

IN THE COURT OF APPEALS OF MARYLAND

NO. 129

September Term, 1996

LE MARC'S MANAGEMENT
CORPORATION et al.

v.

FRANCISCO VALENTIN

Bell, C.J.,
Eldridge
Rodowsky
Chasanow
Raker
Wilner
Karwacki, Robert L. (Retired,
Specially Assigned),

JJ.

Dissenting Opinion by Bell, C.J.

Filed: May 19, 1998

The majority opinion today continues the inexorable campaign that this Court began in 1992, in Owens-Illinois v. Zenobia, 325 Md. 420, 601 A.2d 633 (1992), to eliminate punitive damages and thereby insulate certain reprehensible conduct from proper punishment. Its intent, the majority will protest, is not the elimination of punitive damages, but the assurance that such damages are awarded when they serve a real function; however, the elimination of punitive damages is the effect when the standard for the allowance of punitive damages is raised to a level that is virtually impossible to meet.¹ By requiring, in addition to clear and convincing proof, that the plaintiff prove that the defendant's actions were the product of "conscious wrongdoing," ___ Md. ___, ___, ___ A. 2d ___, ___ (1998)[slip op. at 7] or "knowing and deliberate wrongdoing," id. at ___, ___ A.2d at ___[slip op. at 8] (quoting Ellerin v. Fairfax Savings, 216, 229, 652 A.2d 1117, 1123 (1995)), this Court has raised the bar of proof of punitive damages, which has been the drill since Zenobia. And that practice of raising the bar has had the effect of virtually eliminating punitive damages in Maryland. In fact, since Zenobia, this Court has reversed the judgment awarding punitive damages, or affirmed the reversal of such awards by the intermediate appellate court, in nearly every case in which the issue was raised. See Scott v. Jenkins, 345 Md. 21, 690 A.2d 1000 (1997); ACandS v. Asner, 344 Md. 155, 86 A.2d 250 (1996); Owens-Corning v. Garrett,

¹My views on, and concern about, raising the bar with respect to the proof of entitlement to punitive damages were set forth at length in Owens-Illinois, Inc. v. Zenobia, 325 Md. 420, 478, 601 A.2d 633, 662 (1992)(Bell, J., concurring and dissenting). I continue to believe the views expressed therein are correct. Indeed, events and decisions, including the one today, over the last six years, have buttressed that belief.

343 Md. 500, 682 A.2d 1143 (1996); Middle States v. Thomas, 340 Md. 699, 688 A.2d 5 (1995); ACandS v. Godwin, 340 Md. 334, 667 A.2d 116 (1995); Montgomery Ward v. Wilson, 339 Md. 701, 664 A.2d 916 (1995); Ellerin v. Fairfax Savings, 337 Md. 216, 652 A.2d 1117 (1995); Alexander v. Evander, 336 Md. 635, 650 A.2d 260 (1994); U.S. Gypsum v. Baltimore, 336 Md. 145, 647 A.2d 145 (1994); Kormornik v. Sparks, 331 Md. 720, 629 A.2d 721 (1993); Adams v. Coates, 331 Md. 1, 626 A.2d 36 (1993); Caldor v. Bowden, 330 Md. 632, 625 A.2d 959 (1993); Eagle-Picher v. Balbos, 326 Md. 179, 604 A.2d 445 (1992); Owens-Illinois v. Armstrong, 326 107, 604 A.2d 47 (1992). Only in Macklin v. Robert Logan Associates, 334 Md. 287, 312, 639 A.2d 112, 124 (1994) did we allow a punitive damages award to stand, but that was solely because we determined that the defendant in that case, the tenant, was not entitled to discretionary review of a punitive damages judgment entered against it because the issue had not been preserved for review.

I once again write in protest of the allowance of reprehensible conduct being insulated from punishment by way of punitive damages. In this case, the majority has changed the standard for award of punitive damages in defamation cases. Before today, this Court had held that the proof required for the award of punitive damages was knowledge that the defamatory statement was false or that it was made with reckless disregard for the truth. See Marchesi v. Franchino, 283 Md. 131, 139, 387 A.2d 1129, 1133 (1978); General Motors Corp. v. Piskor, 277 Md. 165, 174, 352 A.2d 810, 817 (1977); Jacron Sales Co. v. Sindorf, 276 Md. 580, 601, 350 A.2d 688, 700 (1976). Although consistent with the pronouncements of the Supreme Court on the subject of the standard, see New York Times Co. v. Sullivan,

376 U.S. 254, 286, 84 S.Ct. 710, 729, 11 L.Ed.2d 686 (1964); Gertz v. Robert Welch, Inc., 418 U.S. 323, 348, 94 S. Ct. 2997, 3011, 41 L.Ed.2d 789 (1974), this Court went even further by applying that standard to all cases. Today, citing Zenobia and its progeny, and, in particular, Ellerin, the majority overrules these cases and replaces the standard they announced with one requiring that the plaintiff establish the defendant's actual knowledge of the falsity of the defamatory statement.

The majority reasons from Ellerin's analysis of the distinction between "reckless indifference" and "actual knowledge." That analysis concluded that "reckless indifference," although one of the elements of fraud or deceit and although sufficient to support an award for compensatory damages, was not in fact, the equivalent of "actual knowledge." While acknowledging that acting with "reckless indifference" indicates that the defendant has "actual knowledge" of his or her lack of knowledge as to the veracity or falsity of the statement, the majority asserts that is not enough; what must be shown is that the defendant knew, in fact, that the statement was false. Applying that rationale to the requirement in defamation cases that the statement be made with "reckless disregard" of the truth, the majority reaches the identical result in this defamation case as it reached in Ellerin, a deceit case.

I dissented in Ellerin, taking issue with the change in the law and noting that the conduct reflected in proceeding with "reckless indifference" was no less reprehensible than the conduct engaged in with actual knowledge:

"It has long been the law of Maryland and, thus, well settled, that a

defendant, intending to mislead the plaintiff and fully aware that he or she does not know whether the representation he or she makes is true or false, commits the tort of fraud or deceit. E.g., Robertson v. Parks, 76 Md. 118, 131, 24 A. 411, 412 (1892). The rationale underlying the rule is that making a representation of a fact, with intent to deceive and actual knowledge that the speaker does not know whether it is fact or not, is as much a misrepresentation as one made with actual knowledge of falsity and that actual knowledge of the former is as reprehensible as actual knowledge of the latter. Fully recognizing the state of the law, . . . but noting that ‘Maryland cases concerning fraud or deceit have typically involved the form of the tort which is characterized by the defendant's deliberate deception of the plaintiff by means of a representation which he knows to be false,’ the majority nevertheless ‘refines’ the actual knowledge prong of the tort, to include only that situation. . . . And it does so, fully cognizant that, as traditionally understood, the tort countenanced no amount of negligence, however gross. . . . There is absolutely no basis for the majority's change of the law.”

337 Md. at 244, 652 A.2d at 1131 (citations omitted). Because of the majority’s reliance on Ellerin, those comments are just as applicable to this case.

An additional observation is in order. The damage to the defamed person is the same whether the defamer actually knows that what he or she is saying is false or simply knows that he or she does not know if the statement is true or false. What is more and most distressing to me is that after today, it simply will not be important to ensure that what is communicated about another person is true. As I interpret the majority opinion, as long as there is no evidence that the defamer actually knew the information was false and, I suppose, did not shut his or her eyes to what must have been obvious, it does not matter that a brief investigation would have made clear the falsity of the statement; the defamer may publish a false statement about the plaintiff with impunity, without any investigation beyond his or her own records,

and, yet, remain insulated from the risk of punitive damages.² And you can bet that after today's opinion that is precisely what will happen with more and more frequency.

I dissent, most respectfully.

²The jury was instructed, after all:

“Malice exists, one, when a person making the statement deliberately lies or makes the statement with knowledge that it is false or with reckless disregard as to the truth or falsity or, two, when the person making the statement had an obvious reason to distrust either the accuracy of the statement or the source from which the person learned of the statement or, finally item three, when the statement is invented by the person making it or is so inherently improbable that only a reckless person would say, write, or print it.”