

**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS**

**IN RE: FRESENIUS
GRANUFLO/NATURALYTE
DIALYSATE PRODUCTS LIABILITY
LITIGATION**

MDL No. 1:13-md-02428-DPW

This Document Relates to:

1-13-cv-13066-DPW

**Edward J. Lastorka v. Fresenius Medical
Care Holdings, Inc., *et al.***

**PLAINTIFF'S MEMORANDUM OF LAW IN SUPPORT OF MOTION *IN LIMINE* TO
APPLY MASSACHUSETTS LAW TO THE ISSUE OF PUNITIVE DAMAGES
(*MOTION IN LIMINE NO. 5*)**

Plaintiff Edward Lastorka moves *in limine* to request that the Court apply the law of Massachusetts to the issue of punitive damages, rather than the law of Mississippi.

I. INTRODUCTION

Mr. Lastorka has made a claim in this case for punitive damages based upon the Defendants' wonton, reckless and willful actions and omissions including, but not limited to: (1) failing to test and inspect its GranuFlo® product in a reasonable manner in order to ascertain whether or not it was safe; (2) failing to utilize and implement a reasonably safe design in the manufacture of GranuFlo®; (3) failing to warn the Plaintiff of the dangers of GranuFlo®; and (4) manufacturing GranuFlo®, which is an unreasonably dangerous and defective hemodialysis product. These actions and omissions took place at the Defendants' principle place of business in Waltham, Massachusetts. Mr. Lastorka's deceased wife, Jackie Lastorka, underwent dialysis

and was exposed to Granuflo at a clinic in Mississippi. Therefore, either the law of Massachusetts, or the law of Mississippi, shall apply to the issues in this matter.

On the issue of punitive damages, there is a direct conflict between the law of Mississippi and the law of Massachusetts. Specifically, Mississippi imposes a statutory cap on the amount of punitive damages available to Plaintiffs, while Massachusetts does not impose any such cap.¹ In light of this conflict, the question of which state's law should apply to the issue of punitive damages must be determined.

Under Mississippi's choice of law rules, which are applicable here pursuant to this Court's January 2, 2015 Order [DE-848], when there is a direct conflict on the issue of punitive damages, a court should apply the law of the state where the wonton, willful, and/or reckless conduct occurred, not the law of the state where the injury occurred.² In this case that state is Massachusetts, and therefore on the issue of punitive damages Massachusetts law should apply.

II. ARGUMENT

A. The Choice of Law Framework

The threshold issue in any choice of law analysis is to determine which state's choice-of-law rules are applicable.³ In the Court's 1/2/2015 Order, the Court held that for all cases originally filed in Mississippi, Mississippi choice of law principles will apply.⁴ In this case, Mr. Lastorka originally filed his action in Mississippi, and therefore, pursuant to this Court's ruling, Mississippi choice of law rules are applicable.

¹ See Miss. Code Ann §11-1-65; *Aleo v. SLB Toys USA, Inc.*, 995 N.E.2d 740, 754 (Mass. 2013).

² *Ashland Oil, Inc. v. Miller Oil Purchasing Co.*, 678 F.2d 1293, 1304-05 (5th Cir. 1982).

³ See *In Re: Fresenius Granuflo/Naturalyte Dialysate Products Liability Litigation*, Jan. 2, 2015 Memorandum and Order on Motion to Dismiss [DE-8484] at 6-7 (hereinafter 1/2/2015 Order).

⁴ *Id.* at 19.

Under Mississippi's choice of law rules, the first step in the choice of law analysis is to determine whether the laws of the competing states actually differ. If there is no true conflict in the respective states' law, the court need not analyze the issue any further.⁵ Where a true conflict does exist, however, Mississippi's choice-of-law rules call for the application of the "center of gravity" or "most significant relationship" test, which for tort matters, like this one, is set forth in Section 145 of the Restatement (Second) of Conflict of Laws.⁶

To determine which state has the "most significant relationship," Section 145 instructs courts to consider the following factors: "the place where the injury occurred;" "the place where the conduct causing the injury occurred;" "the domicile, residence, nationality, place of incorporation and place of business of the parties;" and "the place where the relationship, if any, between the parties is centered."⁷ Section 145 further states: "these contacts are to be evaluated according to their relative importance with respect to the *particular issue*."⁸

Importantly, Mississippi courts have long recognized that "the law of a single state does not necessarily control every issue in a given case." Rather, the center of gravity test must be applied to each issue presented.⁹ In explaining why the choice of law analysis should not be an "all or nothing proposition," Mississippi courts have often emphasized that: "one state may have

⁵ See *South Carolina Insur. Co. v. Keymon*, 974 So. 2d 226 (Miss. 2008); *Zurich American Insur. Co. v. Goodwin*, 920 So. 2d 427 (Miss. 2006).

⁶ *Mitchell v. Craft*, 211 So. 2d 509 (Miss. 1968); *William v. Liberty Mutual Insur. Co.*, 741 F.3d 617 (5th Cir. 2014).

⁷ Section 145(2) Restatement (Second) of Conflicts of Laws § 145(2).

⁸ *Id.* (emphasis added).

⁹ *McDaniel v. Ritter*, 556 So. 2d 303, 312 (Miss. 1989); see also *Rieger v. Group Health Association*, 851 F. Supp. 788, 791 (N.D. Miss. 1994) (stating "once a court has determined the state with the most significant relationship with a cause of action, the court is under no obligation to apply the law of that state to every facet of the case.").

a legitimate concern with one facet or issue of the case, but not with another, and hence it is not necessary in each case to apply only the law of a single state to all phases of the lawsuit.”¹⁰

This “issue by issue” analysis is especially important in the area of punitive damages, where Mississippi choice of law principles dictate that the place where the punitive conduct occurred is the most critical factor to be considered when determining which state’s law will apply to a request for punitive damages.¹¹ In explaining why the place where the punitive conduct occurred is the most significant factor in determining which state’s punitive damages law should apply, the Fifth Circuit in *Ashland* pointed to the Comments following Section 145 of the Restatement (Second) of Conflicts.¹² Those comments state, in pertinent part:

the interest of a state in having its tort rule applied in the determination of a particular issue will depend upon the purpose sought to be achieved by that rule and by the relation of the state to the occurrence and the parties. **If the primary purpose of the tort rule involved is to deter or punish misconduct . . . the state where the conduct took place may be the state of dominant interest and thus that of most significant relationship.**¹³

These principles require application of Massachusetts law to the issue of punitive damages.

B. Massachusetts Law Should Apply to the Issue of Punitive Damages

1. There is a conflict between the laws of Mississippi and Massachusetts on the issue of punitive damages

There is a true and direct conflict between Mississippi and Massachusetts as to the issue

¹⁰ *Fells v. Bowman*, 274 So. 2d 109, 112 (quoting *Wilcox v. Wilcox*, 133 N.W. 2d 408 (Wis. 1965)).

¹¹ *Ashland Oil, Inc. v. Miller Oil Purchasing Co.*, 678 F.2d 1293, 1304-05 (5th Cir. 1982).

¹² *Id.*

¹³ Restatement (Second) of Conflicts of Laws §145 cmt. (c) (emphasis added).

of punitive damages. Mississippi imposes a statutory cap on the amount of punitive damages available to plaintiffs.¹⁴ Specifically, the Mississippi legislature has capped punitive damage awards at varying dollar amounts based on the net worth of the defendant.¹⁵ To the contrary, Massachusetts does not impose any such caps on punitive damage awards.¹⁶ Thus, a conflict between the laws of Mississippi and the laws of Massachusetts exists.

2. Massachusetts Has the Most Significant Relationship to the Issue of Punitive Damages

Because there is a conflict between the laws of Mississippi and Massachusetts and because Mississippi choice of law rules apply, the Court must determine which state has the most significant relationship to the question of the Defendants' punitive conduct. In other words, the Court must determine where the center of gravity is for Defendants' allegedly punitive conduct.¹⁷ As set forth above, when conducting this choice of law analysis on the issue of punitive damages, the most critical factor is the place where the alleged punitive conduct occurred.¹⁸

For example in *Ashland*, the Fifth Circuit considered whether Mississippi or Louisiana law should apply to the issue of punitive damages.¹⁹ In making this determination, the court applied Restatement of Conflicts §145 and the significant relationship test and concluded that Louisiana law applied because Louisiana was the state where "all of the egregious misconduct of

¹⁴ See Miss. Code Ann §11-1-65.

¹⁵ *Id.*

¹⁶ *Aleo v. SLB Toys USA, Inc.*, 995 N.E.2d 740, 754 (Mass. 2013); see also *Clifton v. Massachusetts Bay Transp. Auth.*, 839 N.E.2d 314 (Mass. 2005) (stating "a proper punitive damage award" is one that is "sufficient . . . to send a clear message to the [defendant] of condemnation for its reprehensible behavior . . .").

¹⁷ *Mitchell v. Craft*, 211 So. 2d 509 (Miss. 1968); *William v. Liberty Mutual Insur. Co.*, 741 F.3d 617 (5th Cir. 2014).

¹⁸ See *Ashland Oil, Inc. v. Miller Oil Purchasing Co.*, 678 F.2d 1293, 1304-05 (5th Cir. 1982) (quoting Restatement (Second) of Conflicts of Laws §145 cmt. (c)); see also *Houston North Hospital Properties v. Telco Leasing, Inc.*, 688 F.2d 408, 409 (5th Cir. 1982).

¹⁹ *Ashland*, 678 F.2d at 1304-05 (5th Cir. 1982).

this company occurred.”²⁰ The court reasoned that the purpose of a punitive damages award is to warn and deter “the defendant from committing like offenses in the future,” therefore the state where that defendant does business is the state with the most significant relationship to the issue of punitive damages.²¹

In the arena of products liability suits against drug and medical device manufacturers, courts throughout the country have found that the law of the state where the defendants’ principal place of business and decision making hub is located is the state with the most significant relationship to the issue of punitive damages. For example, in *Daniel v. Wyeth, Pharm., Inc.*,²² the court applied Pennsylvania law to the punitive damages claim of an Arkansas plaintiff who was prescribed the drug by an Arkansas doctor who received and communicated the contents of the drug’s warning labels in Arkansas. Importantly, the court found that Wyeth’s “corporate decisions regarding the failure or refusal to conduct adequate testing to determine whether its products increased the risk of breast cancer in postmenopausal women occurred primarily (if not exclusively) in Pennsylvania, where corporate leadership is located.”²³ In so concluding, the *Daniel* court cited with approval the decision of *Kelly v. Ford Motor Co.*,²⁴ which applied the punitive damages law of Michigan because “the evidence is uncontradicted that all of the relevant conduct, including the development activity, design, testing, and decision-

²⁰ *Id.* at 1305.

²¹ *Id.*; see also *Houston North Hospital Properties v. Telco Leasing, Inc.*, 688 F.2d 408, 409 (5th Cir. 1982) (where the court found that where the primary purpose of a law is to deter or punish, the state where “the conduct took place rather than the state where the injury ‘occurred’ is the ‘state of dominant interest and thus that of most significant relationship’”).

²² 15 A.3d 909, 935 (Pa. Super. 2011).

²³ *Id.*; see also *Singleton v. Wyeth Inc.*, No. 1893 EDA 2010, 2012 Pa. Super. LEXIS 1593, at *5-6, n.2 (Pa. Super. Ct. July 20, 2012) (same).

²⁴ 933 F. Supp. 465, 469 (E.D. Pa. 1996).

making relating to the allegedly-defective Bronco II, took place at Ford's headquarters in Dearborn, Michigan.”

Similarly, in *Deutsch v. Novartis Pharms. Corp.*,²⁵ the court held that that New Jersey punitive damages law applied where New York plaintiffs alleged that a New Jersey-headquartered defendant failed to conduct adequate clinical trials, concealed information from the FDA and other regulatory agencies, and attempted to maximize profits by increasing the dosage for its drugs to excessive levels. The court reasoned, “plaintiffs have failed to rebut [defendant's] plausible claim that the corporate decisions at issue were made from the company's corporate headquarters in New Jersey.”²⁶

In this case, the Defendants' principal place of business and decision making center is in Massachusetts. Moreover, all the relevant conduct that forms the basis of Plaintiff's punitive damages claim occurred in Massachusetts.²⁷ Specifically, Plaintiff's punitive damages claim is based upon the Defendants' wonton, reckless and willful actions and omissions including, but not limited to: (1) failing to test and inspect its GranuFlo® product in a reasonable manner in order to ascertain whether or not it was safe; (2) failing to utilize and implement a reasonably safe design in the manufacture of GranuFlo®; (3) failing to warn the Plaintiff of the dangers of GranuFlo®; and (4) manufacturing GranuFlo®, which is an unreasonably dangerous and defective hemodialysis product. Defendants cannot dispute that the key corporate decisions related to GranuFlo®, including decisions about design, manufacturing, selling, testing, marketing and labeling were made from Defendants' principle place of business in Waltham,

²⁵ 723 F. Supp. 2d 521, 525-26 (E.D.N.Y. 2010).

²⁶ *Id.*

²⁷ *See In Re: Fresenius Granuflo/Naturalyte Dialysate Products Liability Litigation*, Jan. 2, 2015 Memorandum and Order on Motion to Dismiss [DE-8484] at 26.

Massachusetts. Therefore, in accordance with Section 145 of the Restatement (Second) of Conflicts and the case law discussed above, Massachusetts law should apply to the issue of punitive damages.

CONCLUSION

For all the foregoing reasons, Plaintiff respectfully requests that the Court grant its motion *in limine* to apply Massachusetts law to the issue of punitive damages.

Respectfully submitted,

Dated: November 30, 2015

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CERTIFICATE OF SERVICE

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