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AT _____ O'Clock _____ M
CLERK OF DISTRICT COURT

Deputy

**IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE
STATE OF IDAHO IN AND FOR THE COUNTY OF KOOTENAI**

JEANNE BALEK,

Plaintiff,

vs.

JEFFREY R. SHORT.

Defendant.

Case No. **CV 2008 4562**

**MEMORANDUM DECISION AND
ORDER GRANTING PLAINTIFF'S
MOTION TO AMEND COMPLAINT
TO CLAIM PUNITIVE DAMAGES**

I. INTRODUCTION AND PROCEDURAL BACKGROUND.

On June 29, 2006, plaintiff Jeanne Balek (Balek) was a passenger in a twenty-five-foot pontoon boat returning to the Silver Beach Marina from Arrow Point in Coeur d'Alene, Idaho. At about 10:00 p.m., the boat Balek was traveling upon was struck from the rear by a twenty-five-foot cabin cruiser boat being operated by defendant Jeffrey Short (Short). Law enforcement responded to the collision, arriving at Silver Beach Marina where the parties had taken both boats after the collision. Short was given a sobriety test, arrested on suspicion of operating a watercraft under the influence, and taken to the Kootenai County Public Safety Building for booking. Short pled to negligent operation of a boat, a violation of I.C. § 67-7017, and sentenced to five days in jail, a \$250 fine, six months probation, and a withheld judgment.

On June 10, 2008, Balek filed her Complaint for Damages and Jury Demand. Short filed his Answer on June 24, 2008. A jury trial was scheduled for May 18, 2009.

On March 19, 2009, based upon the parties Stipulation to Continue Trial, this Court scheduled the jury trial for October 26, 2009. On July 10, 2009, Balek filed her Motion for Leave to Amend Complaint, to allow a claim for punitive damages. Both parties briefed the issue and on September 1, 2009, oral argument was held on that motion. Because Balek's "Plaintiff's Reply to Defendant's Memorandum in Opposition to Motion to Amend Complaint" was filed August 31, 2009, and because Short's "Defendant's Memorandum in Opposition to Motion to Amend Complaint to Claim Punitive Damages" was filed August 27, 2009, this Court did not have ample opportunity to read those memorandum and the cases cited therein, prior to oral argument on September 1, 2009. Accordingly, the issue was taken under advisement.

Balek claims:

The facts adduced demonstrate sufficient evidence to support a finding that Jeffrey Short was highly intoxicated at the time of the collision, and that his intoxication caused him to operate the [boat] recklessly, at excessive speed, without maintaining a proper lookout, and directly causing the collision and Jeanne Balek's injuries.

Memorandum in Support of Motion to Amend Complaint, p. 4.

II. ANALYSIS.

Idaho Code § 6-1604 concerns punitive damages, and applies to cases such as this where the cause of action accrued after January 1, 2003. That statute requires that in order for a court to allow leave to amend a complaint to add a claim for punitive damages, there must be evidence presented at a hearing which establishes a reasonable likelihood of proving facts that would support a claim for punitive damages at trial. At trial, there must be proof that there was oppressive, fraudulent, malicious, or outrageous conduct, and such proof must be by clear and convincing evidence. The version of I.C. § 6-1604 prior to 2003 required only that such evidence be demonstrated

by the preponderance of the evidence.

The decision to grant or deny a motion to amend to add a prayer for punitive damages is reviewed under the abuse of discretion standard. *Rockefeller v. Grabow*, 136 Idaho 637, 647, 39 P.3d 577, 587 (2001); *Kuntz v. Lamar Corp.*, 385 F.3d 1177, 1187 (9th Cir. 2004) (Finding that the district court did not abuse its discretion in denying leave to amend on the grounds that Kuntz had not established a reasonable likelihood of proving the requisite “extremely harmful state of mind”). The evidence is reviewed to determine whether there was sufficient evidence for the jury to find that a defendant acted with aggressive, fraudulent, malicious, or outrageous conduct. See I.C. 6-1604. Punitive damages are not favored in the law and should only be used in the most unusual and compelling circumstances. *Manning v. Twin Falls Clinic & Hosp.*, 122 Idaho 47, 52, 830 P.2d 1185, 1190 (1992).

I.C. § 16-1604 states:

(1) In any action seeking recovery of punitive damages, the claimant must prove, by clear and convincing evidence, oppressive, fraudulent, malicious or outrageous conduct by the party against whom the claim for punitive damages is asserted.

(2) In all civil actions in which punitive damages are permitted, no claim for damages shall be filed containing a prayer for relief seeking punitive damages. However, a party may, pursuant to a pretrial motion and after hearing before the court, amend the pleadings to include a prayer for relief seeking punitive damages. The court shall allow the motion to amend the pleadings if, after weighing the evidence presented, the court concludes that, the moving party has established at such hearing a reasonable likelihood of proving facts at trial sufficient to support an award of punitive damages.

Balek argues that punitive damages are appropriate in this case because:

Focusing solely on the facts at hand, Jeffrey Short’s reckless operation of his boat, failure of field sobriety tests, obvious drunkenness, confrontational attitude, blatant disregard for the safety of others, and attempt to avoid responsibility for the consequences of his conduct, the Court should conclude that these facts are sufficient to allow a jury to find

that punitive damages are warranted.

Memorandum in Support of Motion to Amend Complaint, p. 6.

Although there is little Idaho authority on this issue, treatises have analyzed precedent on the propriety of punitive damages in cases involving driving while intoxicated.

The recovery of punitive damages in drunk driving cases, in accordance with principles generally applicable in the field of punitive damages, is awarded to punish the intoxicated driver and to deter both the driver and others from engaging in similar misconduct in the future. As a general rule in motor vehicle accident cases, it is well established that punitive damages are recoverable in the defendant's misconduct, which proximately caused personal injury or death, was sufficiently offensive.

Danny R. Veilleux, Annotation, *Intoxication of Automobile Driver as Basis for Awarding Punitive Damages*, 33 A.L.R. 5th 303 (1995). In California, driving while intoxicated may constitute an act of malice sufficient to warrant punitive damages where circumstances reveal a conscious disregard of probable dangerous consequences. *Taylor v. Superior Court of Los Angeles County*, 24 Cal.3d 890, 598 P.2d 854 (1979); *Dawes v. Superior Court of Orange County*, 111 Cal.App. 3d 82, 168 Cal. Rptr. 319 (4th Dist. 1980).

Similarly, in Ohio, evidence that a negligent driver had consumed alcohol is relevant and admissible to establish whether the driver acted with actual malice, justifying punitive damages, where drinking and driving may constitute reckless, outrageous behavior justifying a jury to find a defendant acted with willful indifference to the rights and safety of others. *Cabe v. Lunich*, 70 Ohio St. 3d 598, 640 N.E.2d 159 (1994); *Payne v. Delay*, 51 Ohio Misc. 65, 367 NE. 2d 75 (1977) (holding it would be improper to rule as a matter of law that driving while intoxicated cannot result in an award of punitive damages). As pointed out by Balek, several jurisdictions have held that driving while intoxicated *alone* is sufficient to provide the reckless or wanton conduct to support an

award of punitive damages: *Hawkinson v. Geyer*, 362 N.W. 2d 784, 788 (Minn.Ct.App. 1984); *Ingram v. Pettit*, 340 So.2d 922 (Fla. 1976); *Sebastian v. Wood*, 66 N.W.2d 841, 846 (Iowa 1954); *Langlois v. Wolford*, 539 S.E.2d 565, 568 (Ga.Ct.App. 2000); *Focht v. Rabada*, 268 A.2d 157 (Pa. Super.Ct. 1970); *Huff v. Chrimson*, 315 S.E.2d 711, 714-15 (N.C.Ct.App. 1984); *Cabe v. Lunich*, 640 N.E.2d 159 (Ohio 1994); *Miller v. Blanton*, 210 S.W.2d 293, 295 (Ark. 1948). Conversely, case law in Arizona, Indiana, Kansas, and Oregon, *inter alia*, hold that allegations of intoxication *alone* are not a sufficient basis to permit punitive damages claims to be submitted to a jury absent other compelling circumstances: *Olson v. Walker*, 162 Ariz. 175, 781 P.2d 1015 (Ariz. App. 1989); *Walczewski v. Wright*, 181 Ind. 615, 393 NE 2d 228 (1979); *Gesslein v. Britton*, 175 Kan. 661, 266 P.2d 263 (1954); *Harrell v. Ames*, 265 Or. 183, 508 P.2d 211 (1973) (holding that an award of punitive damages must be supported by more than evidence showing a defendant was driving under the influence.)

Because Short's boat collided with and overran Balek's boat from behind, Balek argues by analogy, pointing out several jurisdictions which have held that driving while intoxicated and disregarding a stop sign, resulting in injuries, is sufficient to support an award of punitive damages: *Stojkovic v. Weller*, 802 S.W.2d 152 (Mo. 1991); *Lyons v. Progressive Ins. Co.*, 881 So.2d 124 (La.Ct.App. 2004). These would be examples of intoxication *plus* some *additional* fact (running a stop sign).

Essentially all cases cited to this Court concern intoxicated driving of an *automobile*. This Court is unable to make any significant distinction between driving a motor vehicle while intoxicated and operation of a motorized boat while intoxicated.

The issue of law as to whether operation of a vehicle (or a boat) while intoxicated *alone*, has not been decided by Idaho's appellate courts. While the weight of authority

seems to point to allowing such, this Court need not make that legal inroad, because there is much more than Short's intoxication involved here. It was night and dark at the time of the collision. Short was operating his boat between 20 to 25 miles per hour in that blackness. Short did not see Balek's boat at all prior to the collision. Thus, there is ample evidence that Short was not paying sufficient attention to what was going on around him, given his speed and darkness. So, in addition to Short's intoxication, Short is either: a) going too fast in the dark to see what he was approaching and have time in which to react, or b) not watching where he was going, or c) both going too fast in the dark to see what was approaching *and* not paying attention. As an indication of both the level of his intoxication and complete lack of awareness, Short essentially "ran over" Balek's pontoon boat, yet Short had no idea after the collision that he had just hit and ran over a fairly large (25 foot according to the police report) pontoon boat. According to the police report, the contributing factors attributed to Short were: "no proper lookout", "excessive speed" and "alcohol use". No contributing factors were attributed to operator of the boat in which Balek was a passenger.

At oral argument, Short's counsel argued this is a negligent boating case because that was the crime Short pled guilty to...negligent boating. That may be what the prosecuting attorney charged and what Short pled guilty to, but that does not cause the fact of Short's intoxication to vaporize. It is not disputed that Short drank alcohol on the night in question and there is ample evidence submitted that Short was under the influence at the time of the collision.

Also at oral argument, counsel for Short argued that there was no causal connection between Short's intoxication and the accident. Regarding punitive damages, the issue is not simply whether Short's intoxication alone allows a claim for punitive

damages, but instead whether Short's conduct in the aggregate, could support an award of punitive damages. There is evidence that Short was operating a large twenty-five-foot cabin cruiser, at excessive speeds at night on a black lake, not looking where he was going, and running into and over another large twenty-five-foot pontoon boat, without knowing he had done so. The causal connection, proximate cause and cause in fact, is really as to Short's aggregate conduct, not as to Short's intoxication taken in isolation.

This Court appreciates the fact that the instant motion is committed to this Court's discretion. This Court's ruling does not foreclose the Court's refusal to submit such a jury instruction to the finder of fact if Balek fails to prove oppressive, fraudulent, malicious, or outrageous conduct by clear and convincing evidence at trial.

III. CONCLUSION AND ORDER.

This Court exercises its discretion and finds it must allow Balek to amend her complaint to add a claim for punitive damages. Balek has presented evidence establishing a reasonable likelihood that oppressive, fraudulent, malicious, or outrageous conduct will be proven by clear and convincing evidence at trial.

IT IS HEREBY ORDERED Balek's Motion for Leave to Amend Complaint is GRANTED.

IT IS FURTHER ORDERED given the proximity of trial Balek must file her Amended Complaint by September 18, 2009.

Entered this 11th day of September, 2009.

John T. Mitchell, District Judge

Certificate of Service

I certify that on the _____ day of September, 2009, a true copy of the foregoing was mailed postage prepaid or was sent by interoffice mail or facsimile to each of the following:

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