

**A CATEGORICAL APPROACH TO PERSUASIVE AUTHORITY: USING
PERSUASIVE AUTHORITY WHEN PROVING, DEFENDING, AND
APPEALING PUNITIVE DAMAGES CLAIMS**

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I. INTRODUCTION

This Article attempts to alleviate the difficulty that arises in proving, defending, and appealing punitive damages claims. For practitioners, judges, and fact finders, evaluating a claim for punitive damages is a fact-intensive inquiry.¹ Often, a punitive damages case deals with difficult and varied facts that are unique to the situation.² As a result, on many occasions practitioners cannot easily analogize these cases to binding precedent when arguing for, or against, a punitive damages claim.³ This Article outlines an approach meant to allow courts and practitioners to rely more heavily on primary persuasive authority with greater confidence when binding authority is not available.⁴

Specifically, this Article discusses and argues for two propositions. The first is a broad proposition that is applicable to many

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¹*Eichenseer v. Reserve Life Ins. Co.*, 934 F.2d 1377, 1382 (5th Cir. 1991) (“This is a fact intensive analysis. On appellate review of a punitive damages award, a court must carefully consider the nature of the wrong and the status of the parties.”).

²*Id.*

³*See infra* Part V.B (discussing the lack of cases dealing with tractor-driver conduct and awards of punitive damages).

⁴*See infra* Part IV.

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situations: When binding authority⁵ is not available, primary persuasive authority is given greater deference than dissimilar statutes.⁶ Attorneys should use primary persuasive authority in the form of case law and statutes from jurisdictions with the same or similar statutes, procedural rules, and interpretations.⁷ To illustrate this proposition, the second proposition proposes a narrow focus: When binding authority is not available to determine whether punitive damages claims are appropriate, courts should give primary persuasive authority greater deference than dissimilar statutes.⁸ Attorneys should use primary persuasive authority in the form of case law and statutes from jurisdictions with the same or similar statutes, procedural rules, and

⁵*Pardo v. State*, 596 So. 2d 665, 666-67 (Fla. 1992) (“The [d]istrict [c]ourts of [a]ppeal are required to follow Supreme Court decisions. As an adjunct to this rule it is logical and necessary in order to preserve stability and predictability in the law that, likewise, trial courts be required to follow the holdings of higher courts—[d]istrict [c]ourts of [a]ppeal. The proper hierarchy of decisional holdings would demand that in the event the only case on point on a district level is from a district other than the one in which the trial court is located, the trial court be required to follow that decision. Alternatively, if the district court of the district in which the trial court is located has decided the issue, the trial court is bound to follow it. Contrarily, as between [d]istrict [c]ourts of [a]ppeal, a sister district’s opinion is merely persuasive.” (quoting *State v. Hayes*, 333 So. 2d 51, 53 (Fla. Dist. Ct. App. 1976) (footnote and citations omitted)).

⁶*Id.*; see Chad Flanders, *Toward a Theory of Persuasive Authority*, 62 OKLA. L. REV. 55, 69-70 (2009) (stating that court opinions of other jurisdictions are one of the most commonly used persuasive authorities).

⁷*Pardo*, 596 So. 2d at 666-67; see Chad Flanders, *supra* note 6, at 69-70.

⁸See *infra* Part IV; see also Susan W. Fox & Wendy S. Loquasto, *The Art of Persuasion Through Legal Citations*, 84 FLA. B.J., no. 4, Apr. 2010, at 49, 49 (“The primary purposes of citation are support and attribution for the propositions advanced by the author. Proper citation further requires consideration of the source of the applicable law, whether the authority is binding or merely persuasive and the credibility attributable to the author or authority cited. In short, persuading a court to follow precedent, distinguish it, or overrule it—as the case requires to advance your client’s position—is in large part dependent upon credible citations and sound reasoning based upon the citations.”).

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interpretations.⁹ This Article outlines a categorical approach to employing these two propositions for greater ease and confidence when an attorney or a court must rely on persuasive authority, especially when this reliance may be of paramount importance in a case.

This Article begins with a general discussion of punitive damages and the purpose behind these claims.¹⁰ Next, there is a general overview of how different states and the federal government approach punitive damages, both procedurally and substantively.¹¹ In the next Section, there is an overview of the approaches taken by states on punitive damages, which is categorized based on the common use of similar standards of proof and conduct requirements.¹² This Section is the crux of the Article, and practitioners may utilize this categorical persuasive-authority approach in many other scenarios.

Section IV illustrates this categorical approach by dividing the standard of proof category and the conduct category into subcategories. The standard of proof category compares various state statutes by each state's respective standard of proof.¹³ The conduct category defines the type of conduct and mental state that an attorney must establish for a punitive damages award based on the aforementioned standards of

⁹*See infra* Part IV; *see also* Fox & Loquasto, *supra* note 8 (“The primary purposes of citation are support and attribution for the propositions advanced by the author. Proper citation further requires consideration of the source of the applicable law, whether the authority is binding or merely persuasive and the credibility attributable to the author or authority cited. In short, persuading a court to follow precedent, distinguish it, or overrule it—as the case requires to advance your client’s position—is in large part dependent upon credible citations and sound reasoning based upon the citations.”).

¹⁰*See infra* Part II.

¹¹*See infra* Part III; *see also* Turner v. Werner Enters., Inc., 442 F. Supp. 2d 384, 385-87 (2006) (applying Kentucky statutes and case law); Capstick v. Allstate Ins. Co., 998 F.2d 810, 818, 823 (1993).

¹²*See infra* Part IV.

¹³*See, e.g., infra* Appendix I, II (comparing the clear and convincing, preponderance of the evidence, and beyond a reasonable doubt standards).

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proof.¹⁴ Based on these categories, when binding authority is not available, then cases from jurisdictions with a similar standard of proof and mental state should be the most persuasive.¹⁵ As this Article will discuss further, other formations create less persuasive authority.¹⁶

Lastly, in Section V of this Article, the categorical approach is applied to the trucking industry to evaluate how a claim for punitive damages against a truck driver may be defended.¹⁷ First, Subsection A discusses some background information regarding the trucking industry and the common parties and claims involved in these cases.¹⁸ Next, Subsection B outlines a hypothetical fact pattern in which the use of Florida procedural law is discussed for a situation when a plaintiff seeks to amend a complaint to add a claim for punitive damages.¹⁹ This application and discussion show the importance of a fact-intensive inquiry when discerning whether the actions of a defendant are sufficient to meet the criteria required by the applicable standard of proof and conduct requirement outlined.²⁰

The importance of evaluating whether a claim for punitive damages is likely to succeed is immeasurable at every stage of litigation.²¹ For a plaintiff it can mean compensation for a grievous wrong and perhaps the assurance that no one else will have to suffer the

¹⁴See, e.g., *infra* Appendix I, IV (analyzing intentional, willful, wanton, and outrageous conduct).

¹⁵*Infra* Part IV.

¹⁶*Infra* Part IV; see also text accompanying notes 91-92.

¹⁷See *infra* Part V.

¹⁸See *infra* Part V.A.

¹⁹See *infra* Part V.B.

²⁰See *infra* Part V.B.

²¹Patrick A. Gaughan, *The Economics of Punitive Damages*, ECONOMATRIX RESEARCH ASSOCS., INC., <http://economatrix.com/the-economics-of-punitive-damages.php> (last visited Feb. 12, 2014).

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same injury or fate.²² For a defendant, even the threat that a punitive damages claim may go to a jury can greatly impact trial strategy, the willingness of a client to settle for what may seem like an unreasonable amount, or completely bankrupting a business or individual if such awards are allowed.²³ Perhaps even more dangerous for a defendant is the ripple effect such awards can cause.²⁴ When a jury returns a verdict with punitive damages awarded it may change how a whole industry conducts business.²⁵ As such, the use and implementation of the categorical approach to evaluating these claims is essential to the day-to-day practice of dealing with punitive damages claims.²⁶

II. BACKGROUND ON PUNITIVE DAMAGES CLAIMS

Punitive damages are a form of recovery that are intended to punish the tortfeasor for a wrongdoing, above and beyond compensatory damages, and act as a deterrent for other similarly situated tortfeasors.²⁷ These damages have a long tradition that span thousands of years.²⁸ In recent decades, there has been a great deal of debate and discussion surrounding this form of relief with the advent of

²²*Id.*

²³*Id.*

²⁴*Id.*

²⁵*Id.*

²⁶*See infra* Part V.B.

²⁷Gaughan, *supra* note 21.

²⁸*See* John M. Leventhal & Thomas A. Dickerson, *Punitive Damages: Public Wrong or Egregious Conduct? A Survey of New York Law*, 76 ALB. L. REV. 961, 962 (2012-2013) (“The concept of punitive damages was present in the oldest recorded legal systems: Babylonian law in the Code of Hammurabi, Hittite Laws of approximately 1400 B.C., the Hebrew Covenant Code of Mosaic Law c. 1200 B.C., and the Hindu Code of Manu c. 200 B.C. Anglo-Saxon law included a related practice which required wrongdoers to pay money damages for almost every type of crime, including homicide.” (citation omitted)).

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tort reform legislation.²⁹ Specifically, issues that are traditionally
considered and written extensively about regard legislative caps on
punitive damages,³⁰ limitations of this relief to certain statutory
claims,³¹ and arguments on appeal that the awarded amount is
unconstitutional and grossly excessive.³²

Explicitly, in these claims is the need to have a fact-intensive
inquiry into the conduct of the tortfeasor to determine whether the
conduct complained of goes above and beyond the elements of simple
negligence.³³ There is typically a heightened standard of proof for these
claims,³⁴ and there is almost always a mental state and conduct
requirement that rises above simple negligence.³⁵ Both of these
requirements are explained in greater detail.³⁶

The conduct described typically includes malice, willfulness,
wantonness, gross negligence, or reckless indifference.³⁷ As such, the
conduct and the perceived mental state of the tortfeasor, which form the

²⁹*See Punitive Damages Reform*, AM. TORT REFORM ASS'N, <http://www.atra.org/issues/punitive-damages-reform> (last visited Feb. 11, 2014) (stating that punitive damages awards have become “astronomically large”).

³⁰*Evans v. State*, 56 P.3d 1046, 1049 (Alaska 2002) (“Chapter 26, SLA 1997 modified AS 09.17.010 to place a cap on the amount of noneconomic damages that may be awarded in tort actions ‘for personal injury and wrongful death.’”).

³¹*Id.*

³²*See Pac. Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1, 23-25 (1991) (holding that a punitive damages award that was over two-hundred times the respondent’s total out-of-pocket expenses and four times the compensatory damages award is unconstitutionally excessive).

³³*See Woolstrum v. Mailloux*, 190 Cal. Rptr. 729, 733 (App. Dep’t Super. Ct. 1983) (holding that there was insufficient evidence for a jury to award punitive damages but enough evidence for negligence and compensatory damages).

³⁴*See infra* Appendix III.

³⁵*See infra* Appendix I.

³⁶*See infra* Part IV.

³⁷*See infra* Appendix I.

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basis of these claims, is the crux for determining whether these damages should be allowed or whether the damages awarded are excessive.³⁸

In essence, every fact matters.³⁹ This is particularly so because the vast majority of the appellate courts reviewing these damages do so *de novo*,⁴⁰ which allows the appellant to again argue that the damages were impermissibly allowed, or not allowed, a second time around.⁴¹ Regarding excessiveness arguments, the conduct in question is limited to only a portion of the analysis.⁴²

The United States Supreme Court has laid out a framework for federal review of excessiveness arguments.⁴³ In considering the constitutionality of an award of punitive damages, the Court is required to conduct a *de novo* review of the trial court's determination that the award was not so grossly excessive as to violate due process.⁴⁴ The court must evaluate the amount of punitive damages using three criteria:

³⁸*Estate of Despain v. Avante Group, Inc.*, 900 So. 2d 637, 640 (Fla. Dist. Ct. App. 2005) (“To merit an award of punitive damages, the defendant’s conduct must transcend the level of ordinary negligence and enter the realm of willful and wanton misconduct . . .”).

³⁹*See, e.g.*, *Woolstrum v. Mailloux*, 190 Cal. Rptr. 729, 733 (App. Dep’t Super. Ct. 1983).

⁴⁰*State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 418 (2003); *see also Despain*, 900 So. 2d at 642.

⁴¹Jack R. Reiter, *Judging Your Appeal: A Practitioner’s Perspective*, 84 FLA. B.J., no. 5, May 2010, at 34, 34 (“The *de novo* standard presents an appellant with the best chance of success by providing a proverbial second bite at the apple. When an appellate court applies the *de novo* standard, it literally examines an issue anew. This enables the appellate court to review the order and record in their entirety to determine whether the trial court’s conclusion is contrary to law or otherwise erroneous. Furthermore, under this standard, the appellant does not face either heightened deference to the trial court or a presumption of correctness insulating the trial court’s order.”).

⁴²*See infra* notes 43-48 and accompanying text.

⁴³*Cooper Indus., Inc. v. Leatherman Tool Grp., Inc.*, 532 U.S. 424, 440 (2001); *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 574-75 (1996).

⁴⁴*Cooper Indus.*, 532 U.S. at 431.

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“(1) the degree or reprehensibility of the defendant’s misconduct, (2) the disparity between the harm (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.”⁴⁵ Within this three-prong analysis, the first element is particularly important, as it allows the appellant an opportunity to revisit the conduct at issue and analogize the issue to other similarly situated cases.⁴⁶ In evaluating the reprehensibility of the tortfeasor, appellate courts will look to certain factors. These factors include:

[T]he harm caused was physical as opposed to economic; the tortious conduct evinced an indifference to or a reckless disregard of the health or safety of others; the target of the conduct had financial vulnerability; the conduct involved repeated actions or was an isolated incident; and the harm was the result of intentional malice, trickery, or deceit, or mere accident.⁴⁷

For a more complete explanation of how attorneys present these damages to a court or the jury, the following outlines the different procedural pleadings and motions by which punitive damages claims are generally litigated.⁴⁸

III. PROCEDURAL CONSIDERATIONS FOR PUNITIVE DAMAGES CLAIMS

Every state has different, but similar, means for allowing

⁴⁵*Id.* at 440.

⁴⁶*See BMW of N. Am.*, 517 U.S. at 579 (distinguishing the facts of the case when compared with other cases).

⁴⁷*State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 419 (2003) (citing *BMW of N. Am.*, 517 U.S. at 576-77).

⁴⁸*See infra* Part III.

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punitive damages claims.⁴⁹ In some states, there is a requirement that the damages must be affirmatively pled into the complaint without a hearing.⁵⁰ In a few states, a plaintiff must seek leave to amend his or her complaint prior to seeking these damages,⁵¹ and a full-scale hearing is held to determine whether a plaintiff may even seek these damages.⁵² For a plaintiff who must seek leave to amend the complaint, this is the first time that it is so important to seek out favorable cases to establish that the conduct of the tortfeasor rises to a level that is so reprehensible that a court should award these damages.⁵³ Equally, this is the time for the defendant to prepare a substantial defense to protect against the court allowing the plaintiff to amend his or her complaint.⁵⁴

Regardless of whether a plaintiff must seek leave to amend his or her complaint, or may simply plead these damages and proceed, in the situation where the court allows these damages, a defendant has several mechanisms to defend against these claims.⁵⁵ First and

⁴⁹*See infra* Appendix I.

⁵⁰*See, e.g.*, *SHV Coal, Inc. v. Cont'l Grain Co.*, 587 A.2d 702, 703 (Pa. 1991) (holding that the plaintiff's company affirmatively pled punitive damages in its complaint); *Pittsburgh Outdoor Adver. Co. v. Va. Manor Apartments, Inc.*, 260 A.2d 801, 802 (Pa. 1970) (holding that the plaintiff's company affirmatively pled punitive and compensatory damages in its complaint).

⁵¹*See, e.g.*, FLA. R. CIV. P. 1.190(f).

⁵²*Id.*

⁵³*See Minotty v. Baudo*, 42 So. 3d 824, 836 (Fla. Dist. Ct. App. 2010) (upholding the refusal of the trial court to award punitive damages because the plaintiffs did not seek leave to properly amend their complaint); *see also Holmes v. Bridgestone/Firestone, Inc.*, 891 So. 2d 1188, 1190-91 (Fla. Dist. Ct. App. 2005) (reviewing favorable case law that the plaintiff brought forth to support an amendment to his complaint for punitive damages).

⁵⁴*See Holmes*, 891 So. 2d at 1190-91 (explaining that the defendant made multiple arguments as to why the appellate court should refuse to grant the plaintiff leave to amend his complaint for punitive damages).

⁵⁵C. Barry Montgomery & Bradley C. Nahrstadt, *How to Defend Punitive Damages Claims Effectively—and Maybe Successfully*, 66 DEF. COUNS. J. 347, 358-59 (1999) (noting the different mechanisms that defendants may use to challenge a claim for punitive damages).

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foremost, at the conclusion of discovery, a defendant may decide to file a motion for summary judgment on the issue of punitive damages.⁵⁶ A defendant may argue that the plaintiff has not sufficiently presented his or her case for why these damages are appropriate.⁵⁷ If this is unsuccessful, then an attorney should prepare several motions in limine to limit what, when, and how certain evidence of punitive damages is presented to the jury.⁵⁸

One motion in limine that may be utilized is that the plaintiff may not mention punitive damages until the point that the plaintiff makes a prima facie showing that he or she is entitled to such relief.⁵⁹ Further, many states allow for bifurcated trials.⁶⁰ The first portion of the trial determines liability, and the second portion of the trial determines punitive damages.⁶¹ Whether to proceed in this fashion is ultimately up to the attorneys involved, but if a trial is bifurcated a defendant can file motions in limine to limit any discussion of net worth, the financial status of the defendant, or potentially harmful facts that may not be relevant or permissible during the liability phase of the trial for various reasons.⁶²

⁵⁶*Id.* at 358 (“Although in most jurisdictions courts are usually reluctant to grant summary judgment, they often are willing to do so on the issue of punitive damages because such damages traditionally have not been favored by the law.”); *see also* Purnick v. C.R. England, Inc., 269 F.3d 851, 852-54 (7th Cir. 2001) (analyzing motions for summary judgment on the issue of punitive damages).

⁵⁷Montgomery & Nahrstadt, *supra* note 55, at 358.

⁵⁸*Id.* at 358-59 (“The motion in limine probably is defense counsel’s very best tool in confining the scope of inquiry at trial to narrow matters of relevance” in determining punitive damages).

⁵⁹*Id.* at 358.

⁶⁰*See id.* at 359 (noting that most U.S. courts have the power to bifurcate trials in which punitive damages are sought).

⁶¹*Id.*

⁶²*See id.* at 358-59 (stating that defense counsel should advocate for the bifurcation of punitive damages at trial to protect the defendant from unfair prejudice in the determination of his liability or compensatory damages).

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Finally, both parties can attempt to tailor jury instructions to the particular issues involved in the case that may be appropriate.⁶³ While many states have form jury instructions for punitive damages,⁶⁴ one may look to similarly constructed instructions, which may use more beneficial language to one's case.⁶⁵

There are many opportunities throughout the litigation of a case to put forth arguments before the trial court regarding the admissibility of certain facts for, or against, punitive damages.⁶⁶ However, an issue that can often arise is that the particular facts of one's case are so unique that one cannot find a case of binding authority on point.⁶⁷ In these situations, an attorney and the court are limited to arguments based on either persuasive authority or simply arguments that the conduct does rise to the level based on all of the evidence presented.⁶⁸ The following Section outlines the categorical approach to utilizing persuasive authority more effectively when binding authority is unavailable.⁶⁹

⁶³*Id.* at 364 (noting that defense counsel should draft jury instructions with particular specificity in order to avoid an excessively large punitive damages verdict).

⁶⁴*E.g.*, Florida Standard Jury Instructions in Civil Cases, 0601, Section 503.1, JICIV FL-CLE 5-1 (2013), *available at* http://www.floridasupremecourt.org/civ_jury_instructions/instructions.shtml#500.

⁶⁵*See Fla. E. Coast Ry. Co. v. McKinney*, 227 So. 2d 99, 101 (Fla. Dist. Ct. App. 1969) (recognizing that standard jury instructions are not obligatory).

⁶⁶ *See supra* text accompanying notes 49-65; *see also Fincke v. Peeples*, 476 So. 2d 1319, 1323 (Fla. Dist. Ct. App. 1985) (upholding the admissibility of certain facts that supported a claim for punitive damages against the defendant hospital).

⁶⁷ *See In re Mentor Corp. ObTape Transobturator Sling Prod. Liab. Litig.*, No. 4:08-MD-2004 (CDL), 2010 WL 1998166, at *2 (M.D. Ga. May 18, 2010) (noting that no case exists with the same facts at issue in a punitive damages claim); *see also Belliard v. Becker*, 166 P.3d 911, 915 (Ariz. Ct. App. 2007) (analyzing persuasive legal authority from other jurisdictions to remand a partial retrial limited to punitive damages because it was an issue of first impression).

⁶⁸*See In re Mentor Corp.*, 2010 WL 1998166, at *2 (applying nonbinding, persuasive legal authority and specific facts to determine that the claim for punitive damages will be upheld); *see also Yeakly v. Doss*, 257 S.W.3d 895, 900 (Ark. 2007) (stating that the existing case law was not on point and "of little precedential value").

⁶⁹*See infra* Part IV.

**IV. THE CATEGORICAL APPROACH OF UTILIZING PERSUASIVE
AUTHORITY**

The beginning of this Article posited two propositions. The broad proposition that when binding authority is not available, persuasive authority from jurisdictions with the same, or similar, statutory and procedural rules and interpretations of those statutes should be given greater deference than dissimilar statutes.⁷⁰ The second proposition, which is the narrow application of the first, is that when binding authority is not available in a punitive damages claim and an attorney or court must rely upon persuasive authority, then persuasive authority from jurisdictions with the same, or similar, statutory and procedural rules and interpretations of those statutes should be given greater deference over dissimilar statutes.⁷¹ As may be more clear by this point, the issue of whether punitive damages is “appropriate” deals with the particular facts of the case at issue.⁷² Generally speaking, the most difficult part for an attorney arguing that a court should utilize this categorical approach is the act of creating and identifying the categories and system.⁷³

Regarding the general proposition, the manner in which an attorney defines the categories is clearly dependent upon the legal issue at hand.⁷⁴ Clearly, the focus of the issue in this Article relates to punitive damages, which is ultimately an analysis of whether the conduct in question sufficiently meets the applicable standard of

⁷⁰See Fox & Loquasto, *supra* note 8, at 49; Frederick Schauer, *Authority and Authorities*, 94 VA. L. REV. 1931, 1940 (2008) (explaining that courts must first follow binding precedent, then secondary authorities such as persuasive legal authority by nonbinding courts).

⁷¹See *supra* note 8 and accompanying text.

⁷²See *supra* note 33 and accompanying text.

⁷³See generally James C. Schroeder & Robert M. Dow, Jr., *Arguing for Changes in the Law*, 25 LITIG., no. 2, Winter 2009, at 37 (noting the complex process attorneys must use when applying binding and nonbinding, persuasive legal authority to support their case).

⁷⁴See *infra* text accompanying notes 75-85.

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proof.⁷⁵ As such, these two issues are categorized into two broad categories,⁷⁶ and then subcategories of each.⁷⁷ The first category is the applicable standards of proof required to establish punitive damages.⁷⁸ The second category is all of the different mental states and conduct required to establish punitive damages.⁷⁹

The standards of proof are then defined into four subcategories: (1) clear and convincing,⁸⁰ (2) preponderance of the evidence,⁸¹ (3) beyond a reasonable doubt,⁸² and (4) no clear standard.⁸³ The second category is also broken down broadly into two subcategories: (1) intentional conduct,⁸⁴ and (2) unintentional conduct.⁸⁵ While these categories will be explained fully, the manner in which these categories are utilized must first be understood.

The creation of these categories and subcategories allows for a hierarchy of persuasive authority.⁸⁶ When used in application, a practitioner must identify similar attributes between one state's statute, another state's standard of proof, and category of conduct.⁸⁷ This

⁷⁵See *infra* Part IV.A-B.

⁷⁶See *infra* Appendix I.

⁷⁷See *infra* Part IV.A-B.

⁷⁸See *infra* Part IV.A.

⁷⁹See *infra* Part IV.B.

⁸⁰See *infra* Appendix I-III.

⁸¹See *infra* Appendix I-III.

⁸²See *infra* Appendix I-III.

⁸³See *infra* Appendix I-III.

⁸⁴See *infra* Appendix IV.

⁸⁵See *infra* Appendix IV.

⁸⁶See Fox & Loquasto, *supra* note 8, at 49-50.

⁸⁷See Flanders, *supra* note 6, at 70 (stating that courts are more persuaded by another court's opinion if they are frequently addressing the same issue).

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process can be exemplified as follows: Where one state has the same standard of proof and the same conduct then this persuasive authority is the most persuasive compared to all dissimilar state statutes.⁸⁸ Thus, standard of proof plus conduct equals the most persuasive nonbinding authority.⁸⁹

In the context of punitive damages, when evaluating the conduct in question versus the standard of proof, the applicable description of the conduct requirement is more important than the standard of proof to establish the claim.⁹⁰ This is because the conduct requirement informs the court of whether the actions at issue are as reprehensible as the conduct described.⁹¹ Thus, a practitioner may look to the subcategories of conduct to determine whether the state statute requires only intentional conduct, or if unintentional conduct is sufficient to establish such a claim.⁹² If one's state has the same conduct requirement as the other persuasive authority that state should be considered more persuasive than when only the standard of proof is the same, but less persuasive than when both the conduct and the standard of proof are the same.⁹³ Thus, the following hierarchy occurs when evaluating another state's punitive damages standard:

1. The same standard of proof (SP) + the same conduct (C) = most persuasive (MP)
2. Only the same conduct (either intentional or unintentional) = persuasive (P)

⁸⁸See Fox & Loquasto, *supra* note 8, at 49-50 (finding that court decisions from other states will be more persuasive when those decisions are consistent with Florida law).

⁸⁹*Id.*

⁹⁰Hodges v. S.C. Toof & Co., 833 S.W.2d 896, 901 (Tenn. 1992) (finding that punitive damages should only be awarded to cases involving the "most egregious of wrongs").

⁹¹See *id.* (stating that the conduct in question must rise to the level of intentional, fraudulent, reckless, or malicious).

⁹²See *infra* Appendix IV.

⁹³Fox & Loquasto, *supra* note 8, at 50.

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3. Only the same standard of proof (SP) = least persuasive (LP)⁹⁴

Before demonstrating the use of these categories, the terms found within each subcategory are discussed below.

A. Standard of Proof Category

This Section outlines four subcategories of standards of proof for comparison.⁹⁵ These subcategories are described in the order of the most common to the least common standards of proof.⁹⁶ The first subcategory, clear and convincing evidence, means “evidence in which there is no serious or substantial doubt about the correctness of the conclusions drawn from the evidence.”⁹⁷ This is something more than a preponderance of the evidence⁹⁸ but less than beyond a reasonable doubt.⁹⁹ The second subcategory, preponderance of the evidence, or the “‘greater weight of the evidence’ means the more persuasive and convincing force and effect of the entire evidence in the case.”¹⁰⁰ Generally, this is the lowest standard of proof that a movant must meet in a civil trial.¹⁰¹

⁹⁴See *supra* text accompanying notes 86-93.

⁹⁵See Appendix II.

⁹⁶See *infra* text accompanying notes 97-107.

⁹⁷*In re Valentine*, 79 S.W.3d 539, 546 (Tenn. 2002) (quoting *Hodges v. S.C. Toof & Co.*, 833 S.W.2d 896, 901 n.3 (Tenn. 1992)).

⁹⁸*In Interest of J.P.*, 574 N.W.2d 340, 342 (Iowa 1998) (“Clear and convincing evidence is more than a preponderance of the evidence but less than evidence beyond a reasonable doubt. [citation omitted] ‘It means that there must be no serious or substantial doubt about the correctness of a particular conclusion drawn from the evidence.’”) (quoting *In Interest of L.G.*, 532 N.W.2d 478, 481 (Iowa Ct. App. 1995)).

⁹⁹*Id.*

¹⁰⁰Florida Standard Jury Instructions in Civil Cases, 0501, Section 401.3, JICIV FL-CLE 4-1 (2013).

¹⁰¹*Jeremiah v. State*, 73 S.W.3d 857, 858 n.1 (Mo. Ct. App. 2002) (stating that preponderance of the evidence is the “lowest standard of proof”).

The third subcategory is subject to internal state divisions as to the required standard of proof.¹⁰² Different states have various interpretations for standards of proof.¹⁰³ Based on the applicable court, one may look to the other categories for guidance.¹⁰⁴ Finally, the fourth, and least utilized subcategory, is the beyond-a-reasonable-doubt standard.¹⁰⁵ Only Colorado employs the beyond-a-reasonable-doubt standard for every punitive damages case,¹⁰⁶ while Oklahoma utilizes this standard only in the most grievous of circumstances.¹⁰⁷

B. Conduct Category

This Section examines the requisite mental state and conduct requirements for each state.¹⁰⁸ A quick review of the Appendixes will illustrate how the conduct described by the state statutes is varied, and perhaps too varied to systematically define.¹⁰⁹ As such, this Section broadly divides conduct into two subcategories, including conduct requirements that mandate intentional misconduct and conduct requirements that mandate unintentional conduct, wherein gross negligence or reckless indifference is sufficient.¹¹⁰ However, before

¹⁰²*See infra* Appendix I (e.g., New York, Delaware).

¹⁰³*See infra* Appendix I.

¹⁰⁴*See infra* Appendix I-II.

¹⁰⁵*See infra* Appendix I-II.

¹⁰⁶COLO. REV. STAT. § 13-25-127(2) (2013).

¹⁰⁷OKLA. STAT. tit. 23, § 9.1 (2013) (allowing for a sliding scale regarding the amount of punitive damages awardable based upon reprehensibility of the defendant's conduct, including "reckless disregard for the rights of others," acting intentionally with malice towards others, and where the court finds that there is "evidence beyond a reasonable doubt that the defendant . . . acted intentionally and with malice and engaged in conduct life threatening to humans . . .").

¹⁰⁸*See infra* Appendix I.

¹⁰⁹*See infra* Appendix I.

¹¹⁰*See infra* Appendix IV.

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discussing this Section more substantively, an important distinction must be made regarding this second category.¹¹¹

The legislatures of each respective state have allowed for multiple descriptions of the type of conduct that substantiates a claim for punitive damages.¹¹² Many times, there is a list of conduct that runs the gamut¹¹³ and allows for punitive damages where conduct may be deemed both intentional and unintentional actions.¹¹⁴ One respected attorney in the trucking industry notes that, in practice, the difference between willful and wanton conduct and gross negligence is often nonexistent.¹¹⁵ However, that does not change the fact that courts should adhere to the plain meaning of the text, and a more cohesive interpretation of these definitions would serve the courts well.¹¹⁶

¹¹¹*See infra* text accompanying notes 112-18.

¹¹²*See infra* Appendix I.

¹¹³*See, e.g.*, IDAHO CODE ANN. § 6-1604(1) (2013) (listing “[o]ppressive, fraudulent, malicious or outrageous conduct”); *Franz v. Calaco Dev. Corp.*, 818 N.E.2d 357, 366 (Ill. App. Ct. 2004) (“[Punitive damages] are available only in cases where the wrongful act complained of is characterized by wantonness, malice, oppression, willfulness, or other circumstances of aggravation.”). “The purposes of punitive damages are punishment of a specific defendant and both general and specific deterrence, and such damages will be awarded only where the defendant’s conduct is willful or outrageous due to evil motive or a reckless indifference to the rights of others.” *Id.* (citing *Proctor v. Davis*, 682 N.E.2d 1203 (Ill. App. Ct. 1997)).

¹¹⁴*See, e.g.*, *Phelps v. Louisville Water Co.*, 103 S.W.3d 46, 51-53 (Ky. 2003) (holding that reckless disregard, or gross negligence, is sufficient to satisfy an award of punitive damages under Kentucky law).

¹¹⁵DAVID N. NISSENBERG, *THE LAW OF COMMERCIAL TRUCKING: DAMAGES TO PERSONS AND PROPERTY* 280 (3d ed. 2003).

¹¹⁶*See generally* Richard Aaron Chastain, *Cleaning up Punitive Damages: A Statutory Solution for Unguided Punitive-Damages Awards in Maritime Cases*, 63 VAND. L. REV. 813, 823-43 (2010) (noting that courts should avoid major sources of conflict over how to set punitive damages and adhere to the historical intent of punitive damages: to serve as a deterrence to tortfeasors, retribution, and compensation, particularly in the maritime industrial context); *see also* Flanders, *supra* note 6, at 75 (stating that courts may harmonize their rulings with other courts in order to treat “like cases alike”).

Whether courts have always interpreted it as such, there is a definitional and practical difference between conduct that is willful and wanton and conduct that is grossly negligent.¹¹⁷ While courts may have previously interpreted these phrases interchangeably, the legislature has clearly illustrated a definitional preference for a heightened requirement of an intentional act, rather than an unintentional act, and the courts should interpret this language accordingly.¹¹⁸

Concerning the subcategory of intentional conduct, state statutes typically describe such conduct as malicious,¹¹⁹ intentional,¹²⁰ wanton,¹²¹ and willful.¹²² Each state has various nuances to each of these definitions, but the underlying similarity is the tortfeasor's intention to commit a wrongful act.¹²³

In the second subcategory, unintentional conduct, gross negligence, or reckless indifference to the individuals harmed is sufficient to carry the claimant's burden.¹²⁴ Again, each state uses varying language to define this concept; however, this subcategory of states allows for a tortfeasor's unintentional conduct to rise to the

¹¹⁷See NISSENBERG, *supra* note 115, at 280-81 (stating that gross negligence does not encompass an intentional element).

¹¹⁸See, e.g., KAN. STAT. ANN. § 60-3701(c) (2013) (requiring willful, wanton, fraudulent, or malicious conduct).

¹¹⁹See *id.*

¹²⁰See MINN. STAT. § 549.20(1)(a) (2013) (stating that "deliberate disregard for the rights or safety of others," means that "the defendant has knowledge of facts or intentionally disregards facts that create a high probability of injury to the rights or safety of others," yet the defendant "deliberately proceeds to act in conscious or intentional disregard of the high degree of probability of injury to the rights or safety of others").

¹²¹See KAN. STAT. ANN. § 60-3701(c) (2013) (requiring willful, wanton, fraudulent, or malicious conduct).

¹²²See *id.*

¹²³See *infra* Appendix I.

¹²⁴See *infra* Appendix I.

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requisite level to impose punitive damages.¹²⁵

However, note that in each of these unintentional act states, intentional action is also considered when evaluating the conduct of the tortfeasor.¹²⁶ As such, many of the state statutes include language for both intentional conduct and gross negligence.¹²⁷ In essence, this unintentional act subcategory allows a claimant to establish a lower standard of conduct for a punitive damages claim because both intentional and unintentional conduct can sufficiently meet this standard.¹²⁸ This is an important practical consideration when evaluating persuasive authority.¹²⁹

For purposes of this Article, in looking at these two subcategories, states in the unintentional conduct subcategory may be analogized to states in the intentional conduct subcategory to substantiate an argument that the conduct in question is the “most persuasive” compared to other states.¹³⁰ Essentially, if a case from a state in the intentional conduct subcategory found that intentional misconduct occurred, and if that state’s statute is sufficiently similar to another state that is in the unintentional conduct category, then the case authority should be highly persuasive for a case in the other state.¹³¹ Since a claimant must establish a higher standard for intentional conduct, it logically follows that he or she should not have to establish

¹²⁵*See infra* Appendix I and IV.

¹²⁶*See infra* Appendix I and IV.

¹²⁷*See infra* Appendix I and IV; *see, e.g.*, FLA. STAT. § 768.72(2)(a)-(b) (2013).

¹²⁸*See infra* Appendix I and IV; *see, e.g.*, § 768.72(2)(a)-(b).

¹²⁹*See* Kenneth W. Simons, *Rethinking Mental States*, 72 B.U. L. REV. 463, 523 (1992) (establishing that the current hierarchy of mental states allows for the proof of a higher standard to satisfy a lower standard).

¹³⁰*See infra* Appendix IV (listing the states in each category); Simons, *supra* note 129.

¹³¹*See, e.g.*, Simons, *supra* note 129; *see also* Fox & Loquasto, *supra* note 8, at 49-50 (stating that persuasive authority from other states may be used to show sound reasoning).

as much conduct for an unintentional act.¹³²

As such, all the states that are part of the unintentional conduct subcategory may use the intentional conduct subcategory case law as well because the evidentiary burden to establish unintentional conduct is essentially lower than the intentional conduct subcategory's burden.¹³³ Specifically, conduct that is considered malicious surely will also be considered grossly negligent.¹³⁴ Due to restraints of time and practicality, this conduct subcategory is not broken down into smaller subcategories. However, for the reader's convenience, several appendices follow this Article that allow both an attorney and a court the opportunity to evaluate each state to find the most persuasive authority among the states.¹³⁵

One should always remember that no matter how one evaluates the conduct in question, each claimant must establish that the conduct was something more than simple negligence, which is no small feat.¹³⁶ What one must realize is that both the unintentional and the intentional subcategories outline heightened standards for a plaintiff to prove the defined egregious and reprehensible conduct above and beyond a simple negligence case.¹³⁷

In practice, many times a plaintiff cites a case as persuasive authority with facts that barely reach the level of simple negligence to stand for the proposition that the conduct of a defendant in a particular

¹³²See Simons, *supra* note 129 (referencing MODEL PENAL CODE § 2.02 (1985)).

¹³³*Id.*

¹³⁴*Id.* (referencing MODEL PENAL CODE § 2.02).

¹³⁵See *infra* Appendices I-IV.

¹³⁶See, e.g., Byrd v. Potts, 182 S.E.2d 837, 839 (N.C. Ct. App. 1971) (holding that the plaintiff could not establish evidence sufficient to prove negligence even though the defendant had hit the plaintiff with his car); see also Fragnella v. Petrovich, 281 P.3d 103, 109 (Idaho 2012) (stating that the plaintiff's claim of negligence failed because she did not prove that the truck driver was the proximate cause of the accident).

¹³⁷See *infra* Appendices I.

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case is worthy of punitive damages.¹³⁸ Because a court may be without binding authority on such an issue, a court would look to the attorneys for some substantive argument or persuasive authority.¹³⁹ This Article is designed for these types of situations.

As the defense attorney in these situations, one may look to comparatively structured state statutes and common law to pull persuasive authority to argue against the claim.¹⁴⁰ For plaintiff's counsel, he or she may do the same to articulate his or her position.¹⁴¹ In these situations, the categorical approaches outlined above allow attorneys to argue that cases that come from a jurisdiction with the same standard of proof and the same mental state or conduct should be given greater deference than cases that are not.¹⁴² Speaking in what may appear to be generalities, it may be difficult to see this approach in context. The following is a discussion and application of this categorical approach in action.¹⁴³

V. APPLICATION OF THE CATEGORICAL APPROACH TO THE TRUCKING INDUSTRY

A. *Background on the Typical Trucking Parties and Claims*

The trucking industry, and thus, tractor-trailer accidents, are

¹³⁸*E.g.*, *Woolstrum v. Mailloux*, 190 Cal. Rptr. 729, 733 (App. Dep't Super. Ct. 1983).

¹³⁹*Fox & Loquasto*, *supra* note 8, at 50-51 (stating that a nonbinding court opinion with identical facts will be highly persuasive).

¹⁴⁰*See Flanders*, *supra* note 6, at 79-83 (discussing how state courts consider other state courts' interpretations of a uniform act as authoritative and how state courts determining common law tort cases look to trends in the decisions of other state courts).

¹⁴¹*See id.*

¹⁴²*See supra* Part IV.A-B (outlining the categorical approach of utilizing persuasive authority and how cases from a jurisdiction with the same standard of proof and same mental state should be given greater deference than dissimilar cases and statutes).

¹⁴³*See infra* Part V (applying the categorical approach outline in the previous section to the trucking industry).

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particularly susceptible to claims of punitive damages because of the
devastation that these accidents can cause.¹⁴⁴ As such, this Section
focuses on the trucking industry and these types of cases for two
reasons.¹⁴⁵

First, several different types of claims arise from these
accidents¹⁴⁶ beyond the obvious claim of negligence for the driver;
namely, claims of negligent hiring, negligent training, and violations of
federal safety acts.¹⁴⁷ Occasionally, there are corresponding criminal
charges due to the intoxication of a driver.¹⁴⁸ As such, while beyond the
scope of this paper, if the reader chooses to read the cited cases, one
will see how the interplay of various parties and facts can impact a
claim for punitive damages.¹⁴⁹

Second, intermodal transportation, like the trucking industry,
requires companies to move people and freight from around the world

¹⁴⁴Matthew S. Hefflefinger & Patrick E. Poston, *Punitive Damages in Trucking Litigation: Recognizing Risk and Assessing Exposure*, DEF. RES. INST., July 2012, at 1, 1.

¹⁴⁵*See infra* text accompanying notes 146-52.

¹⁴⁶*See* Hefflefinger & Poston, *supra* note 144, at 2 (discussing the common trucking cases involving punitive damages).

¹⁴⁷*Id.*

¹⁴⁸*See* Mercury Motor Express, Inc. v. Smith, 372 So. 2d 116, 116 (Fla. Dist. Ct. App. 1979), *rev'd on other grounds*, 393 So. 2d 545 (Fla. 1989) (intoxicated tractor-trailer driver was charged and pled guilty to manslaughter).

¹⁴⁹*See, e.g.*, Glenn McLendon Trucking Co. v. Williams, 359 S.E.2d 351, 354 (Ga. Ct. App. 1987). In *McLendon*, a trucking company ordered mechanics to make repairs on the trucks without giving them the appropriate tools to perform the task; while the truck was on the road, its wheels began to smoke. *Id.* at 354. This activity was observed by another driver who radioed the truck's driver. *Id.* The truck's driver ignored the advice of the other driver to stop and continued on the route. *Id.* The truck's driver did not stop until he was told that his brake drum was falling on his brake line. Before the driver could stop, however, the wheels separated from the truck and the wheels crashed into another car, injuring a passenger. *Id.*

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and throughout the United States.¹⁵⁰ An understanding of the risks that accompany such work can aid a practitioner in an early evaluation and provide a realistic assessment of the potential success or failure of a punitive damages claim.¹⁵¹ Such assessments can greatly impact the initial case evaluation, the discovery, the range of the settlement amount at issue, the trial, and the appellate strategy.¹⁵²

To begin, as in most industries, certain types of lawsuits bring certain types of claims against specific individuals.¹⁵³ These claims are always dependent upon the facts of the particular case. In tractor-trailer accident cases, the claims and the facts are generally very similar.¹⁵⁴ The basic factual scenario is that a tractor-trailer driver, whether because of his or her actions or another reason, perhaps mechanical issues, has caused an accident where there are serious bodily injuries or death.¹⁵⁵ From this point on, the nuances of the facts and named parties can differ greatly.¹⁵⁶ However, the following are the general types of

¹⁵⁰See William DeWitt & Jennifer Clinger, *Intermodal Freight Transportation*, COMM. ON INTERMODAL FREIGHT TRANSP. 1, 2, <http://onlinepubs.trb.org/onlinepubs/millennium/00061.pdf> (last visited Feb. 11, 2014) (discussing intermodal freight transportation and how it moves goods domestically and internationally).

¹⁵¹See Hefflefinger & Poston, *supra* note 144 (stating that early identification and understanding of the facts that may award a punitive damages claim is essential for practitioners).

¹⁵²See Montgomery & Nahrstadt, *supra* note 55, at 350-65 (discussing how to successfully defend punitive damages claims from investigating the claim all the way to possible appeals).

¹⁵³See *Briner v. Hyslop*, 337 N.W.2d 858, 860 (Iowa 1983) (plaintiff's estate sued both the driver and driver's employer for wrongful death action arising out of a car accident, which was the result of an intoxicated driver falling asleep behind the wheel); see also *D'Arbonne Constr. Co., v. Foster*, 91 S.W.3d 540, 542 (Ark. Ct. App. 2002) (accident victims brought personal injury and wrongful death actions against truck driver, construction company, and others for injuries and death suffered when truck crossed center line and smashed head on into victims' car).

¹⁵⁴Hefflefinger & Poston, *supra* note 144.

¹⁵⁵*Id.* at 2 (discussing the factual scenarios involving trucking accidents resulting in death or serious bodily harm that brings about punitive damages claims).

¹⁵⁶See *id.*

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facts and claims that an attorney typically files on behalf of a
plaintiff.¹⁵⁷

Generally, these trucking accident claims arise from the following factual scenarios: the driver's conduct,¹⁵⁸ the trucking companies' hiring or supervision policies,¹⁵⁹ the trucking companies' operating procedures,¹⁶⁰ or the physical condition of the truck.¹⁶¹ These types of conduct can lead to negligence claims against the driver¹⁶² and claims for negligent entrustment, negligent supervision, and negligent hiring and retention against the employer as well.¹⁶³ To illustrate the difficulty for practitioners, a common hypothetical situation is outlined below.¹⁶⁴ This hypothetical is based on Florida law with an illustration of the categorical use of persuasive authority.¹⁶⁵

B. Utilizing the Categorical Approach for Driver Conduct in a Tractor-Trailer Accident

The following is a description of a typical hypothetical situation

¹⁵⁷*See id.* (discussing claims that can arise from driver's conduct, trucking companies hiring or supervision policies, trucking companies' operating procedures, and physical conditions of truck).

¹⁵⁸*Id.*

¹⁵⁹*Id.*

¹⁶⁰*Id.* at 3.

¹⁶¹*Id.*

¹⁶²*See* Johnson v. Fla. Farm Bureau Cas. Ins. Co., 542 So. 2d 367, 368 (Fla. Dist. Ct. App. 1988) (involving a plaintiff that sued a driver, the driver's employer, and other parties for negligence).

¹⁶³*See* FLA. STAT. ANN. § 768.72(3) (West 2013); *see also* Mercury Motor Express, Inc. v. Smith, 372 So. 2d 116, 116 (Fla. Dist. Ct. App. 1979), *rev'd on other grounds*, 393 So. 2d 545 (Fla. 1989) (illustrating that employers can be liable for the acts of their employees).

¹⁶⁴*Infra* Part V.B.

¹⁶⁵*Infra* Part V.B.

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encountered in practice. Utilizing Florida law, in this hypothetical the plaintiff is seeking to amend his or her complaint with an allegation that a driver's conduct rises to the level to warrant punitive damages.¹⁶⁶ In this situation, which is often the case, the attorneys have completed some discovery but not all of it.¹⁶⁷ The plaintiff seeks to amend the complaint to add a claim for punitive damages, and both the plaintiff's and the defendant's attorney must submit a brief detailing to the court why punitive damages should or should not be permitted.¹⁶⁸ In this hypothetical, the allegations are, and the discovery has uncovered, the following: The driver allegedly knowingly, or with total disregard for the consequences, drove an overloaded, one-hundred-thousand-pound truck with questionable brakes causing a rear-end collision with the plaintiff. The plaintiff suffered severe injuries from the collision, resulting in permanent impairment because of the impact. This was a vehicle that the driver knew, or should have known, had bad brakes. This was a vehicle that the driver knew was too tall for the traveled route. The driver lacked proper permits to drive the route where the accident occurred. The driver had no logbook documentation showing compliance with hours of service requirements in violation of federal and state regulations. Finally, the driver knowingly falsified his employment application by not disclosing his criminal traffic record.

In light of this hypothetical, both parties must turn to the applicable statute governing punitive damages in Florida for a determination of whether this conduct rises to the level where the court

¹⁶⁶See FLA. R. CIV. P. 1.190(f) (regarding amended and supplemental pleadings); FLA. STAT. § 768.72(2) (2013) (stating clear and convincing evidence as the standard of proof required, and either intentional misconduct or gross negligence as the level of misconduct).

¹⁶⁷See Lisa Eichhorn, *A Sense of Disentitlement: Frame-Shifting and Metaphor in Ashcroft v. Iqbal*, 62 FLA. L. REV. 951, 952 (2010) (stating the challenges plaintiffs face while drafting pleadings before discovery has been completed).

¹⁶⁸See FLA. R. CIV. P. 1.190(f) (stating "[a] motion for leave to amend a pleading to assert a claim for punitive damages shall make a reasonable showing, by evidence in the record or evidence to be proffered by the claimant, that provides a reasonable basis for recovery of such damages. The motion to amend can be filed separately and before the supporting evidence or proffer, but each shall be served on all parties at least 20 days before the hearing").

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would allow the plaintiff to amend his or her complaint.¹⁶⁹ As in some
states, in Florida an award of punitive damages is a two-step process.¹⁷⁰
First, there is a hearing before the trial court to determine whether there
is sufficient evidence to warrant presenting a claim for punitive
damages to the jury.¹⁷¹ Second, the plaintiff must establish to the jury,
based on clear and convincing evidence, that punitive damages is
warranted.¹⁷² Thus, in Florida, this pretrial hearing is essential
procedurally,¹⁷³ and aids in both trial strategy¹⁷⁴ and appellate purposes
for establishing whether punitive damages are appropriately submitted
to the jury.¹⁷⁵

In this pretrial hearing, in order to permit a punitive damage
claim to reach a jury, the trial court must determine that there is a
reasonable evidentiary basis in the record that the tortfeasor committed
intentional misconduct or gross negligence.¹⁷⁶ However, what the court

¹⁶⁹FLA. STAT. ANN. § 768.72(1) (West 2013).

¹⁷⁰*See id.* § 768.72(1)-(2) (stating that there must be an evidentiary hearing to
determine whether there is a basis for recovery of such damages, and then the claim is
submitted to the jury).

¹⁷¹*Id.* § 768.72(1).

¹⁷²*Id.* §§ 768.72(2), 768.725.

¹⁷³*Estate of Despain v. Avante Grp., Inc.*, 900 So. 2d 637, 641 (Fla. Dist. Ct. App.
2005).

¹⁷⁴*See* Rhett Traband, *An Erie Decision: Should State Statutes Prohibiting the
Pleading of Punitive Damages Claims be Applied in Federal Diversity Actions?*, 26
STETSON L. REV. 225, 228, (1996-1997) (explaining that the pretrial hearing equates
to a mini trial in which the plaintiff can test his or her theory in front of the defendant
about whether the defendant acted with the required frame of mind and misconduct).

¹⁷⁵*See* Reiter, *supra* note 41.

¹⁷⁶§ 768.72(1)-(2).

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deems as a reasonable evidentiary basis is not clearly defined.¹⁷⁷ As such, in this situation a practitioner must begin by evaluating the language of the punitive damages statute at issue.¹⁷⁸

In this statute, the conduct in question is defined.¹⁷⁹ “‘Intentional misconduct’ means that the defendant had actual knowledge of the wrongfulness of the conduct and the high probability that injury or damage to the claimant would result and, despite that knowledge, intentionally pursued that course of conduct, resulting in injury or damage.”¹⁸⁰ Clearly, this is conduct that falls within the intentional conduct subcategory.¹⁸¹ However, the statute continues, and defines the other standard of conduct, namely, gross negligence.¹⁸² In this context, “[g]ross negligence’ means that the defendant’s conduct was so reckless or wanting in care that it constituted a conscious disregard or indifference to the life, safety, or rights of persons exposed to such conduct.”¹⁸³ Thus, Florida is a state that falls within the unintentional conduct subcategory and the clear-and-convincing subcategory.¹⁸⁴

¹⁷⁷Several district courts of appeal have weighed in on the question of what is considered a reasonable basis, notably the first, fourth, and fifth districts. *Holmes v. Bridgestone/Firestone, Inc.*, 891 So. 2d 1188, 1191 (Fla. Dist. Ct. App. 2005); *Estate of Despain*, 900 So. 2d at 644. The Fourth and Fifth District Courts have held that the trial court is not to evaluate and weigh the evidence proffered; in *The Estate of Despain*, the Fifth District Court stated, “discretion is *not* the standard that [the court] should apply . . . rather, the finding of a reasonable basis under the statute requires a *legal determination* by the trial court that the requirements of section 768.72(1) have been met.” *Estate of Despain*, 900 So. 2d at 644 (emphasis added); *see also* *Holmes*, 891 So. 2d at 1191.

¹⁷⁸§ 768.72(1)-(2).

¹⁷⁹*Id.* § 768.72(2)(a)-(b).

¹⁸⁰*Id.* § 768.72(2)(a).

¹⁸¹*See supra* Part IV.B.

¹⁸²§ 768.72 (2)(b).

¹⁸³*Id.*

¹⁸⁴*See infra* Appendices I-II, IV.

The next step is to review binding authority in Florida where the conduct of the driver in question was allegedly sufficient to warrant punitive damages.¹⁸⁵ In searching for these cases, in Florida, there appears to be only two cases that deal directly with claims for punitive damages against tractor-trailer drivers based on their driving conduct.¹⁸⁶ However, in both cases, the drivers were intoxicated at the time of the accident.¹⁸⁷ In both cases, the juries awarded punitive damages, however, only one case affirmed the damages on appeal.¹⁸⁸ Both cases are so factually dissimilar from the hypothetical at hand that neither the plaintiff's counsel nor the defense counsel are well advised to rely solely on these cases for arguments for and against amending this complaint.¹⁸⁹

In the hypothetical case at issue, there is no evidence that the driver of this tractor-trailer was intoxicated.¹⁹⁰ Rather, the only evidence uncovered to date is that the driver (1) drove an overloaded, one-hundred-thousand-pound truck with questionable brakes causing a rear-end collision, (2) should have known that the truck had bad brakes, (3) knew that the tractor-trailer was too tall for the traveled route, (4) lacked proper permits to drive the route, (5) had no logbook documentation showing compliance with hours of service requirements in violation of federal and state regulations, and (6) knowingly falsified his employment application by not disclosing his criminal traffic

¹⁸⁵*Johnson v. Fla. Farm Bureau Cas. Ins. Co.*, 542 So. 2d 367, 368 (Fla. Dist. Ct. App. 1988); *Mercury Motor Express, Inc. v. Smith*, 372 So. 2d 116, 116-17 (Fla. Dist. Ct. App. 1979), *rev'd on other grounds*, 393 So. 2d 545 (Fla. 1989).

¹⁸⁶*Johnson*, 542 So. 2d at 368; *Mercury Motor Express*, 372 So. 2d at 116.

¹⁸⁷*Johnson*, 542 So. 2d at 368; *Mercury Motor Express*, 372 So. 2d at 116.

¹⁸⁸*Johnson*, 542 So. 2d at 369-371; *Mercury Motor Express*, 372 So. 2d at 116-17.

¹⁸⁹*See, e.g., Ingram v. Pettit*, 340 So. 2d 922, 924 (Fla. 1976) (holding that punitive damages are available to a plaintiff in Florida where voluntary intoxication is involved in an automobile accident). *Contra Ojus Indus. v. Brannam*, 351 So. 2d 1055, 1057 (Fla. Dist. Ct. App. 1977) (holding that punitive damages were not justified when driver was not intoxicated, and illustrating that the fact of intoxication is important in the punitive damages decision).

¹⁹⁰*See supra* Part V.B.

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record.¹⁹¹ The question is, does this driver's conduct reach the level of intentional or gross negligence? Based on the importance of this ruling, both plaintiff and defense counsel would be wise to utilize persuasive authority to argue for, or against, amending the complaint.¹⁹²

This is where practitioners can utilize the categorical approach. In relying upon this approach of employing persuasive authority, the practitioners can see that Florida is a state that has a standard of proof that requires clear and convincing evidence¹⁹³ and falls within the category for unintentional conduct, as evidenced by the gross negligence standard.¹⁹⁴ As such, both attorneys can look to the appendices following this Article to find corresponding states for persuasive authority as a basis for their arguments.¹⁹⁵ Some states that have a similar makeup as Florida include Alaska, Pennsylvania, South Carolina, and Indiana.¹⁹⁶ While Florida does not have any cases that deal with the manner and conduct of tractor-trailer drivers prior to an accident, Indiana does.¹⁹⁷

In *Purnick v. C.R. England, Inc.*,¹⁹⁸ the plaintiff appealed the district court's summary judgment denying the plaintiff's punitive damages claim.¹⁹⁹ In this case, a tractor-trailer driver rear-ended the plaintiff's car.²⁰⁰ Per the relevant federal regulations, truck drivers may

¹⁹¹*Supra* Part V.B.

¹⁹²*See* Fox & Loquasto, *supra* note 8, at 49-50.

¹⁹³FLA. STAT. §§ 768.72(2), 768.725 (2013).

¹⁹⁴*See infra* Appendix I-IV.

¹⁹⁵*See infra* Appendix I-IV.

¹⁹⁶*See infra* Appendix I-IV.

¹⁹⁷*See infra* text accompanying notes 196-205.

¹⁹⁸*Purnick v. C.R. England, Inc.*, 269 F.3d 851 (7th Cir. 2001).

¹⁹⁹*Id.* at 852.

²⁰⁰*Id.*

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not spend any more than ten continuous hours on duty.²⁰¹ This driver
was approaching his tenth hour.²⁰² The evidence at trial showed the
driver had falsified his written trip logs and had driven beyond the limit
several times in the week preceding the accident.²⁰³ At the time of the
accident, the truck driver admitted that he was “‘mesmerized’ by the
road, did not brake until after impact, and could not recall when he first
saw the vehicle.”²⁰⁴ The district court granted the defendants’ motion to
dismiss the plaintiff’s punitive damages claim, and the Seventh Circuit
affirmed, concluding that:

[E]ven assuming that [the plaintiff] has shown that [the
driver] falsified his logs, drove beyond the ten-hour limit
several times in the week preceding the crash, and was
fatigued when he hit her car, she presents no evidence
that [the driver] actually knew that his misconduct would
probably result in injury.²⁰⁵

In its opinion, the Seventh Circuit relied on Indiana law, which
only allows punitive damages upon a showing of clear and convincing
evidence, intentional conduct, or gross negligence.²⁰⁶ In its opinion, the
court cited to the language of *Wanke v. Lynn’s Transportation Co.*,
which the court relied upon almost exactly by mirroring the language
found within the Florida punitive damages statute:

Punitive damages may be awarded only upon a showing
by clear and convincing evidence that the defendants
“subjected other persons to probable injury, with an
awareness of such impending danger and with heedless

²⁰¹*Id.*

²⁰²*Id.*

²⁰³*Id.*

²⁰⁴*Id.*

²⁰⁵*Id.* at 852-53.

²⁰⁶*Id.* at 852 (citing *Wanke v. Lynn’s Transp. Co.*, 836 F. Supp. 587, 599-600 (N.D. Ind. 1993)).

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indifference of the consequences.” Punitive damages may be awarded upon a showing of defendants’ willful and wanton misconduct, even absent malice, ill will, or intent to injure As examples of such misconduct, [the following is sufficient]: conscious indifference, heedless indifference, reckless disregard for the safety of others, reprehensible conduct, and heedless disregard of the consequences.²⁰⁷

In this scenario, the defense counsel may argue that factually these cases are similar because the type of action is similar and the conduct of the driver is similar; more importantly, however, this case should be highly persuasive because of the similar standard of proof and conduct requirements between both Florida and Indiana.²⁰⁸ Perhaps it is not necessary to go this far in briefing the motion, but in utilizing the categorical approach between Florida and Indiana there is the same standard of proof²⁰⁹ and the same conduct,²¹⁰ which equals the most persuasive type of case law available.²¹¹

If not utilizing this approach, a logical choice when looking at persuasive authority may be to look at a regionally close jurisdiction.²¹² In this hypothetical, the most likely choice is to look to Georgia law.²¹³ However, while regionally close, Florida and Georgia have different requirements for the conduct that a plaintiff must meet in order to

²⁰⁷*Wanke*, 836 F. Supp. at 599-600 (citations omitted).

²⁰⁸*Compare* FLA. STAT. § 768.72 (2013) (clear and convincing evidence and either intentional misconduct or gross negligence), *with* *Erie Ins. Co. v. Hickman*, 622 N.E. 2d 515, 520 (Ind. 1993) (stating gross negligence must be proven by clear and convincing evidence to award punitive damages).

²⁰⁹*See supra* note 208.

²¹⁰*See supra* note 208.

²¹¹*See* *Fox and Loquasto*, *supra* note 8, at 49-50.

²¹²*See* *Flanders*, *supra* note 6, at 76-77 (stating unity among circuit courts is desirable).

²¹³*See infra* Appendix I.

establish punitive damages.²¹⁴

While both states require a showing of clear and convincing evidence, Georgia requires that the conduct of the tortfeasor must be “willful misconduct, malice, fraud, wantonness, oppression, or that entire want of care which would raise the presumption of conscious indifference to consequences.”²¹⁵ Gross negligence is not enough.²¹⁶ An example of a case that plaintiff’s counsel may utilize in their argument to award punitive damages is *J.B. Hunt Transport, Inc. v. Bentley*.²¹⁷

In *Bentley*, the court awarded punitive damages because of a truck driver’s conduct.²¹⁸ The evidence showed that the truck had been taken in for maintenance shortly before the accident.²¹⁹ At trial, several witnesses testified that the driver was operating the tractor-trailer very erratically and swinging from lane to lane for at least ten to twenty miles before the accident, yet the driver did not take it out of service.²²⁰ A Georgia Public Service Commission inspection found logbook violations, one-third of which related to excessive hours driving.²²¹ The driver destroyed the driver’s logbook, as well as pre-trip and post-trip inspection reports on the vehicle, after it had initiated its own investigation.²²²

²¹⁴*See infra* Appendix IV.

²¹⁵GA. CODE ANN. § 51-12-5.1(b) (2000 & Supp. I 2013); *see also infra* Appendix IV.

²¹⁶*Bartja v. Nat’l Union Fire Ins. Co.*, 463 S.E.2d 358, 361 (Ga. Ct. App. 1995).

²¹⁷*J.B. Hunt Transp., Inc. v. Bentley*, 427 S.E.2d 499 (Ga. Ct. App. 1993).

²¹⁸*Id.* at 503.

²¹⁹*Id.* at 500-01.

²²⁰*Id.* at 501.

²²¹*Id.* at 504.

²²²*Id.* at 504-05.

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At first glance, this may seem like a great case to rely on for the plaintiff.²²³ Similar to the hypothetical, the driver knowingly drove a mechanically-deficient vehicle when he drove a one-hundred-thousand-pound truck with questionable brakes and should have known the truck had bad brakes.²²⁴ In this case, the driver failed to adequately adhere to federal and state regulations when he lacked proper permits to drive the route and had no logbook documentation showing compliance with hours-of-service requirements in violation of federal and state regulations.²²⁵ Finally, there was a level of intentional wrongdoing that can be argued on the part of both drivers because both drivers hid or destroyed evidence, such as when the hypothetical driver knowingly falsified his employment application by not disclosing his criminal traffic record.²²⁶ A trial court may be persuaded by this and perhaps may even find this more persuasive because it is a regionally close state, where these trucks are even likely traveling on the same roads.²²⁷ However, the response of the defense counsel goes beyond just arguing that this is factually insufficient.²²⁸

In response to the plaintiff citing *Bentley*, besides arguing the factual dissimilarities, the defense counsel can argue that in Georgia the applicable standard for punitive damages requires “willful misconduct, malice, fraud, wantonness, oppression, or that entire want of care which would raise the presumption of conscious indifference to

²²³*Id.* at 506 (appearing to be a great case for the plaintiff because the court of appeals finds in favor of the plaintiff and affirms the jury’s award of punitive damages).

²²⁴*Id.* at 500-01.

²²⁵*Id.* at 502.

²²⁶*Id.* at 504-05.

²²⁷See Patrick M. Garry et. al., *The Challenges to Harmonization of Inter-jurisdictional Trade Laws: A Study of Transportation Regulation Disparities Within the Northern Great Plains Region*, 51 S.D. L. REV. 256, 260 (2006) (stating that the nature of trucking regulations creates an interest in neighboring states for uniform regulations).

²²⁸*J.B. Hunt Transp.*, 427 S.E.2d at 504 (appellants argue that not only is the evidence factually insufficient, it “fail[s] to support an award of punitive damages in any amount”).

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consequences.”²²⁹ And, perhaps most importantly, gross negligence is
not enough, and where there is no evidence of malice, fraud, or
oppression, the plaintiff must prove willful misconduct, conscious
indifference, or wantonness.²³⁰ The defense counsel can argue that the
standard for this neighboring jurisdiction is even higher and requires an
even greater showing of intentional willful misconduct.²³¹ Now,
besides defense counsel being able to merely say that the facts are not
analogous, the court has other reasons to find that the plaintiff’s cited
case is the *least persuasive* case cited because the only similarity
between the two statutes is the standard of proof, not the designated
conduct.²³²

VI. CONCLUSION

The fact-intensive inquiry surrounding punitive damages
demands that attorneys and courts spend careful time evaluating
whether allegations of punitive damages are sufficiently plead, and

²²⁹GA. CODE ANN. § 51-12-5.1(b) (2000 & Supp. I 2013).

²³⁰*Bartja v. Nat’l Union Fire Ins. Co.*, 463 S.E.2d 358, 361 (Ga. Ct. App. 1995); *see also J.B. Hunt Transp.*, 427 S.E.2d at 502-03.

²³¹*See* § 51-12-5.1(b) (the standard for Georgia requires a showing of “willful misconduct, malice, fraud, wantonness, oppression, or that entire want of care which would raise the presumption of conscious indifference to consequences” by clear and convincing evidence).

²³²*Id.* (requiring clear and convincing evidence to show that the person engaged in “willful misconduct, malice, fraud, wantonness, oppression, or that entire want of care which would raise the presumption of conscious indifference to consequences”). *But see* FLA. STAT. § 768.72(2) (2013) (requiring clear and convincing evidence to show “that the defendant was personally guilty of intentional misconduct or gross negligence”).

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 established, before opening up a party to this potential punishment.²³³
 As stated earlier, this Article argues for two propositions.²³⁴ The first
 proposition is that in many situations, when binding authority is not
 available, persuasive authority from jurisdictions with the same or
 similar statutory and procedural rules and interpretations of those
 statutes should be given greater deference than dissimilar statutes.²³⁵
 The second proposition, as illustrated by this Article, is that in the case
 of punitive damages, when binding authority is not available, persuasive
 authority from jurisdictions with the same or similar statutory and
 procedural rules and interpretations of those statutes should be given
 greater deference than dissimilar statutes based on the outlined
 categorical approach.²³⁶ The hope is that this Article will give
 practitioners and courts an additional tool to utilize when evaluating
 whether these claims should, and should not, be available.

**VII. APPENDIX I: PUNITIVE DAMAGES STANDARD OF PROOF WITH
 MENTAL STATE AND CONDUCT—ALPHABETICAL**

State	Standard of Proof	Mental State and Conduct

²³³See Heather R. Klaassen, *Punishment Defanged: How the United States Supreme Court Has Undermined the Legitimacy and Effectiveness of Punitive Damages* [*Philip Morris USA v. Williams* 127 S. Ct. 1057(2007)], 47 WASHBURN L.J. 551, 565-66 (2008); see also Joseph J. Chambers, *In re Exxon Valdez: Application of Due Process Constraints on Punitive Damages Awards*, 20 ALASKA L. REV. 195, 255 (2003) (discussing the differing results between the district court and the appellate court on whether the \$5 billion punitive damages award was excessive and showing that even when both courts applied the same tests to the same facts, they reached different conclusions).

²³⁴See *supra* Part I.

²³⁵See *supra* Part I.

²³⁶See *supra* Part I.

Alabama	Clear and convincing	“[C]onsciously or deliberately engaged in oppression, fraud, wantonness, or malice”
Alaska	Clear and convincing	Outrageous conduct, including acts with malice or bad motives, or conduct involving reckless indifference to the interest of another person.
Arizona	Clear and convincing	“Evil motives or willful or wanton disregard of the interests of others.”
Arkansas	Clear and convincing	“[W]antonness or such a conscious indifference to the consequences that malice might be inferred.”
California	Clear and convincing	Oppression, fraud, or malice.
Colorado	Beyond a reasonable doubt	“[F]raud, malice, or willful and wanton conduct”
Connecticut	Preponderance of the evidence	Reckless indifference to the rights of others or an intentional and wanton violation of those rights.
Delaware	Clear and Convincing or Preponderance of the evidence	Wanton or willful disregard for the safety of others, the conduct must be egregious of an intentional or reckless nature and malice.

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District of Columbia	Clear and convincing	Defendant must commit a tortious act with evidence that the “act was accompanied by conduct and a state of mind evincing malice or its equivalent.”
Florida	Clear and convincing	An individual defendant must be guilty of intentional misconduct or gross negligence. This means “the defendant had actual knowledge of the wrongfulness of the conduct and the high probability that injury or damage to the claimant would result and, despite that knowledge, intentionally pursued that course of conduct, resulting in injury or damage.” “Gross negligence’ means that the defendant’s conduct was so reckless or wanting in care that it constituted a conscious disregard or indifference to the life, safety, or rights of persons exposed to such conduct.”
Georgia	Clear and convincing	“Willful misconduct, malice, fraud, wantonness, oppression, or that entire want of care which would raise the presumption of conscious indifference to consequences.” Gross negligence is not enough.

Hawaii	Clear and convincing	“[W]anton, oppressive, malicious, or reckless behavior.”
Idaho	Clear and convincing	“[O]ppressive, fraudulent, malicious, or outrageous conduct”
Illinois	Preponderance of the evidence	“[W]antonness, malice, oppression, willfulness.” The defendant’s conduct must involve some element of outrage similar to a crime, and must be outrageous, either because the defendant’s acts are done with evil motive or because they are done with reckless indifference to the rights of others.
Indiana	Clear and convincing	“[M]alice, fraud, gross negligence, or oppressiveness which was not the result of a mistake of fact or law, honest error or judgment, overzealousness, mere negligence, or other human failing.”

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Iowa	Clear and convincing	Willful and wanton misconduct means the act must be done intentionally and in unreasonable “disregard of a known or obvious risk that was so great as to make it highly probable that harm would follow, and which thus is usually accompanied by a conscious indifference to the consequences.”
Kansas	Clear and convincing	Willful, wanton, fraudulent, or malice.
Kentucky	Clear and convincing	Oppression, fraud, and gross negligence. Gross negligence is defined as “wanton or reckless disregard for the lives, safety and property of others,” which can be implied from conduct that is “so outrageous that malice is implied.
Louisiana	Preponderance of the evidence	Louisiana law provides for punitive damages in two limited situations: (1) where an intoxicated defendant operated a motor vehicle and caused injuries to another person, and (2) where a defendant perpetrator engages in criminal sexual activity with a victim less than seventeen years old.

Maine	Clear and convincing	Actual or implied malice. Actual malice exists where the “defendant’s tortious conduct is motivated by ill will toward the plaintiff.” Implied malice occurs where “deliberate conduct by the defendant . . . is so outrageous that malice toward a person . . . can be implied.” But, a mere reckless disregard is not enough to be considered implied malice.
Maryland	Clear and convincing	Maryland requires actual malice, which is defined as “evil motive, intent to injure, ill will, or fraud.”
Massachusetts	Preponderance of the evidence	No punitive damages are allowed unless authorized by statute. For example, personal-injury matters and the wrongful-death statute allow punitive damages for “malicious, willful, wanton or reckless conduct . . . or by the gross negligence of the defendant.”
Michigan	Not applicable	Not applicable

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Minnesota	Clear and convincing	“[D]eliberate disregard for the rights or safety of others[,]” which means “act[ing] . . . [with] knowledge of facts or intentionally disregard[ing] facts that create a high probability of injury . . . and deliberately proceeds . . . in conscious or intentional disregard . . . or proceeds to act with indifference to the high probability of injury”
Mississippi	Clear and convincing	“[W]illful, wanton or reckless disregard for the safety of others, or committed actual fraud.”
Missouri	Clear and convincing	“[O]utrageous because of evil motive or reckless indifference.”
Montana	Clear and convincing	“Actual fraud or actual malice. . . . [A]ctual malice [occurs when the defendant] ha[d] knowledge of facts or intentionally disregards facts that create a high probability of injury . . . and [either] deliberately proceed[ed] to act in conscious or intentional disregard . . . or proceed[ed] to act with indifference.”
Nebraska	Not applicable	Not applicable

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Nevada	Clear and convincing	“[O]ppression, fraud, or malice, [either] express or implied.”
New Hampshire	Not applicable	Not applicable
New Jersey	Clear and convincing	“[A]ctual malice or accompanied by a wanton and willful disregard of persons who foreseeably might be harmed by those acts or omissions.”
New Mexico	Preponderance of the evidence	Some culpable mental state and conduct that rises to a “willful, wanton, malicious, reckless, oppressive, or fraudulent level.”
New York	No clear standard	No clear standard; however, courts have held conduct that is “morally culpable” and having “evil and reprehensible motives” is sufficient. Further, conduct may be sufficient when it is depraved or so gross, wanton, malicious, and culpable as to evince utter recklessness, or where it was actuated by evil, reprehensible or wrongful purposes or motives.
North Carolina	Clear and convincing	Fraud, malice, willful, or wanton conduct.
North Dakota	Clear and convincing	Oppression, fraud, or actual malice.

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Ohio	Clear and convincing	Malice, aggravated, or egregious fraud, oppression, or insult.
Oklahoma	Clear and convincing	Sliding scale regarding amount of punitive damages awardable based upon reprehensibility of the defendant's conduct. Conduct includes reckless disregard for the rights of others, intentionally with malice towards others, and the court finds there is evidence beyond a reasonable doubt that the defendant acted intentionally and with malice and engaged in conduct that is life-threatening to humans.
Oregon	Clear and convincing	"Malice or has shown a reckless and outrageous indifference to a highly unreasonable risk of harm and has acted with a conscious indifference to the health, safety and welfare of others."
Pennsylvania	Clear and convincing	Intentional, willful, wanton, or reckless conduct.
Rhode Island	Clear and convincing	Willful, reckless, or wicked conduct amounting to criminal acts.

South Carolina	Clear and convincing	“[W]illful, wanton, or in reckless disregard of the plaintiff’s rights.”
South Dakota	Clear and convincing	Willful, wanton, or malicious conduct. Malice may be shown by actual or presumed malice. Presumed malice is established where a person acts willfully or wanton to the injury of others; it can “be shown by demonstrating a disregard for the rights of others.”
Tennessee	Clear and convincing	Intentionally, fraudulently, maliciously, or recklessly.
Texas	Clear and convincing	Fraud, malice, or gross negligence.
Utah	Clear and convincing	“[W]illful and malicious or intentionally fraudulent conduct, or conduct that manifests a knowing and reckless indifference toward, and a disregard of, the rights of others.”
Vermont	Preponderance of the evidence	“[I]ntentional and deliberate, and has the character of outrage frequently associated with crime.” Mere negligence, or even recklessness, is not enough.
Virginia	Preponderance of the evidence	Willful or wanton conduct or a conscious disregard for the safety of others.

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Washington	Not applicable	Not applicable
West Virginia	Preponderance of the evidence	Gross fraud; malice; oppression; or wanton, willful, or reckless conduct; or criminal indifference to civil obligations affecting the rights of others.
Wisconsin	Clear and convincing	Intentional disregard of the plaintiff's right, or that the defendant was substantially certain his or her conduct would result in the plaintiff's rights being disregarded. Intentional disregard is defined as a purposeful or awareness to a substantial certainty.
Wyoming	No clear standard	Outrage, similar to that usually found in crime that is willful and wanton misconduct and that is intentional.

**APPENDIX II: PUNITIVE DAMAGES STANDARD OF PROOF—
ALPHABETICAL²³⁷**

- Alabama.** Clear and convincing.
Alaska. Clear and convincing.
Arizona. Clear and convincing.
Arkansas. Clear and convincing.
California. Clear and convincing.
Colorado. Beyond a reasonable doubt.

²³⁷See *supra* Appendix I.

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Connecticut. Preponderance of the evidence.**Delaware.** Clear and convincing or preponderance of evidence.**District of Columbia.** Clear and convincing.**Florida.** Clear and convincing.**Georgia.** Clear and convincing.**Hawaii.** Clear and convincing.**Idaho.** Clear and convincing.**Illinois.** Preponderance of the evidence.**Indiana.** Clear and convincing.**Iowa.** Clear and convincing.**Kansas.** Clear and convincing.**Kentucky.** Clear and convincing.**Louisiana.** Preponderance of the evidence.**Maine.** Clear and convincing.**Maryland.** Clear and convincing.**Massachusetts.** Preponderance of the evidence.**Michigan.** Not applicable.**Minnesota.** Clear and convincing.**Mississippi.** Clear and convincing.**Missouri.** Clear and convincing.**Montana.** Clear and convincing.**Nebraska.** Not applicable.**Nevada.** Clear and convincing.**New Hampshire.** Undetermined.**New Jersey.** Clear and convincing.**New Mexico.** Preponderance of the evidence.**New York.** No clear standard.**North Carolina.** Clear and convincing.**North Dakota.** Clear and convincing.**Ohio.** Clear and convincing.**Oklahoma.** Clear and convincing.**Oregon.** Clear and convincing.**Pennsylvania.** Clear and convincing.**Rhode Island.** Clear and convincing.**South Carolina.** Clear and convincing.**South Dakota.** Clear and convincing.

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Tennessee. Clear and convincing.
Texas. Clear and convincing.
Utah. Clear and convincing.
Vermont. Preponderance of the evidence.
Virginia. Preponderance of the evidence.
Washington. Not applicable.
West Virginia. Preponderance of the evidence.
Wisconsin. Clear and convincing.
Wyoming. No clear standard.

**APPENDIX III: PUNITIVE DAMAGES STANDARD OF PROOF—BY
CATEGORY**

Clear and Convincing

Alabama
Alaska
Arizona
Arkansas
California
Delaware
District of Columbia
Florida
Georgia
Hawaii
Idaho
Indiana
Iowa
Kansas
Kentucky
Maine
Maryland
Minnesota
Mississippi
Missouri
Montana
Nevada
New Jersey

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North Carolina

North Dakota

Ohio

Oklahoma

Oregon

Pennsylvania

Rhode Island

South Carolina

South Dakota

Tennessee

Texas

Utah

Wisconsin

Preponderance of the Evidence

Connecticut

Delaware

Illinois

Louisiana

Massachusetts

New Mexico

Vermont

Virginia

West Virginia

Beyond a Reasonable Doubt

Colorado

Oklahoma

No Clear Standard

New York

Wyoming

Punitive Damages Not Available

Michigan

Nebraska

New Hampshire

Washington

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APPENDIX IV: CONDUCT CATEGORY²³⁸**Intentional Conduct States**

Alabama
Arizona
Arkansas
California
Colorado
Delaware
District of Columbia
Georgia
Idaho
Iowa
Kansas
Maine
Maryland
Nevada
New Jersey
New York
North Carolina
North Dakota
Ohio
Rhode Island
South Dakota
Vermont
Virginia
Wisconsin
Wyoming

Unintentional Conduct States

Alaska
Florida
Hawaii
Illinois (reckless indifference)
Indiana

²³⁸See *supra* Appendix I.

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Kentucky

Massachusetts

Minnesota

Missouri

Montana

New Mexico

Oklahoma

Oregon

Pennsylvania

South Carolina

Tennessee

Texas

Utah

West Virginia