehensible; this factor weighs against remittitur of the punitive-damages awards.

Next, we note that the trial court determined that the ratio of punitive damages to compensatory damages awarded in these cases weighs against remittitur. We agree. Concerning this factor, this Court stated in Shiv-Ram, Inc. v. McCaleb, 892 So. 2d 299, 317 (Ala. 2003):

"Under [BMW of North America, Inc. v. Gore, 517 U.S. [559,] 575, 116 S. Ct. 1589 [(1996)], and [State Farm Mutual Automobile Insurance Co. v. Campbell, 538 U.S. [408,] 419, 123 S. Ct. [1513,] 1521 [(2003)], we presume that [the plaintiff] has been made whole for injuries by the compensatory-damages award, but we do not consider that the ratio between the punitive-damages award and the compensatory-damages award of slightly less than three to one is unreasonable. See AutoZone[,

1150118, 1150119

Inc. v. Leonard], 812 So. 2d [1179,] 1187 [(Ala. 2001)], approving a ratio of punitive damages to compensatory damages of 3.7:1, despite the fact that all of the \$75,000 compensatory-damages award in excess of \$3,000 necessarily related to mental anguish. ... Subsequently, in Campbell, the United States Supreme Court observed that, based on prior caselaw, in practice few awards exceeding to a significant degree a single-digit ratio between punitive and compensatory damages would satisfy due process and acknowledged that in both Gore and Pacific Mutual Life Insurance Co. v. Haslip, 499 U.S. 1, 111 S. Ct. 1032, 113 L. Ed. 2d 1 (1991), it had approved a 4:1 ratio."

In the present case, the jury awarded Randell \$850,000 in compensatory damages and \$750,000 in punitive damages; the ratio of punitive to compensatory damages for Randell is 0.88:1. The jury awarded Donna \$450,000 in compensatory damages and \$750,000 in punitive damages; the ratio of punitive to compensatory damages for Donna is 1.67:1. The jury awarded Wells \$500,000 in compensatory damages and \$500,000 in punitive damages; the ratio of punitive to compensatory damages for Wells is 1:1. Accordingly, we find the ratio of punitive damages to compensatory damages to be reasonable for all three plaintiffs.

Lastly, the trial court determined that "the financial condition of [Thomas] was not a factor that diminished the appropriateness of the punitive damages awarded." After this

1150118, 1150119

Court remanded the cases for the trial court to enter orders consistent with Hammond, Thomas filed a motion for a remittitur. Thomas attached to his motion his own affidavit, but the affidavit was not signed by Thomas or notarized. Thomas's unsigned affidavit states that Thomas is currently unemployed, that he has not been employed since the accident, that he has no current source of income, no assets, and no money in his checking account, and that he is unable to satisfy any portion of the judgments entered against him. The Heards filed a motion to strike Thomas's affidavit on the basis that Thomas had failed to sign the affidavit.

In its orders on remand denying Thomas's motion for a remittitur, the trial court refused to consider not only the unsigned affidavit, but also all testimony offered by Thomas. The trial court held that Thomas "was not a credible witness." (Emphasis in original.) The trial court further stated:

"In oral argument before this court [Thomas's] counsel made the statement that [Thomas's] affidavit can be considered by the court as evidence in the case and proof of [Thomas's] financial condition, and verification was not needed. Plaintiffs urged [Thomas's] affidavit to be struck as not timely filed; however, it really doesn't matter. If the witness on the affidavit is found not to be a credible witness by the court, then verification of that information would be necessary to convince the

1150118, 1150119

court that the contents are true. Such was not provided, and, therefore, since [Thomas] is not credible, the court finds no evidence of [Thomas's] true financial condition, and, thus, concludes that the financial condition of [Thomas] was not a factor that diminished the appropriateness of the punitive damages awarded."

We note that the trial court did not strike Thomas's affidavit, as the Heards requested. Instead, the trial court simply found that Thomas was not a credible witness and that his testimony, in any form, was not credible. In Cameron v. State, 508 So. 2d 304, 306 (Ala. Crim. App. 1987), the Court of Criminal Appeals stated that a trial court's finding that a witness "was not a credible witness"

"is binding on the court which 'can neither pass judgment on the possible truthfulness or falsity of testimony, ... nor on the credibility of witnesses.' Collins v. State, 412 So. 2d 845, 846 (Ala. Crim. App. 1982) (citations omitted). 'When there is no showing to the contrary, the presumption is always in favor of correct action on the part of the trial judge.' Ballard v. State, 236 Ala. 541, 542, 184 So. 260 (1938)."

Thomas makes no argument in his brief before this Court concerning the trial court's finding that he was not a credible witness. Instead, ignoring that portion of the trial court's orders, Thomas simply asserts that he offered testimony concerning his financial position. Because Thomas

1150118, 1150119

has not challenged the trial court's finding that he was not a credible witness, we will not consider this testimony. We further note, although not argued by Thomas, that the trial court did not err in refusing to give any weight to Thomas's unsworn affidavit testimony. In State Home Builders Licensure Board v. Stephens, 756 So. 2d 878, 879 (Ala. Civ. App. 1998), the Court of Civil Appeals noted that an affidavit unsigned by the affiant "does not constitute admissible evidence."

Accordingly, there is essentially no evidence indicating Thomas's financial position. As a result, this factor weighs neither in favor of nor against a finding that the punitive-damages awards were excessive.

Conclusion

Having considered the trial court's remand orders in light of the Gore and Hammond/Green Oil factors, we conclude that no remittitur is needed and that the punitive-damages awards returned by the jury are appropriate and do not infringe upon Thomas's due-process rights.

1150118 -- AFFIRMED.

1150119 -- AFFIRMED.

Parker, Main, and Wise, JJ., concur.

1150118, 1150119

Shaw and Bryan, JJ., concur in the result.

Stuart, C.J., and Bolin, Murdock, and Sellers, JJ.,
dissent.

1150118, 1150119

MURDOCK, Justice (dissenting).

I dissent for the same reasons I dissented from the opinion issued on March 24, 2017, remanding these cases for the trial court to revisit the remittitur issue. Specifically, I did not think then that there was sufficient evidence to allow a jury to find that wantonness on the part of Timothy Joel Thomas had been "clearly and convincingly" established. The orders of the trial court on remand do not address the several deficiencies in the evidence of wantonness that I pointed out in my special writing to the March 24, 2017, opinion.