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\$13M win against DaimlerChrysler to keep firm busy

Lawyers at Butler Wooten will face challenge to punitive award in crash death case

By Zach Lowe, The American Lawyer

Lawyers at Butler, Wooten & Fryhofer find themselves in the middle of a nationally watched punitive damages case after a closely divided Tennessee Supreme Court reversed a lower court and upheld a \$13.4 million award to a mother whose infant son died in a 2001 car crash.

The ruling is the latest twist in a case that has seen various courts cut punitive damages against DaimlerChrysler Corp. from \$98 million to \$20 million, to \$13.3 million, and finally to zero. But just when momentum was on the side of DCC and its lawyers at Gibson, Dunn & Crutcher, the Tennessee Supreme Court reinstated the \$13.4 million award last week.

"I think this is the largest yo-yo effect I've ever seen on any case," says Theodore Boutrous Jr. of Gibson Dunn. He plans to appeal the punitive damages verdict to the U.S. Supreme Court. Boutrous says the huge reward, which is nearly triple the \$5 million awarded in compensatory damages, violates due process because there is no way DCC could have anticipated that its conduct could be punished to such a degree.

In particular, Boutrous says the court's decision to allow evidence of similar injuries that occurred after the crash at the center of the case comes close to penalizing DCC for injuries suffered by other parties not named in the suit—something tort reformers hoped would end after the U.S. Supreme Court slashed such punitive damages against Philip Morris USA in a 2007 tobacco case. That case, along with the court's recent decision to cut punitive damages in the Exxon Valdez case from \$2.5 billion to \$500 million, had reformers like Boutrous optimistic.

But Leigh M. May, a Butler, Wooten attorney in Atlanta who worked on the trial and appeal in the case, said the punitive damages amount is well within constitutional standards. "In fact it has been reduced so much it cannot have the deterrent effect Chrysler's reckless disregard of human life deserves," she said.

The victim, 8-month-old Joshua Flax, was in a child safety seat in the back of a Chrysler minivan when a speeding driver rear-ended the car in Nashville in 2001, court records show. The impact jolted the front passenger seat backward; it struck Joshua's head, causing fatal brain injuries. Flax's parents sued DCC, claiming the company knew the front seats in its minivans moved backward in rear-ended crashes, endangering rear seat occupants.

Gibson Dunn argued that DCC's seats were actually safer than federal regulations required. More rigid seats could endanger front seat occupants, the team said. Given this evidence, Boutrous says there is no way DCC could have anticipated huge punitive damages—something he sees as a violation of due process.

But the plaintiff team, which also included James E. Butler Jr. and George W. Fryhofer III of Butler Wooten, introduced evidence that customers complained about the back-sliding seats both before and after the crash. DCC "deceitfully covered up" the problem, the majority wrote, conduct that meets the level of reprehensibility necessary to a higher-than-usual punitive reward. They thus upheld the trial court's \$13 million in punitive damages—an

amount the trial court settled on after ruling that the \$98 million jurors recommended was excessive.

Boutrous says he's disappointed but hopes to use the case to set stricter standards for punitive rewards. "Courts continue to express confusion on this," he says. "And we will continue to raise these issues."



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