

Punitive Damage Discovery Twenty Years After the Adoption of Rule 4003.7

Rule 4003.7 has been a part of the Pennsylvania Rules of Civil Procedure since 1997. Twenty years have passed since its adoption, but uncertainty still abounds. Under what circumstances and at what stage of the proceedings may a party obtain information regarding the wealth of a defendant for purposes of a punitive damages claim?

The text of the Rule itself seems fairly straightforward. It states:

A party may obtain information concerning the wealth of a defendant in a claim for punitive damages only upon order of court setting forth appropriate restrictions as to the time of the discovery, the scope of the discovery, and the dissemination of the material discovered.

Pa. R. Civ. P. 4003.7.

Clearly, leave of court is required before a party may engage in discovery seeking financial information in support of a claim for punitive damages. But what is the standard that the court should use in order to decide a motion under Rule 4003.7? The Rule is silent. To compound the matter, there are few post-1997 reported court decisions interpreting Rule 4003.7, and there is *no* appellate authority on the subject.

Some in the defense bar have argued that the Rule requires a consideration of evidence produced in a case and whether that evidence supports a *prima facie* case for punitive damages. The viewpoint more consistent with the case law and the text of the Rule is that the threshold for conducting wealth discovery is met when the *pleadings* state a *prima facie* basis for awarding punitive damages.

In *Ogozaly v. American Honda Motor Co.*, 67 Pa. D. & C. 4th 314 (Lack. Co. 2004) (“*Ogozaly II*”), which is one of the few post-rule cases, the court uses the following language:

We interpreted Rule 4003.7 as incorporating the **common-law** requirement that obligates a plaintiff to **aver** specific facts establishing a prima facie basis for recovering punitive damages as a condition precedent for securing financial wealth discovery.

Id. at 316 (Emphasis added)

Use of the term “aver” would lead to the conclusion that a pleading standard rather than an evidence standard should be applied. The Court had previously dismissed an earlier motion requesting wealth discovery, however, and required the plaintiff to produce an expert report, identify the defect at issue and furnish a factual basis for the punitive damage claim. *Id.* at 317. See *Ogozaly v. American Honda, Inc.*,

No. 98 CV 2647, 2003 WL 26131652, *3- 5 (Lackawanna Co. C. P. June 9, 2003)(*Ogozaly I*). This action by the court in *Ogozaly I* would appear to support an evidence based standard, contrary to the court's later pronouncement in *Ogozoly II*.

Ogozaly concerned an ATV rollover accident in which the plaintiff asserted he was injured due to product defect and the defendant maintained the accident occurred due to the plaintiff's intoxication. In *Ogozaly I*, Judge Terrence Nealon rejected the standard applied in an earlier pre-Rule case, *Open Inns, Ltd*, 32 Pa. D. & C.4th 175 (Chester Co. C. P. 1996), which did not allow wealth discovery "unless and until there is first a showing of evidence to support the allegations upon which the claim for punitive damages is based and a reasonable basis for asserting that such claim will eventually be able to be submitted to a jury." *Id.* at 179. Judge Nealon, in contrast held that

[U]nlike the *Open Inns* court, we do not believe that there must be "a showing of evidence" to substantiate the punitive damages claim prior to allowing a plaintiff to serve discovery under Rule 4003.7. Rather, if the plaintiff's complaint contains specific averments of fact which indicate that the defendant is chargeable with willful, wanton or recklessly indifferent conduct, then discovery of the defendant's net worth is appropriate under Rule 4003.7.

Ogozaly I at *5. See also *Ogozaly II*, 67 Pa. D. & C. 4th at 316. Nevertheless, in *Ogozaly I*, Judge Nealon denied the request for discovery under Rule 4003.7 because the complaint contained merely boilerplate allegations and after five years the plaintiff had yet to identify the defect in the product or even taken a single deposition. Therefore, the denial was "without prejudice to [plaintiff's] right to seek discovery at a later date regarding Honda's wealth in the event he produces an expert report, identifies the design defect at issue, and furnishes a factual basis for his punitive damages claim." *Id.*

Ogozaly I and II, do not stand for the proposition that expert reports must be required before Rule 4003.7 discovery may be allowed. The Court in *Ogozaly II* stated that it was necessary to review the substance of the expert reports because those reports referenced communications and documents indicating Honda's knowledge of unreasonably dangerous characteristics of the ATV product. In other words, the expert reports established the necessary knowledge required for reckless indifference as a basis for awarding punitive damages.

Prior to the promulgation of Rule 4003.7, a number of other common pleas courts similarly found that under the common law evidentiary proof of the punitive claim was not a prerequisite to wealth discovery. See, e.g., *Bucks v. Pennfield Corp.*, 4 Pa. D. & C. 4th 474, 482-485 (Lebanon Co. C. P. 1989)(court need not evaluate evidence to determine if punitive claim supported, but should merely consider pleadings, relevant discovery and future proceedings to determine if the record includes more than mere allegations); *Sprague v. Walter*, 23 Pa. D. & C. 3d 638, 647 (Phila. Co. C. P. 1982)(where pleading and general status and stage of case indicate that a bona fide claim for punitive damages is presented wealth discovery must be allowed; ruling upon sufficiency of discovered evidence would invade fact-finding province of jury); *Peterman*

v. Geisinger Medical Center(no. 2), 13 Pa. D. & C. 3d 153 (Montour Co. C. P. 1980)(sufficient averment of facts); *Roman v. Pearlstein*, 8 Phila. 151 (Phila. Co. C. P. 1982)(same), *aff'd in part and rev'd in part on other grounds*, 478 A.2d 845 (Pa.Super. 1984); *King v. Logue*, 9 Pa. D. & C. 3d 137 (Phila. Co. C. P. 1978)(bald conclusory allegations not sufficient but financial discovery allowed when the factual allegations in pleadings would be sufficient to place the question before the jury).

Some earlier common pleas court decisions, it had different interpretations of the threshold for permitting discovery of wealth information, primarily to protect a party from what was viewed as an invasion of privacy designed to harass the defendant. See, e.g., *Open Inns*, supra. The better and more modern rationale, however, is that a court need not evaluate evidence and may allow such discovery provided that specific facts are averred which support a *prima facie* basis for recovering punitive damages. See discussion in *Ogozaly I*, supra, at *3-5; see also *Sprague*, supra, at 644-64.

Indeed, the fact that the Rule was enacted leads to the conclusion that this is the correct interpretation. Rule 4003.7 by its terms commits the question of whether to permit wealth discovery to the discretion of the trial court. See Explanatory Comment – 1997, Pa. R. C. P. 4003.7 (“new Rule 4003.7 places under the control of the court the discovery of information concerning the wealth of a defendant when there is a claim for punitive damages.”) By requiring leave of court, the Rule entrusts to the trial judge the task of assuring that abuses of the discovery process that concerned earlier courts do not occur and that a sufficient basis for wealth discovery is present.

That was the argument made, and the ultimate outcome, in a recent appeal of a trial court’s order for wealth discovery under Rule 4003.7 in a case handled by the author. In *Straub v. USPLabs, et al*, Civ. No. 2403 May Term 2014 (Phila. Co. C. P.), the common pleas court judge certified for appellate review the question of whether a Rule 4003.7 motion was properly granted. The Superior Court, however, denied the defendants’ petition for permission to appeal. *Straub*, No. 110 EDM 2016 (Pa. Super. Oct. 7, 2016)(Per Curium Order). While no reasoning was given, it would appear that the Superior Court properly declined to hear the appeal because of the discretionary nature of the issue under the language of the Rule.

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