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LEGAL ALERT

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Can an Employer Be Held Vicariously Liable for Punitive Damages Based Solely upon an Employee's Action?

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The requirements for a successful punitive damages claim are well-defined under New Jersey case law. Similarly, vicarious liability under the doctrine of *respondeat superior* is equally well-defined. An interesting issue arises when these two areas of law intersect. The question becomes when, if ever, can an entity be held vicariously liable for punitive damages based solely upon an employee's actions? The case law and reasoning below offers strategy when faced with such a scenario.

A claim for punitive damages is a traditionally high bar to vault. New Jersey case law defining when to award punitive damages is established under N.J.S.A. 2A:15-5.9, et seq. In order to sustain a claim for punitive damages a party must prove: actual malice, which is defined as an intentional wrongdoing or an evil-minded act; and (2) an act accompanied by a wanton and willful disregard of the rights of another. Edwards v. Our Lady of Lourdes Hosp., 217 N.J. Super. 570, 575 (App. Div. 1987). The Court in Berg v. Reaction Motors Division, 37 N.J. 396 (1962) further described this standard, holding that the "wanton and willful" standard requires a "positive element of conscious wrongdoing ... [which] may be satisfied upon a showing that there has been a deliberate act of probability of harm and reckless indifference to consequence." Id. at 414.

A claim for mere negligence, or even gross negligence, does not warrant the recovery of punitive damages. Edwards, supra, 217 N.J. Super. at 460; see also Stern v. Abramson, 159 N.J. Super. 571, 574 (Law Div. 1977). In Edwards, the plaintiff alleged medical malpractice against a hospital for failing to adequately supply staffing for clinical supervision of a nursing shift and knowingly staffing inadequate and non-qualified employees. As a result, plaintiff alleged that the hospital engaged in wanton misconduct with reckless disregard of the plaintiff's rights. Plaintiff sought punitive damages for the hospital's direct conduct and decisions pertaining to staffing. The Appellate Division held that there was no evidence to support a claim for punitive damages, noting, "plaintiff may not recover punitive damages by recasting merely negligent conduct as willful and wanton." Id. at 460.

In defining vicarious liability, "control by the master over the servant is the essence of the master-servant relationship on which the doctrine of *respondeat superior* is based." Carter v.

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Reynolds, 175 N.J. 402, 410 (2003) (citing Wright v. State, 169 N.J. 422, 436 (2001)). "Although as a general rule of tort law, liability must be based on personal fault, the doctrine of *respondeat superior* recognizes a vicarious liability principle pursuant to which a master will be held liable in certain cases for the wrongful acts of his servants or employees." Id. at 408. (emphasis omitted). "The employer, having 'set the whole thing in motion, should be held responsible for what has happened.'" Galvao v. G.R. Robert Constr. Co., 179 N.J. 462, 467 (2004) (quoting W. Page Keeton, et al., Prosser and Keeton on Torts § 69, at 500 (5th ed. 1984)).

Merging these two issues, specifically in cases when a defendant is named on a vicarious liability basis, punitive damages are only applicable when there has been "'actual participation by upper management or willful indifference.'" Cavuoti v. N.J. Transit Corp., 161 N.J. 107, 117 (1999) (quoting Lehmann v. Toys 'R' Us, Inc., 132 N.J. 587, 625 (1993)). Defining "upper management" is a fact-sensitive inquiry. Typically, upper management is comprised of executive officers, the governing body of the company and those who formulate policies relating to day-to-day operations.

"Concerning punitive damages . . . a greater threshold than mere negligence should be applied to measure" vicarious liability. Lehmann, supra, 132 N.J. at 624. Moreover, punitive damages may not be recovered against an entity or employer for the wrongful act of an individual, unless the act was specifically authorized, participated in, or ratified by the master. Winkler v. Hartford Acci. & Indem. Co., 66 N.J. Super. 22, 29 (App. Div. 1961); Ketchum v. Amsterdam Apartments Co., 94 N.J.L. 7 (Sup. Ct. 1920); Kelleher v. Detroit Motors, 52 N.J. Super. 247 (App. Div. 1958).

In Gaines v. Bellino, 173 N.J. 301 (2002), a vicarious liability claim was brought against an employer for sexual harassment in the workplace; plaintiff sought punitive damages. The Gaines Court held that while an entity could be vicariously liable for punitive damages for the actions of another, active participation by the employer in the creation or maintenance of workplace policies was required. Id. at 320.

It is clear then, that when an employer is named in a lawsuit on a vicarious liability basis, punitive damages can only be successfully established and pursued by proof of willful indifference or actual participation by upper management, whether that be by corporate authorization, ratification or participation. New Jersey courts have followed the United States Supreme Court's historic holding in Lake Shore & Michigan Southern Railway v. Prentice, 147 U.S. 101, 107 (1893), which aptly stated:

> [P]unitive damages, being awarded, not by way of compensation to the sufferer, but by way of punishment of the offender, and as a warning to other, can only be awarded against one who has participated in the offense. A principal, therefore, though of course liable to make compensation for injuries done by his agent within the scope of his employment, cannot be held liable for exemplary or punitive damages, merely by reason of wanton, oppressive or malicious intent on the part of the agent.

Given the foregoing, it may be prudent to advise clients of the active participation requirement in relation to vicarious liability claims for punitive damages, in addition to reviewing policies governing day-to-day activity and how participation in the ratification of employee action is undertaken.

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