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TORTS—PUNITIVE DAMAGES ARE NOT RECOVERABLE IN A NEGLIGENCE ACTION AGAINST AN INTOXICATED DRIVER ABSENT A SHOWING OF ACTUAL MALICE. *Komornik v. Sparks*, 331 Md. 720, 629 A.2d 721 (1993).

I. INTRODUCTION

Drunk driving, a grave social problem with serious legal consequences, is a severe safety risk for both the drunk driver and the potential victims. Every year in Maryland, 10,000 injuries and deaths occur as a result of drunk driving accidents,[1] and thousands of Maryland drivers are arrested for alcohol-related driving offenses.[2] One method that has been used to deter and to punish drunk driving has been to allow victims of drunk driving to recover punitive damages from drunk drivers.[3]

In Maryland, the amount of a punitive damage award is within the jury's discretion[4] and is usually very high.[5] Furthermore, defendants who are liable for punitive damages in Maryland are forced

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1. Ann E. Singleton, *Initiatives to Combat Drunk Driving*, MD. BAR J., May/June 1990 at 17. In America, fifty percent of all fatal car accidents are alcohol-related. Brief of Amicus Curie Maryland Trial Lawyers' Association at 2, Komornik v. Sparks, 331 Md. 720, 629 A.2d 721 (1993) (No. 91-350) (citing Colligan v. Fera, 349 N.Y.S.2d 306, 310 (1973)). In Maryland, the figure increases to ninety percent. Christopher W. Nicholson, *Maryland's Drunk Driving Laws: An Overview*, 11 U. BALT. L. REV. 357, 357 (1982). As an unfortunate example, consider Marylander Jerome Brown. Brown had been driving without a license for two years before he was involved in an accident which killed both his girlfriend and his 14-year-old daughter. Marguerite Michaels, *Unlicensed to Kill*, TIME, June 13, 1994, at 54. Brown was allegedly drunk at the time of the accident. *Id.*
2. *See* Singleton, *supra* note 1, at 17 (stating that 33,000 people were arrested for alcohol-related driving offenses in Maryland during 1988 and 1989).
3. There are two general categories of damages, compensatory and punitive. Compensatory damages compensate the plaintiff for what he has actually lost—for example, medical bills, lost wages, and pain and suffering. W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 2, at 9 (5th ed. 1984). Punitive damages, however, serve to punish the defendant and to deter others from engaging in similar conduct. *Id.; see infra* note 8. Punitive damages may also be called "exemplary, vindictive, penal, . . . aggravated, or retributory." 1 LINDA L. SCHLUETER & KENNETH R. REDDEN, PUNITIVE DAMAGES § 1.3(H) (2d ed. 1989).
4. SCHLUETER & REDDEN, *supra* note 3, § 2.2(A)(2).
5. *See* 2 J. GHIARDI & J. KIRCHER, PUNITIVE DAMAGES LAW AND PRACTICE § 21.01, at 2 (1985).

to pay the award from their own pockets because punitive damages are generally uninsurable and non-dischargeable in bankruptcy.[6] Thus, the heavy financial burden associated with punitive damages achieves the dual purposes of punishment and deterrence.

The imposition of punitive damages also benefits the victim. For example, victims must often pay attorney's fees and litigation costs in order to recover damages that merely cover the cost of their injuries, lost wages, and pain and suffering.[7] Thus, litigation expenses may be recovered only indirectly, through a punitive damage award.[8]

However, on August 26, 1993, the Court of Appeals of Maryland decided, in *Komornik v. Sparks*,[9] that punitive damages were not recoverable in a negligence action against an intoxicated driver absent a showing of actual malice.[10] *Komornik* is of extreme importance both to the victims of drunk drivers and to the Maryland community because the decision has virtually eliminated punitive damages in drunk driving cases.

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6. *See* William C. Cooper, *Punitive Damages and the Drunken Driver*, 8 PEPP. L. REV. 117, 129 (1980) ("[P]unitive damages probably serve as a greater deterrent because they can not [sic] be absolved through bankruptcy, and in many states are uninsurable."); *see also* MONT. CODE ANN. § 33-15-317 (1993) ("Insurance coverage does not extend to punitive or exemplary damages unless expressly included by the contract of insurance."); Allen v. Simmons, 533 A.2d 541, 543-44 (R.I. 1987) (automobile insurer is not obligated to provide insurance coverage for punitive damages).
7. The general rule is that attorney's fees are not recoverable in the absence of a statute that provides for such recovery. SCHLUETER & REDDEN, *supra* note 3, § 2.2(B)(1), at 29.
8. *Id.* Punitive damages are often viewed as a way to compensate plaintiffs for "elements of damage which are not legally compensable," such as wounded dignity or attorney's fees. KEETON, *supra* note 3, § 2, at 9. Furthermore, punitive damages supplement existing laws when criminal punishment is merely a nominal fine or when punishment is an administrative sanction. SCHLUETER & REDDEN, *supra* note 3, § 1.3(G). Punitive damages also vindicate society and the victim. When the plaintiff cannot possibly be made whole by compensatory damages, punitive damages often fulfill the need for retribution. *See id.* § 1.3(G); Gregory A. Williams, Note, *Tuttle v. Raymond: An Excessive Restriction Upon Punitive Damage Awards in Motor Vehicle Tort Cases Involving Reckless Conduct*, 48 OHIO ST. L.J. 551, 558 (1987) ("The use of punitive damages to supplement . . . the criminal law may be entirely justified when one considers the reprehensibility of much conduct that is not effectively regulated by the criminal law."). Nevertheless, compensating the victim is merely a consequence, and not an objective, in awarding punitive damages. The ultimate objective in awarding *punitive* damages is to *punish* the defendant. *See supra* note 3 and accompanying text. The focus, therefore, is on the defendant's undesirable conduct and not on the individual plaintiff's financial predicament.
9. 331 Md. 720, 629 A.2d 721 (1993).
10. *See id.* at 728-31, 629 A.2d at 725-26.

Donna Komornik was injured three days before the 1989 Christmas holiday in a four-car collision caused by a drunk driver, Gregory Sparks.[11] On the day of the accident, Sparks left work early, went to a local lounge, ate lunch, and drank beer.[12] Sparks then went to another bar, where he drank an unknown amount of whiskey.[13]

Later that day, Sparks returned home. He wanted to go Christmas shopping, but he did not have a car.[14] Without permission, Sparks took the keys to his sister's pick-up truck and went for a drive.[15] He drove around for about one hour and became lost.[16] Sparks eventually found himself on Merritt Boulevard, approaching a line of cars stopped at a red light.[17] He attempted to stop but depressed the clutch rather than the brake and consequently caused the collision that injured Donna Komornik.[18]

Sparks was found to have a blood-alcohol content of 0.19, which is almost twice the level required to prove legal intoxication.[19] Sparks was ultimately convicted of driving while intoxicated.[20] Sparks's driving record also reflected other alcohol-related driving offenses.[21]

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11. *Id.* at 721, 629 A.2d at 721.
12. *Id.* at 723, 629 A.2d at 722. Sparks could not recall the amount of beer he had consumed. *Id.*
13. *Id.*
14. *Id.* A friend had driven Sparks from bar to bar. Joint Record Extract at E-13 to E-14, Komornik v. Sparks, 331 Md. 720, 629 A.2d 721 (1993).
15. *Komornik*, 331 Md. at 723, 629 A.2d at 722.
16. *Id.*
17. *Id.*
18. *Id.* Komornik's vehicle was struck in the rear by the car that was struck by Sparks. *Id.* at 721, 629 A.2d at 721. The impact caused her vehicle to strike the car in front of her's. *Id.*
19. *Id.* at 723, 629 A.2d at 722. A blood alcohol level of 0.10 or more is prima facie evidence of driving while intoxicated. MD. CODE ANN., CTS. & JUD. PROC. § 10-307(e) (1995). A blood alcohol level of 0.07 or more is prima facie evidence of driving while under the influence of alcohol. *Id.* § 10-307(d).
20. *Komornik*, 331 Md. at 723, 629 A.2d at 722; *see* MD. CODE ANN., CTS. & JUD. PROC. § 10-307(d). Driving while intoxicated is a violation of MD. CODE ANN., TRANSP. § 21-902(a) (1992). Section 21-902(a) states that "[a] person may not drive or attempt to drive any vehicle while intoxicated." *Id.* § 21-902(a). The maximum punishment for a violation of subsection (a) is a fine of not more than $1,000 and/or imprisonment for not more than one year for a first offense, and a fine of not more than $2,000 and/or imprisonment for not more than two years for a second offense. *Id.* § 27-101(k)(1). Sparks was sentenced to only 15 days in jail and a mere $200 fine. *Komornik*, 331 Md. at 723 n.4, 629 A.2d at 722 n.4.
21. Just six weeks prior to the car accident in the case *sub judice*, Sparks's license was suspended because he refused to submit to a breathalyzer test. *Komornik*, 331 Md. at 724, 629 A.2d at 723. Sparks's record also showed that he had received a probation before judgment in May of 1982 for driving under the influence of alcohol and that he had been convicted in December of 1984 for driving while intoxicated. *Id.* at 723-24, 629 A.2d at 722-23. As a result of the

Donna Komornik brought a civil negligence suit against Sparks in the Circuit Court for Baltimore County.[22] Although Komornik was awarded compensatory damages for her hospital bills and for pain and suffering, the trial judge ruled that punitive damages could not be recovered.[23] The judge reached this decision by applying the standard set forth in *Owens-Illinois, Inc. v. Zenobia*.[24] Komornik appealed, arguing that "[t]he trial court erred in concluding that the decision of the Court of Appeals in *Zenobia* require[d] proof of intent to injure, evil motive, or ill will in order to recover punitive damages in a tort action against an intoxicated driver."[25] The Maryland court of appeals granted certiorari prior to the court of special appeals's review and affirmed the circuit court's ruling, holding that punitive damages were not recoverable against an intoxicated driver absent a showing of actual malice.[26]

II. BACKGROUND

Maryland's history regarding its treatment of punitive damages in automobile tort cases can be grouped into three distinct phases. Phase I covers the time period between 1944 and 1972. Phase II covers the period of time between 1972 and 1993. Phase III began in 1993 and continues today. During the earliest period, Maryland followed the standard set forth in *Davis v. Gordon*,[27] which was the first Maryland case to address the issue of punitive damages in an automobile tort case.

In *Davis*, the administrator of the victim's estate brought an action against the driver to recover damages sustained by the victim as a result of a fatal automobile accident.[28] The Maryland court of appeals addressed for the first time whether a jury instruction on the imposition of punitive damages was proper in an automobile tort case where there was no evidence of the defendant's motive or intent to injure.[29] The trial court allowed the jury to be instructed on the

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December 1984 conviction, Sparks's drivers license was restricted for three years and twelve points were assessed against it. *Id.*

22. Appellant's Brief at 1, Komornik v. Sparks, 331 Md. 720, 629 A.2d 721 (1993) (No. 91-350); *see Komornik*, 331 Md. at 722, 629 A.2d at 722.
23. *Komornik*, 331 Md. at 721-22, 629 A.2d at 721-22.
24. 325 Md. 420, 601 A.2d 633 (1992). See *infra* notes 77-92 and accompanying text for a discussion of the *Zenobia* standard.
25. *Komornik*, 331 Md. at 722, 629 A.2d at 722.
26. Actual malice is defined in Maryland as "evil motive, intent to injure, ill will, or fraud." *Zenobia*, 325 Md. at 460 n.20, 601 A.2d at 652 n.20.
27. 183 Md. 129, 36 A.2d 699 (1944).
28. *Id.* at 130, 36 A.2d at 699.
29. A preliminary issue on appeal was whether evidence of the defendant's traffic violation was admissible. *Id.* at 132, 36 A.2d at 700. The court held that the evidence was not admissible. *Id.*

imposition of punitive damages, but the court of appeals reversed and remanded.[30]

The *Davis* court was reluctant to hold that punitive damages were recoverable in an automobile tort case under any circumstances.[31] According to the court, criminal penalties were a better means of deterrence than were punitive damages because criminal penalties could be applied regardless of whether injury occurred. Punitive damages, on the other hand, could only be applied if the wrongdoer's conduct resulted in injury to another person.[32] Nevertheless, the court held that punitive damages were recoverable in a negligence action only if the plaintiff could show "an element of fraud, or malice, or evil intent, or oppression entering into and forming part of the wrongful act."[33] In other words, a plaintiff had to show by a preponderance of the evidence that a defendant had acted with actual malice in order to recover punitive damages.[34]

Under *Davis*, a victim incurring serious bodily injury or pecuniary loss could not be assured of recovering punitive damages.[35] Cases involving humiliation, injured feelings, or damage to a plaintiff's reputation would more likely contain the required elements of motive, malice, and evil intent than would a case involving a drunk driver.[36]

The Maryland court of appeals further refined the *Davis* standard for recovering punitive damages in *Conklin v. Schillinger*.[37] In *Conklin*, the defendant struck the plaintiff's car head-on while traveling at night, on the left side of the road, without lights.[38] The plaintiff

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30. *Id.* at 134-35, 36 A.2d at 701.
31. *See id.* at 133-34, 36 A.2d at 700-01.
32. The *Davis* court stated:

> We have many rules of the road, all designed and intended to promote the public safety. They have severe penalties for their violation whether there is an accident or not. If all drivers and all pedestrians observed these rules there would not be any accidents. The rules of the road are far more effective than any inflammatory verdicts in making our streets and highways safe for travel. The fear of arrest is more of a deterrent than a verdict in a civil case for damages.

Id. at 133, 36 A.2d at 701.
33. *Id.*
34. The *Davis* standard, "fraud, or malice, or evil intent, or oppression entering into and forming part of the wrongful act," is very similar to the actual malice standard defined in *Zenobia*, which is "evil motive, intent to injure, ill will, or fraud." *Compare Davis*, 183 Md. at 133, 36 A.2d at 701, *with* Owens-Illinois, Inc. v. Zenobia, 325 Md. 420, 460 n.20, 601 A.2d 633, 652 n.20 (1992).
35. *See Davis*, 183 Md. at 134, 36 A.2d at 701.
36. *See id.*
37. 255 Md. 50, 257 A.2d 187 (1969).
38. *Id.* at 54-55, 257 A.2d at 190.

was knocked unconscious and his wife was thrown through the windshield of their car.[39]

The trial court refused to uphold the jury's punitive damage award, claiming that *Davis v. Gordon* precluded the imposition of punitive damages.[40] The plaintiffs appealed, arguing that punitive damages should be available when the defendant causes injury by his intentional disregard for the safety of others.[41]

Although the *Conklin* court recognized the inherent difficulty in the actual malice standard set forth in *Davis*, the court declined to clarify the standard.[42] The *Conklin* court acknowledged that proving malice would be extremely difficult for a plaintiff who was injured by a negligent driver when there was no proof of actual intent to harm.[43] The court also ackowledged that a standard that was the legal equivalent of malice, such as wanton or reckless disregard, might be easier for a plaintiff to prove.[44] Nevertheless, the court

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39. *Id.* at 55, 257 A.2d at 190.
40. *Id.* at 70, 257 A.2d at 197.
41. *Id.* at 71, 257 A.2d at 198. The Conklins also argued that the trial court had no power to grant a new trial on the ground of excessive damages because granting a new trial violated their constitutional right to a trial by jury under the Maryland Constitution. *Id.* at 58, 257 A.2d at 191. The court of appeals held that the power to grant a new trial on the ground of excessive verdicts was constitutional for four reasons. First, English decisions handed down prior to the adoption of the Maryland Constitution in 1776 indicated that this particular power could be exercised. *Id.* at 58-64, 257 A.2d at 191-94. Second, the Maryland practice of granting a new trial solely upon the ground of an excessive verdict was well established. *Id.* at 64-66, 257 A.2d at 194-95. Third, a majority of states grant their higher courts the power to review excessive verdicts. *Id.* at 68, 257 A.2d at 196. Finally, federal courts have the authority to grant new trials solely on the ground of excessive verdicts. *Id.* at 66-68, 257 A.2d at 195-96. The *Conklin* court also relied heavily on Judge Medina's opinion in Dagnello v. Long Island R.R., 289 F.2d 797 (2d Cir. 1961).

    Whether the Seventh Amendment to the United States Constitution prohibits a new trial solely on the basis of an excessive verdict is an issue that the Supreme Court has not addressed. The Seventh Amendment provides that "no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law." U.S. CONST. amend. VII; *see also* Jonathan Kagan, *Toward a Uniform Application of Punishment: Using the Federal Sentencing Guidelines as a Model for Punitive Damage Reform*, 40 UCLA L. REV. 753, 768-69 (1993) (stating that if a new trial cannot be constitutionally granted, statutory caps on liability may be called into question).
42. *Conklin*, 255 Md. at 71, 257 A.2d at 198.
43. *Id.*
44. The *Conklin* court stated:

    > The difficulty in the Maryland cases arises in regard to factual situations in which there is no evidence of *actual intent* to injure or of *actual malice* toward the injured person, but in which the defendant's conduct is of such an extraordinary character as possibly to be

declined to change the *Davis* rule, stating that the issue was not properly before the court.[45]

Phase II of Maryland's treatment of punitive damages in automobile tort cases began in 1972, with the holding of *Smith v. Gray Concrete Pipe Company*.[46] The United States District Court for the Eastern District of Virginia certified to the Court of Appeals of Maryland the question of whether punitive damages should be recoverable in an automobile accident case where the defendant was merely reckless and not malicious.[47] This question gave the court of appeals yet another opportunity to reformulate the standard set forth in *Davis*.

Smith involved an action against Gray Concrete Pipe Company, brought by the administrator and parents of a deceased victim, for damages sustained by the decedent as a result of an automobile accident caused by the defendant's employee.[48] The Maryland high court began its analysis by citing those Maryland cases that allowed punitive damages in other areas of tort law.[49] The court recognized that allowing punitive damages in automobile tort cases was a growing trend in a number of jurisdictions and was regarded as the majority approach.[50]

> the legal equivalent of such actual intent or actual malice, sometimes described as "wanton," "reckless disregard of the rights of others," and the like. We rather agree that in this latter type of situation, the language of some of the Maryland cases needs further interpretation and possible reconsideration to reach a more clear cut rule . . . .

Id. (emphasis in original).

45. *Id.*
46. 267 Md. 149, 297 A.2d 721 (1972).
47. *Id.* at 152, 297 A.2d at 723. Prior to bringing the action in federal court, the plaintiffs had filed the same cause of action in the Circuit Court for Montgomery County. *Id.* at 155, 297 A.2d at 725. The case was removed to the Circuit Court for Prince George's County, after a dispute over venue. *Id.* Later, the plaintiffs took a voluntary nonsuit in the Circuit Court for Prince George's County. *Id.* at 156, 297 A.2d at 726. The case was certified to the court of appeals pursuant to the Uniform Certification of Questions of Law Act. MD. CODE ANN., CTS. & JUD. PROC. §§ 12-601 to -609 (1995).
48. *Smith*, 267 Md. at 151-53, 297 A.2d at 723-24.
49. *Id.* at 162, 297 A.2d at 728-29. The court cited the following cases: Summit Loans, Inc. v. Pecola, 265 Md. 43, 288 A.2d 114 (1972) (invasion of privacy); Drug Fair v. Smith, 263 Md. 341, 283 A.2d 392 (1971) (assault and battery, false imprisonment and malicious prosecution); Great Atl. & Pac. Tea Co. v. Paul, 256 Md. 643, 261 A.2d 731 (1970) (assault and battery, slander and false imprisonment); Vancherie v. Siperly, 243 Md. 366, 221 A.2d 356 (1966) (assault and battery); Fennell v. G.A.C. Finance Corp., 242 Md. 209, 218 A.2d 492 (1966) (libel); McClung-Logan v. Thomas, 266 Md. 136, 172 A.2d 494 (1961) (trover and conversion); Nichols v. Meyer, 139 Md. 450, 115 A. 786 (1921) (trespass). *Smith*, 267 Md. at 162, 297 A.2d at 728-29.
50. *Smith*, 267 Md. at 162-65, 297 A.2d at 729-30.

The *Smith* court, drawing upon the dicta in *Conklin v. Schillinger*,[51] held that a wanton or reckless disregard for human life in the operation of a motor vehicle was the legal equivalent of malice.[52] According to the court, if wanton or reckless disregard for human life was a sufficient standard by which to determine criminal guilt, then the standard was also sufficient to determine the requisite state of mind for civil liability.[53] After *Smith*, proof of actual malice, evil intent, or oppression was not required in order for a plaintiff to be awarded punitive damages.[54] Instead, a plaintiff could prove implied malice by showing that the defendant acted with the legal equivalent of actual malice.[55]

To limit the effect of the new, implied malice standard, the *Smith* court mandated a higher burden of pleading.[56] Plaintiffs' complaints were required to provide greater specificity and more detailed factual accounts of defendants' negligent conduct.[57] "[B]ald or conclusory allegations of 'wanton or reckless disregard for human life'" would not withstand a motion to dismiss the complaint.[58]

The court of appeals applied the new *Smith* rule in *Nast v. Lockett*.[59] *Nast* arose from an automobile accident involving three cars.[60] One car was driven by the plaintiff, Edward Nast, the second car was driven by the defendant, Lois Lockett, and the third car was

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51. 255 Md. 50, 257 A.2d 187 (1969).
52. *Smith*, 267 Md. at 168, 297 A.2d at 731-32. Interestingly, the court stated that the standard for malice, "wanton or reckless disregard for human life," was a sufficient standard for imposing civil liability because it was regarded as adequately stringent for imposing criminal penalties. *Id.* at 168, 297 A.2d at 732.
53. *Id.* at 168, 297 A.2d at 731-32. The *Smith* court used the requisite state of mind for manslaughter by automobile in formulating a standard for the allowance of punitive damages in automobile tort cases. The manslaughter by automobile statute provides, in pertinent part, that "[e]very person causing the death of another as the result of the driving . . . of an automobile . . . in a *grossly negligent* manner, shall be guilty of a misdemeanor to be known as 'manslaughter by automobile . . . .'" MD. ANN. CODE art. 27, § 388 (1957, 1992 Repl. Vol.) (emphasis added). Gross negligence was defined as "a wanton or reckless disregard for human life." *Smith*, 267 Md. at 167, 297 A.2d at 731 (citing Romanesk v. Rose, 248 Md. 425, 237 A.2d 12 (1968); Wasileski v. State, 241 Md. 323, 216 A.2d 551 (1966); Johnson v. State, 213 Md. 527, 132 A.2d 853 (1957)).
54. *See Smith*, 267 Md. at 165-68, 297 A.2d at 730-32.
55. *Id.*
56. *Id.* at 168, 297 A.2d at 732.
57. *Id.*
58. *Id.* The *Smith* court wanted to avoid a standard that was so flexible that it would become "virtually unlimited in its application." *Id.* at 166, 297 A.2d at 731.
59. 312 Md. 343, 539 A.2d 1113 (1988).
60. *Id.* at 347, 539 A.2d at 1115.

driven by Charles Houck.[61] Both Lockett and Houck had been drinking prior to the accident.[62]

The trial judge decided that, as a matter of law, the conduct of Lockett and Houck, even considering their intoxication, did not amount to a wanton or reckless disregard for human life.[63] The jury was, therefore, not instructed on the issue of punitive damages.[64] The court of appeals agreed with the trial judge that Lockett's conduct, as a matter of law, could not support an award for punitive damages.[65] The court of appeals disagreed, however, as to Houck's

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61. *Id.*
62. *Id.* at 352, 355-56, 539 A.2d at 1118-20. Nast had been following Lockett's car when Lockett attempted to make a U-turn. *Id.* at 347, 539 A.2d at 1115. Lockett was unable to complete the turn and came to a stop. *Id.* She began to back up so that she could complete the turn when Houck, who was traveling in the opposite direction, ran into her. *Id.* Houck did not slow his speed or deviate from his course. *Id.* Houck's car ricocheted off of Lockett's car and struck the plaintiff's car. *Id.* at 348, 539 A.2d at 1115.
63. *Id.* at 359, 539 A.2d at 1121.
64. *Id.* at 348, 539 A.2d at 1115-16.
65. *Id.* at 367, 539 A.2d at 1125. A preliminary question was whether evidence of the defendants' alcohol impairment was legally sufficient to sustain a finding that the defendants were "intoxicated" by law. *Id.* at 355-59, 539 A.2d at 1119-21. In deciding this issue, the court examined the evidence of intoxication against each defendant. *Id.* Lockett's blood alcohol content was approximately 0.11 to 0.12. *Id.* at 356, 539 A.2d at 1119. There was no other evidence of drunkenness. *Id.*

In April of 1988, when *Nast* was decided, the legislature had not defined either "intoxication" or "under the influence of alcohol." *Id.* at 355 n.5, 539 A.2d at 1119 n.5. Under MD. CODE ANN., CTS. & JUD. PROC. § 10-307, blood alcohol content can serve as prima facie evidence of intoxication or impairment. MD. CODE ANN., CTS. & JUD. PROC. § 10-307 (1995). In July of 1988, the legislature decreased the blood alcohol levels necessary to prove prima facie intoxication or impairment from 0.13 to 0.10 and from 0.08 to 0.07, respectively. *Compare* MD. CODE ANN., CTS. & JUD. PROC. § 10-307 (1987) (amended 1988) *with* MD. CODE ANN., CTS. & JUD. PROC. § 10-307 (Supp. 1990).

Houck's blood alcohol content could not be obtained. *Nast*, 312 Md. at 356-57, 539 A.2d at 1120. An investigating police officer, however, testified that Houck was swaying and staggering, that his breath smelled of alcohol, that his clothes were "disarranged," and that he was "mush mouthed." *Id.* at 357, 539 A.2d at 1120. A paramedic testified that Houck appeared to be intoxicated because he was uncooperative, was combative, could not converse, smelled of alcohol, had bloodshot eyes, and because all he could do was moan. *Id.* The medical doctor who treated Houck at the hospital also testified that Houck appeared to be intoxicated. *Id.* at 358, 539 A.2d at 1120.

The court of appeals held that Houck's conduct, odor, and appearance was sufficient evidence to sustain a finding that Houck was "intoxicated." *Id.* at 359, 539 A.2d at 1121. On the other hand, Lockett's blood alcohol content was insufficient to sustain a finding that she was "intoxicated," but was sufficient to sustain a finding that she was "under the influence of alcohol." *Id.* at 356, 539 A.2d at 1120.

conduct.[66] The *Nast* court held that Houck's conduct was legally sufficient to support an award for punitive damages and, therefore, that the jury should have been instructed on the issue of punitive damages against Houck.[67]

The court held that a sliding scale was to be used in automobile tort cases to determine whether the driver's conduct amounted to wanton or reckless disregard for human life.[68] The requisite state of mind, wanton and reckless, could be inferred from two separate sets of circumstances.[69] First, a wanton or reckless state of mind could be inferred from the manner in which the defendant operated his vehicle.[70] Second, a wanton or reckless state of mind could be inferred from the defendant's degree of intoxication.[71] The *Nast* sliding scale represented the Maryland court of appeals's attempt to formulate a standard that could accommodate all auto-tort cases, including drunk driving cases and cases involving gross negligence or other culpable conduct.

The *Nast* court applied the sliding scale test to the facts in *Nast* and held that, although Houck was negligent in not slowing down or altering his course, his negligence *alone* was not enough to support an award for punitive damages.[72] Houck's negligence, *coupled with his degree of intoxication*, however, was sufficient to raise his actions to the level of wanton and reckless required for a punitive damage award.[73] In contrast, Lockett's degree of impairment, which had not reached the level of legal intoxication, was insufficient to elevate her simple negligence to the level of wanton and reckless conduct.[74]

The implied malice standard, formulated in *Smith* and later applied in *Nast*, was originally limited to torts involving the operation of automobiles.[75] It was subsequently expanded and applied to all

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66. *Id.* at 366, 539 A.2d at 1124.
67. *Id.*
68. *Id.* at 362, 539 A.2d at 1122.
69. *Id.* at 362, 539 A.2d at 1122-23.
70. *Id.* at 362, 539 A.2d at 1123. The *Nast* court stated: "Outrageously dangerous driving permits an inference that the driver does not care whether he kills or severely injures someone else." *Id.*
71. *See id.* at 362-63, 539 A.2d at 1123. In addressing the second set of circumstances from which a wanton and reckless state of mind could be inferred, the court stated that one could "infer a reckless or wanton disregard for human life from the combined acts of voluntarily drinking until intoxicated and then operating a potentially dangerous instrumentality such as an automobile." *Id.*
72. *Id.* at 365-66, 539 A.2d at 1124.
73. *Id.* at 366, 539 A.2d at 1124 (emphasis added).
74. *Id.* at 366-67, 539 A.2d at 1124-25.
75. *See* Owens-Illinois, Inc. v. Zenobia, 325 Md. 420, 457, 601 A.2d 633, 651 (1992).

other non-intentional tort cases[76] until the court of appeals decided *Owens-Illinois, Inc. v. Zenobia*,[77] in 1992. *Zenobia* once again changed the standard that was to be used in awarding punitive damages in non-intentional tort actions.[78]

The plaintiffs, Louis L. Dickerson and William L. Zenobia, sued several asbestos manufacturers, suppliers and installers, including Owens-Illinois, Inc., under a products liability theory, for injuries resulting from exposure to asbestos.[79] The Court of Appeals of Maryland granted certiorari to consider, *inter alia*, the standard that governed the allowance of punitive damages in non-intentional tort cases.[80]

In determining the appropriate standard to use in awarding punitive damages in non-intentional tort cases, the court of appeals explored *Smith* and its progeny, the line of cases applying the implied malice standard.[81] The *Zenobia* court expressly overruled *Smith* and its progeny and expressed concern for the proliferation of punitive damage claims and the increase in criticism of such damages as a means of recovery.[82] The court implied that *Smith*'s holding was hasty and unreasoned,[83] and pointed out that the *Smith* court did not analyze how the implied malice standard would promote the objectives of punitive damages.[84] The court noted that the "arbitrary

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76. *Id.; see* Exxon Corp. v. Yarema, 69 Md. App. 124, 516 A.2d 990 (1986) (applying implied malice standard to interference with property rights), *cert. denied*, 309 Md. 47, 522 A.2d 392 (1987); Medina v. Meilhammer, 62 Md. App. 239, 489 A.2d 35 (applying implied malice standard to personal injury action arising out of injuries sustained by a minor in an apartment complex), *cert. denied*, 303 Md. 683, 496 A.2d 683 (1985); American Laundry Mach. v. Horan, 45 Md. App. 97, 412 A.2d 407 (1980) (applying implied malice standard to products liability case); *see also* Liscombe v. Potomac Edison Co., 303 Md. 619, 637, 495 A.2d 838, 847 (1985) (assuming, without deciding, that the *Smith* holding was applicable to non-intentional torts not involving the operation of automobiles).
77. 325 Md. 420, 601 A.2d 633 (1992).
78. For a discussion of the *Zenobia* standard, see *infra* notes 79-92 and accompanying text.
79. *Id.* at 428, 601 A.2d at 636.
80. *Id.* at 427-28, 601 A.2d at 636.
81. *Id.* at 456-58, 601 A.2d at 650-51. Under the implied malice test, malice was equated with wanton and reckless behavior. Smith v. Gray Concrete Pipe Co., 267 Md. 149, 168, 297 A.2d 721, 731 (1972). Later, gross negligence was equated with malice under the implied malice test. *See* Nast v. Lockett, 312 Md. 343, 365-66, 539 A.2d 1113, 1124 (1988).
82. *Zenobia*, 325 Md. at 450-51, 601 A.2d at 647-48.
83. *Id.* at 456, 601 A.2d at 650-51.
84. The *Zenobia* court stated:

> The *Smith* opinion did not attempt to analyze how this newly established "gross negligence" standard would promote the objectives of punitive damages.

and inconsistent application of the standard for awarding punitive damages frustrate[d] the dual purposes of punishment and deterrence."[85] According to the court, the implied malice test set forth in *Smith* actually undermined the deterrent effect of punitive damages because potential defendants were not provided with enough guidance upon which to predict the type of behavior that would lead to the imposition of punitive damages.[86] The *Zenobia* court held that punitive damages could only be awarded in a non-intentional tort action if the defendant's conduct was characterized by actual malice, defined as "evil motive, intent to injure, ill will, or fraud . . . ."[87] After *Zenobia*, a plaintiff would have to prove that a defendant acted with actual malice in order to recover punitive damages.[88]

. . . .

Despite the *Smith* Court's limitation of the implied malice standard to torts involving the operation of motor vehicles, the standard has been freely applied to other non-intentional torts.

. . . .

The implied malice test adopted in *Smith v. Gray Concrete Pipe Co.* has been overbroad in its application and has resulted in inconsistent jury verdicts involving similar facts. It provides little guidance for individuals and companies to enable them to predict behavior that will either trigger or avoid punitive damages liability, and it undermines the deterrent effect of these awards.

Id. at 456-59, 601 A.2d at 650-52 (citations and footnote omitted).

85. *Id.* at 458-59, 601 A.2d at 652. The *Zenobia* court stated: "The law of punitive damages is characterized by a high degree of uncertainty that stems from the use of a multiplicity of vague, overlapping terms. . . . Accordingly, there is little reason to believe that only deserving defendants are punished, or that fair notice of punishable conduct is provided." *Id.* at 459, 601 A.2d at 652 (quoting D. Ellis, *Fairness and Efficiency in the Law of Punitive Damages*, 56 S. CAL. L. REV. 1, 52-53 (1982)).
86. *Zenobia*, 325 Md. at 459, 601 A.2d at 652. The *Zenobia* court noted that "[t]he gross negligence standard ha[d] led to inconsistent results and frustration of the purposes of punitive damages in non-intentional tort cases." *Id.* at 456, 601 A.2d at 651.
87. *Id.* at 460, 601 A.2d at 652.
88. The *Zenobia* court stated in a footnote:

> We recognize that the term "actual malice" has meant different things in the law, that its popular connotation may not always be the same as its legal meaning, and that its use has been criticized. Nevertheless, we simply use the term in this opinion as a shorthand method of referring to conduct characterized by evil motive, intent to injure, ill will, or fraud. In instructing juries with respect to punitive damages, however, it would be preferable for trial judges not to use the term "actual malice."

Id. at 460 n.20, 601 A.2d at 653 n.20 (citations omitted).

The court of appeals realized, however, that the new actual malice standard would be very difficult, if not impossible, to apply in products liability cases. *See id.* at 460, 601 A.2d at 653. The court, therefore, formulated a standard equivalent to the actual malice standard that would be used only in products

In addition to requiring the plaintiff to demonstrate the defendant's state of mind, the court increased the burden of proof required to recover punitive damages in a non-intentional tort action.[89] The clear and convincing standard[90] was chosen over the preponderance of the evidence standard,[91] the standard used prior to *Zenobia*, because of the seriousness of punitive damages as a penal remedy.[92]

Although *Zenobia*, decided in 1992, once again changed the standard that was to be used in awarding punitive damages in Maryland, the actual malice standard was not applied to automobile torts until 1993, when *Komornik v. Sparks*[93] was decided. Phase III of Maryland's treatment of punitive damages in automobile tort cases, therefore, began in 1993 and continues today.

The court of appeals's holding in *Komornik* was based on its decision in *Zenobia*.[94] Today, due to *Zenobia* and its progeny, Maryland's position on punitive damages in automobile tort cases is that they are only available upon a showing of actual malice.[95] The court has come full circle and, in Phase III, has returned to its original actual malice standard, formulated in Phase I.[96] Phase III, however, is not only a return to Phase I. Rather, the increased burden of proof required under Phase III means that punitive damages are now more difficult to recover than at any other time in Maryland's history.

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liability cases. *Id.* at 462, 601 A.2d at 653. Under the actual malice equivalent standard, a plaintiff could recover punitive damages if he proved: "(1) actual knowledge of the defect on the part of the defendant, and (2) the defendant's conscious or deliberate disregard of the foreseeable harm resulting from the defect." *Id.*

89. *Id.* at 469, 601 A.2d at 657.
90. The clear and convincing evidence standard requires that the plaintiff prove his case with "something more than a mere preponderance of the evidence; the proof must be 'clear and satisfactory' and be of such a character as to appeal strongly to the conscience of the court." *Id.* at 466, 601 A.2d at 655-56 (quoting First Nat'l Bank of S. Md. v. United States Fidelity & Guar. Co., 275 Md. 400, 411, 340 A.2d 275, 283 (1975)). Clear and convincing evidence is "[t]hat proof which results in reasonable certainty of the truth of the ultimate fact in controversy." BLACK'S LAW DICTIONARY 172 (abridged 6th ed. 1991). "Clear and convincing proof will be shown where the truth of the facts asserted is highly probable." *Id.*
91. The preponderance of the evidence standard requires a plaintiff to convince the jury that his version of the facts is "more probable than not." BLACK'S LAW DICTIONARY 819 (abridged 6th ed. 1991).
92. "Punitive damages are a form of punishment and can stigmatize the defendant in much the same way as a criminal conviction." *Zenobia*, 325 Md. at 468, 601 A.2d at 656.
93. 331 Md. 720, 629 A.2d 721 (1993).
94. 325 Md. 420, 601 A.2d 633 (1992).
95. *See id.*
96. *See supra* text accompanying notes 27-45.

III. THE INSTANT CASE

In *Komornik v. Sparks*, defendant Sparks, who was intoxicated at the time of the accident, admitted liability prior to trial.[97] At trial, Sparks argued that his admission of liability coupled with *Zenobia*'s requirement of actual malice meant that punitive damages could not be awarded.[98] Sparks moved to preclude, as irrelevant, any evidence of his driving record or his intoxication.[99] Plaintiff Komornik's sole reason for proffering the evidence of Sparks's driving record and intoxication was to recover punitive damages.[100] In granting Sparks's motion to exclude the evidence, the trial judge relied on the holding of *Zenobia*,[101] which required proof of actual malice before allowing the issue of punitive damages to go to the jury.[102]

On appeal, the Court of Appeals of Maryland reviewed *Davis v. Gordon*,[103] *Conklin v. Schillinger*,[104] *Smith v. Gray Concrete Pipe Co.*,[105] and *Owens-Illinois, Inc. v. Zenobia*.[106] The court of appeals,

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97. *Komornik*, 331 Md. at 722, 629 A.2d at 722.
98. *Id.*
99. *Id.*; Joint Record Extract at E-12, Komornik v. Sparks, 331 Md. 720, 629 A.2d 721 (1993) (No. 91-350).
100. *See Kormornik*, 331 Md. at 722, 629 A.2d at 722. Sparks's admission of liability meant that the only issue for the jury was the amount of Komornik's compensable damages, unless punitive damages were also allowable. *Id.* ("Based on [Sparks's admission] and on *Zenobia*, Sparks moved *in limine* to preclude, as irrelevant to any issue in the case, any evidence of his intoxication and of his driving record."). By proffering evidence of Sparks's intoxication, Komornik hoped to show that Sparks acted with the actual malice, evil motive, intent to injure, or ill will necessary to support an award for punitive damages. *Id.*
101. 325 Md. 420, 601 A.2d 633 (1992).
102. *Zenobia*, 325 Md. at 460, 601 A.2d at 652; *see also* Joint Record Extract at E-12, Komornik v. Sparks, 331 Md. 720, 629 A.2d 721 (1993) (No. 91-350). The trial judge stated:

> [Sparks] has filed a motion *in limine* asking that [Komornik] be precluded from offering into evidence any evidence relating to [Sparks's] driving record and prior subsequent accidents or evidence of drinking or intoxication and in support of that brings to the Court's attention [*Zenobia*]. We have discussed this matter in chambers, and the Court feels that in light of the admission of liability and in my understanding of the opinion, that the evidence would not indicate actual malice as required and, therefore, would have no probative value.

Id.
103. 183 Md. 129, 36 A.2d 699 (1944); *see Komornik*, 331 Md. at 728, 629 A.2d at 725. See also *supra* text accompanying notes 27-36 for a discussion of *Davis v. Gordon*.
104. 255 Md. 50, 257 A.2d 187 (1969); *see Komornik*, 331 Md. at 728, 629 A.2d at 725. See also *supra* text accompanying notes 37-45 for a discussion of *Conklin v. Schillinger*.
105. 267 Md. 149, 297 A.2d 721 (1972); *see Komornik*, 331 Md. at 728-29, 629

like the trial court, relied on the new standard formulated for punitive damages in non-intentional tort cases set forth in *Zenobia*.[107]

The court of appeals agreed with the trial court that the evidence was insufficient to show that Sparks had acted with actual malice.[108] According to the Maryland high court, Donna Komornik presented no facts from which a jury could reasonably infer intent to injure on the part of Sparks.[109] In fact, the court stated that "Sparks's state of mind was to the contrary of that required by *Zenobia*."[110] Sparks's intent was to *avoid* injury because at the time of the accident he was attempting to step on the brake pedal and to prevent his truck from colliding with another vehicle.[111] According to the *Komornik* court, if Sparks had been acting with actual malice he would not have tried to depress the brake pedal.[112]

Komornik's primary argument on appeal was that an analogy should be drawn to the products liability standard set forth in *Zenobia*.[113] Acceptance of the analogy would be a necessary step to Komornik's potential recovery of punitive damages because actual malice would be difficult to prove in a drunk driving case.[114]

In products liability cases, according to *Zenobia*, the equivalent of actual malice could be proven by showing "a bad faith decision by the defendant to market a product, knowing of the defect and danger, in conscious or deliberate disregard of the threat to the safety of the consumer."[115] Komornik argued that an equivalent actual

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A.2d at 725. See also *supra* text accompanying notes 46-58 for a discussion of *Smith v. Gray Concrete Pipe Co.*

106. 325 Md. 420, 601 A.2d 633 (1992); *see Komornik*, 325 Md. at 724-25, 729, 629 A.2d at 723, 725-26. See also *supra* text accompanying notes 77-92 for a discussion of *Owens-Illinois, Inc. v. Zenobia.*
107. *Komornik*, 331 Md. at 724-25, 629 A.2d at 723.
108. *Id.* at 725-26, 629 A.2d at 723-24.
109. *Id.* at 725, 629 A.2d at 724.
110. *Id.* The *Komornik* court explained:

> Komornik's proffer presents no facts from which a jury would be permitted, under *Zenobia*, to infer that Sparks's conduct was characterized by evil motive, intent to injure, ill will, or fraud. Indeed, the proffer reflects that, at the time of the accident, Sparks's state of mind was to the contrary of that required by *Zenobia*. His intent was to avoid injury to those stopped ahead of him. He had not been travelling at an excessive speed, and he was attempting to stop the truck.

Id. at 725-26, 629 A.2d at 724.

111. *Id.*
112. Sparks was applying the clutch rather than the brake. *Id.* at 722, 629 A.2d at 721-22.
113. *Id.* at 726-27, 629 A.2d at 724.
114. *See infra* note 192 and accompanying text.
115. *Zenobia*, 325 Md. at 463, 601 A.2d at 654.

malice test should be formulated for drunk driving cases.[116] Komornik suggested the following equivalent of malice test: "[A] bad faith decision by the Defendant to voluntarily consume excessive amounts of alcohol, have knowledge of the danger associated with driving in this condition and in conscious and deliberate disregard of the threat to the safety of other persons on the highway, drive."[117]

Komornik likened intoxicated drivers to defective products.[118] She argued that the act of drunk driving was analogous to marketing a defective product.[119] By driving while intoxicated, a drunk driver puts all other drivers in danger.[120] Thus, an intoxicated driver is at least as culpable as a corporate defendant that has marketed a defective product knowing of its propensity for harm.[121]

Komornik argued that Sparks had actual knowledge of his "defective condition" because he had been charged with driving under the influence and driving while intoxicated on three prior occasions;[122] the last incident had occurred just over one month prior to the accident with Komornik and had resulted in the suspension of his driver's license.[123] From these facts, Komornik argued, one could infer that Sparks knew that he was unable to operate an automobile safely while under the influence of alcohol.[124] Despite this knowledge, Sparks spent an afternoon drinking and driving, consciously disregarding the foreseeable harm that might result from his behavior.[125] Komornik argued that Sparks's actions were equivalent to, or worse than, the defendant's conduct in *Zenobia*.[126]

The court of appeals flatly rejected Komornik's argument.[127] The high court stated that a supplier of a defective product could be

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116. *Komornik*, 331 Md. at 726-27, 629 A.2d at 724; *see also* Appellant's Brief at 10-12, Komornik v. Sparks, 331 Md. 720, 629 A.2d 721 (1993) (No. 91-350) (explaining how the *Komornik* facts fit into the *Zenobia* products liability test for malice).
117. Appellant's Brief at 8, Komornik v. Sparks, 331 Md. 720, 629 A.2d 721 (1993) (No. 91-350).
118. *Komornik*, 331 Md. at 726, 629 A.2d at 724.
119. *Id.* at 726-27, 629 A.2d at 724.
120. *Id.* at 727, 629 A.2d at 724.
121. *Id.*; Appellant's Brief at 12, Komornik v. Sparks, 331 Md. 720, 629 A.2d 721 (1993) (No. 91-350).
122. Appellant's Brief at 10-11, Komornik v. Sparks, 331 Md. 720, 629 A.2d 721 (1993) (No. 91-350); *see also Komornik*, 331 Md. at 723-24, 629 A.2d at 722-23 (describing Sparks's driving record).
123. *Komornik*, 331 Md. at 724, 629 A.2d at 723. Sparks claimed he was unaware of the suspension. *Id.*
124. Appellant's Brief at 11, Komornik v. Sparks, 331 Md. 720, 629 A.2d 721 (1993) (No. 91-350).
125. *Komornik*, 331 Md. at 723, 629 A.2d at 722.
126. *Id.* at 727, 629 A.2d at 724; Appellant's Brief at 12, Komornik v. Sparks, 331 Md. 720, 629 A.2d 721 (1993) (No. 91-350).
127. *Komornik*, 331 Md. at 727, 629 A.2d at 724. The court succinctly stated that the analogy was "flawed." *Id.*

distinguished from an intoxicated driver because suppliers of defective products relinquish control over the products when they place the products into the stream of commerce.[128] Sparks, on the other hand, did not relinquish control when driving while intoxicated.[129] In fact, the court stated, Sparks was attempting to control his truck at the time of the accident.[130]

The *Komornik* court concluded that the *Smith* implied malice test was too broad in its application and decided to apply the *Zenobia* standard to automobile accident cases.[131] The court reaffirmed its *Zenobia* holding—that the implied malice standard "provide[d] little guidance" for individuals and companies to predict the type of behavior that might lead to the imposition of punitive damages.[132] Thus, the court stated, the implied malice standard undermined the deterrent effect of punitive damages in automobile-tort cases.[133] Accordingly, the court rejected, as a matter of public policy, the idea that punitive damages should be made available when an automobile tort has been committed by an intoxicated driver.[134]

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128. *Id.*
129. *Id.*
130. According to Maryland's high court, "Sparks had not relinquished control of *the truck*; he was trying to control it." *Id.* (emphasis added). However, Komornik's analogy was that Sparks, himself, was the defective product. *See id.* at 726-27, 629 A.2d at 724; Appellant's Brief at 10, Komornik v. Sparks, 331 Md. 720, 629 A.2d 721 (1993) (No. 91-350). Sparks clearly did not have control over himself. In fact, the court admitted that the truck could have been stopped under similar circumstances by a sober driver. *Komornik*, 331 Md. at 727, 629 A.2d at 724-25.
131. *Komornik*, 331 Md. at 729, 629 A.2d at 725-26. Punitive damages could be awarded upon a showing of reckless disregard or even gross negligence under the implied malice standard. See also *supra* text accompanying notes 51-55 for a discussion of the implied malice standard adopted by the court in *Smith*.
132. *Komornik*, 331 Md. at 729, 629 A.2d at 725-26 (quoting Owens-Illinois, Inc. v. Zenobia, 325 Md. 420, 459, 601 A.2d 633, 652 (1992)).
133. *Id.*
134. The Maryland Trial Lawyers' Association advocated the adoption of a *per se* rule allowing punitive damages in drunk driving cases "where a motor vehicle tort [wa]s committed by a driver who ha[d] drunk alcoholic beverages to excess." *Id.* at 729-30, 629 A.2d at 726. See also *infra* note 196 and accompanying text for a discussion on the *per se* approach to drunk driving. The *Komornik* court rejected a *per se* approach as a matter of public policy and, in a footnote, stated:

> We recognize that, across the entire band of torts of all kinds which the *Zenobia* principle governs concerning the award of punitive damages, application of the principle to tortious injury caused by driving while intoxicated is fairly debatable as a matter of social policy. We also note that House Bill 322 of the 1993 session of the Maryland General Assembly would have returned to a standard of "wanton or reckless disregard for human life" in such cases, but that the bill failed on third reading in the House for want of a constitutional

Judge McAuliffe concurred with the majority's result but not with the majority's holding.[135] Judge McAuliffe rejected the majority's position that only actual malice would support an award of punitive damages.[136] Rather, the Judge stated that punitive damages should be recoverable if the plaintiff could show that the defendant acted with conduct sufficient to support a conviction for second-degree murder.[137]

According to Judge McAuliffe, the problem with *Smith* and *Nast* was that punitive damages could be awarded if the plaintiff proved that the defendant acted with gross negligence.[138] In accord with the majority, Judge McAuliffe believed the standard was overbroad and resulted in inconsistent application.[139] Judge McAuliffe, however, believed that a retreat from the gross negligence standard did not necessarily mean that only an actual malice standard would suffice.[140] He advocated that the following standard be applied in all non-intentional tort cases:

> A person who is actually aware that his action involves a clear and serious danger of substantial harm to the plaintiff

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majority under Md. Const. art. III, § 28.

Id. at 730 n.6, 629 A.2d at 726 n.6. Upon a third reading, House Bill 322 failed by only four votes. House of Delegates, Journal of Proceedings, at 1714 (Mar. 19, 1992). A motion was made to reconsider the vote by which House Bill 322 failed to receive a constitutional majority, but the motion was rejected. *Id.* at 1722.

135. *Komornik*, 331 Md. at 731, 629 A.2d at 726 (McAuliffe, J., concurring).

136. *Id.* Judge McAuliffe had made the same argument in his concurring opinion in Owens-Illinois, Inc. v. Zenobia, 325 Md. 420, 476-78, 601 A.2d 633, 660-61 (1992) (McAuliffe, J., concurring).

137. Judge McAuliffe stated that he would adhere to the view expressed in his concurring opinion in *Zenobia* regarding the appropriate state of mind of the defendant for a punitive damages award. *Komornik*, 331 Md. at 731, 629 A.2d at 726 (McAuliffe, J., concurring). In *Zenobia*, Judge McAuliffe advocated the following requisite state of mind:

> There is a state of mind that falls just short of an intent to injure, but is sufficiently egregious to be treated as the legal equivalent of an intent to injure for criminal as well as civil purposes. . . . "This highly blameworthy state of mind is not one of mere negligence. . . . It is not merely one even of gross criminal negligence. . . . It involves rather the deliberate perpetration of a knowingly dangerous act with reckless and wanton unconcern and indifference as to whether anyone is harmed or not."

Zenobia, 325 Md. at 476-77, 601 A.2d at 661 (McAuliffe, J., concurring) (quoting, in part, DeBettencourt v. State, 48 Md. App. 522, 530, 428 A.2d 479, 484, *cert. denied*, 290 Md. 713 (1981)).

138. *Komornik*, 331 Md. at 731-32, 629 A.2d at 727 (McAuliffe, J., concurring).

139. *Id.* (citing Owens-Illinois, Inc. v. Zenobia, 325 Md. 420, 459-60, 601 A.2d 633 (1992)).

140. *Id.* at 732, 629 A.2d at 727.

> or anyone in the plaintiff's class, and who unreasonably takes such action with flagrant indifference as to whether anyone will be harmed or not, should be liable for punitive damages if his conduct causes the foreseeable harm. This type of outrageous conduct, being just short of intentional harm, warrants such a sanction. Although the requisite conduct and state of mind will often include gross negligence, the test would not be met by a showing of gross negligence alone.[141]

Judge McAuliffe concurred with the majority's holding only because he believed Sparks's conduct did not meet this standard.[142]

Judge Chasanow also concurred with the majority's result but wrote separately to advocate the equivalent standard for actual malice that he had advanced in his dissenting opinion in *Zenobia*.[143] Judge Chasanow opined that the *Zenobia* court regressed, instead of progressed, when it held that all non-intentional torts would be subjected to an actual malice standard.[144] Judge Chasanow noted that even in deciding *Zenobia*, the court did not apply the actual malice standard.[145] The *Zenobia* court had concluded that the definition of actual malice, encompassing terms such as evil motive, ill will, and intent to injure, was inapplicable to a products liability action.[146] Thus, the *Zenobia* court formulated a different standard, to be used only in products liability cases, that was the legal equivalent of actual malice.[147]

Judge Chasanow disagreed with the *Komornik* majority's application of the actual malice test to drunk driving cases because he believed, as he did in *Zenobia*, that the majority was attempting to return to the antiquated *Davis* standard.[148] He argued that the *Davis*

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141. *Id.* (McAuliffe, J., concurring) (quoting Owens-Illinois, Inc. v. Zenobia, 325 Md. 420, 477-78, 601 A.2d 633, 661 (1992) (McAuliffe, J., concurring)).
142. *Id.* at 732, 629 A.2d at 727 (McAuliffe, J., concurring).
143. *Id.* at 732-33, 629 A.2d at 727-28 (Chasanow, J., concurring).
144. *Id.* at 733, 629 A.2d at 727-28 (Chasanow, J., concurring).
145. *Id.* See *Zenobia*, 325 Md. at 460 n.20, 601 A.2d at 653 n.20 for a discussion of the products liability standard.
146. *Komornik*, 331 Md. at 736, 629 A.2d at 729 (Chasanow, J., concurring); *see Zenobia*, 325 Md. at 460, 601 A.2d at 653.
147. *Zenobia*, 325 Md. at 461, 601 A.2d at 653.
148. *Komornik*, 331 Md. at 733, 629 A.2d at 727 (Chasanow, J., concurring). Judge Chasanow stated:

> The Court . . . expressly overrule[d] several prior cases, and suggest[ed] we are merely returning to the law as it was set forth in *Davis v. Gordon*. It seems to me the Court is not merely reverting back to previously superseded punitive damages law. Instead, the Court is modifying punitive damages law in tort cases. . . . [Accordingly, t]he "test" which the majority purports to resurrect from *Davis*

standard was no more applicable to other non-intentional tort cases than it was to products liability cases.[149] Judge Chasanow noted that in deciding *Zenobia* and, subsequently, *Komornik*, the majority did not return to the actual malice definition set forth in *Davis*.[150] Instead, the majority modified the *Davis* approach.[151]

According to the majority, actual malice was characterized by "evil motive, intent to injure, ill will, or fraud."[152] Under *Davis*, however, actual malice was characterized by "fraud, or malice, or evil intent, or oppression."[153] Judge Chasanow interpreted the majority's modification of the *Davis* definition as a sign that the majority realized the shortcomings of the original *Davis* standard.[154]

As an alternative to merely modifying the old *Davis* standard, Judge Chasanow suggested the formulation of an actual malice equivalent standard, as the *Zenobia* court did, that would apply to all torts, intentional and non-intentional.[155] The standard would clearly set forth the punishable state of awareness and give sufficient guidance to judges and juries.[156] The improved equivalent standard would require the plaintiff to prove that: (1) the defendant committed an intentional act, and (2) the defendant knew that the act would cause

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> is inadequate in the instant case for the same reasons it was held to be inadequate in *Zenobia*. Instead of looking backward for an archaic test for "actual malice," the Court should look forward as we did in *Zenobia* and formulate an improved "equivalent" test for actual malice.

Id. at 733, 629 A.2d 727-28 (citations omitted).

149. *Id.* at 737, 629 A.2d at 730 (Chasanow, J., concurring).
150. *Id.* at 738, 629 A.2d at 730.
151. *Id.*
152. *Id.* at 724, 629 A.2d at 723 (quoting Owens-Illinois, Inc. v. Zenobia, 325 Md. 420, 460 n.20, 601 A.2d 633, 652 n.20 (1992)).
153. Davis v. Gordon, 183 Md. 129, 133, 36 A.2d 699, 701 (1944). Another reason that the standard applied by the majority in *Komornik* was not merely a return to the *Davis* standard was that the burden of proof had changed after *Zenobia*. *See Zenobia*, 325 Md. at 469, 601 A.2d at 657. *Zenobia* changed the burden of proof for punitive damages in non-intentional tort cases from preponderance of the evidence to clear and convincing proof. *Id.*
154. *Komornik*, 331 Md. at 738, 629 A.2d at 730 (Chasanow, J., concurring).
155. *Id.* at 736-39, 629 A.2d at 728-31. Judge Chasanow was quick to point out that "requiring the equivalent of actual malice uniformly for punitive damages in all tort actions would be consistent with *Zenobia*'s holding." *Id.* at 735, 629 A.2d at 729. An "equivalent" standard would be in accord with *Zenobia*'s holding because the *Zenobia* court sought to formulate a standard that would be uniformly applied and would, at the same time, further the objectives of punitive damages. *Zenobia*, 325 Md. at 450-60, 601 A.2d at 647-52.
156. *Komornik*, 331 Md. at 738-39, 629 A.2d at 730-31 (Chasanow, J., concurring). "Instead of resurrecting and subtly modifying an antiquated definition of actual malice, which gives insufficient guidance to judges and juries," Judge Chasanow argued that the court should "establish a more meaningful 'equivalent' of those words." *Id.* at 738, 629 A.2d at 730.

foreseeable injury or that the defendant "willfully refused to recognize that the act would cause foreseeable injury."[157]

Judge Bell dissented from the majority opinion.[158] In his dissent, the Judge advocated the totality of the circumstances approach that he had previously suggested, in *Zenobia*.[159] Judge Bell opined that in cases where there was no evidence of actual malice, looking at the totality of the circumstances might suggest conduct that was just as reprehensible as actual malice.[160] Based on his reasoning in *Zenobia*, it is apparent that Judge Bell believed that allowing punitive damages where there was evidence of actual malice, but not where there was evidence of a total disregard for human life, was unreasonable.[161] The Judge dissented from the majority's result because he concluded that evil motive, ill will, or intent to injure could be inferred from Sparks's conduct.[162]

IV. OTHER JURISDICTIONS

Other jurisdictions have also addressed the issue of whether punitive damages should be available in an action against a drunk driver and, if so, what standard should govern such an award. Jurisdictions can be categorized by asking three questions. First, what is the requisite state of mind for a punitive damage award? Second,

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157. *Id.* at 739, 629 A.2d at 731. Judge Chasanow stated:

> As to the required state of mind, we should simply extend *Zenobia* and hold that, as a basis for punitive damages, the defendant must have committed an intentional act, not a negligent act, and not even a grossly negligent act. Second, we should require the defendant to have known that the act would cause foreseeable injury or to have willfully refused to recognize that the act would cause foreseeable injury. This is the same basic test that we used in *Zenobia*, and it should be universally applied.

Id.

158. *Id.* at 740, 629 A.2d at 731 (Bell, J., dissenting).

159. *Id.*; *see Zenobia*, 325 Md. at 478-86, 601 A.2d at 661-65 (Bell, J., concurring and dissenting). Judge Bell wrote separately, in *Zenobia*, because he did not agree with the actual malice standard adopted by the majority. *Id.* at 480, 601 A.2d at 662-63. He did agree, however, that a heightened burden of proof was required in punitive damages cases. *Id.* at 480, 601 A.2d at 662. He, therefore, concurred with the *Zenobia* majority's holding that clear and convincing evidence would be required to support an award of punitive damages. *Id.*

160. *See Komornik*, 331 Md. at 740, 629 A.2d at 731 (Bell, J., dissenting); *see also Zenobia*, 325 Md. at 481, 601 A.2d at 663 (Bell, J., concurring and dissenting) (discussing how the totality of the circumstances may reveal conduct "just as heinous" as conduct motivated by actual malice).

161. *See Komornik*, 331 Md. at 740, 601 A.2d at 730 (Bell, J., dissenting); *see also Zenobia*, 325 Md. at 481, 601 A.2d at 663 (Bell, J., concurring and dissenting).

162. *Komornik*, 331 Md. at 740, 601 A.2d at 730 (Bell, J., dissenting).

how should the plaintiff prove the defendant's state of mind? Third, what evidentiary burden must the plaintiff meet?

A. State of Mind

Fine distinctions among states of mind are very difficult, if not impossible, to make. Nevertheless, an attempt at categorization can be made by focusing on the defendant's knowledge of the probable consequences of his actions.[163] As an example, compare Defendant A with Defendant B. Defendant A knows or should know that his actions will probably injure another. Defendant A is careless and indifferent. He does not intend to injure, but he acts without concern for the consequences of his actions. Defendant B, on the other hand, is consciously aware that his actions will probably injure another. Defendant B also does not intend to harm anyone, but he is possessed with the knowledge that, in all likelihood, his actions will harm someone. Defendant B voluntarily disregards this knowledge and acts.

Despite the reprehensibility of Defendant A's state of mind, Defendant B's state of mind is more culpable. Defendant B deliberately made a choice to act with full knowledge of the potential harm whereas Defendant A merely acted with extreme indifference to the possibility of harm. Defendants A and B, therefore, represent two separate states of mind. Defendant A has acted with reckless indifference, and Defendant B has acted with conscious disregard.

When distinguishing among various states of mind, investigation of the defendant's *intent* to bring about the probable consequences of his actions is sometimes as important as the defendant's *knowledge* of the probable consequences of his actions.[164] To further expand upon the example above, consider Defendant C. Defendant C not only knows that his actions will probably harm another person, but he actually intends for his actions to harm. Defendant C has acted with malice, which is the most culpable state of mind.[165]

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163. *See* KEETON, *supra* note 3, § 34, at 208-14 (discussing degrees of care).

164. According to Professor Keeton:

> The three most basic elements . . . [of intent] are that (1) it is a *state of mind* (2) about *consequences* of an act (or omission) and not about the act itself, and (3) it extends not only to having in the mind a purpose (or desire) to bring about given consequences but also to having in mind a belief (or knowledge) that given consequences are substantially certain to result from the act.

RESTATEMENT (SECOND) OF TORTS § 8 (1984) (emphasis in original) (footnotes omitted). Therefore, the concept of knowledge is included in the concept of intent. *Id.*

165. *See Zenobia*, 325 Md. at 454-60, 601 A.2d at 649-53.

Many jurisdictions award punitive damages if the plaintiff merely shows that a drunk driver acted with reckless indifference.[166] A substantial number of jurisdictions award punitive damages upon a showing of conscious disregard.[167] Very few jurisdictions require the

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166. *See* Mince v. Butters, 616 P.2d 127, 129 (Colo. 1980) ("wanton and reckless disregard of the injured parties rights and feelings"); Seymour v. Carcia, 589 A.2d 7, 11 (Conn. App. Ct. 1991) ("reckless indifference to the rights of others"); Gesslein v. Britton, 206 P.2d 263, 265 (Kan. 1954) ("wrongfully, wantonly and recklessly"); Stojkovic v. Weller, 802 S.W.2d 152, 155 (Mo. 1991) (indifference to the safety of others); Svejcara v. Whitman, 487 P.2d 167, 169 (N.M. Ct. App. 1971) (reckless or wanton disregard of the plaintiff's rights); Taylor v. Dyer, 593 N.Y.S.2d 122, 123 (N.Y. App. Div. 1993) (wanton or reckless conduct); Huff v. Chrismon, 315 S.E.2d 711, 715 (N.C. Ct. App. 1984) ("reckless indifference to the interests of others"); Harrell v. Ames, 508 P.2d 211, 214 (Ore. 1973) (wanton or reckless conduct); Focht v. Rabada, 268 A.2d 157, 159 (Pa. 1970) (reckless indifference); Merritt v. Grant, 328 S.E.2d 346, 349 (S.C. Ct. App. 1985) (reckless conduct); Wilt v. Buracker, 443 S.E.2d 196, 207-08 (W. Va. 1993) ("reckless disregard of the safety of others"); Lievrouw v. Roth, 459 N.W.2d 850, 853-54 (Wis. Ct. App. 1990) ("reckless disregard of rights or interests"); Danculovich v. Brown, 593 P.2d 187, 193 (Wyo. 1979) ("reckless disregard of the consequences"); *see also* ALA. CODE § 6-11-20(b)(3) (1993) ("reckless or conscious disregard of the rights or safety of others").

Courts often phrase the requisite state of mind as a combination of two states of mind. For example, a court might require a plaintiff to prove that the defendant acted with a "complete indifference to *or* conscious disregard for the safety of others." *Stojkovic*, 802 S.W.2d at 155 (emphasis added). When a court has phrased the requisite state of mind in this manner, the author of this piece has grouped the case under the category for the least culpable of the two given states of mind. Therefore, *Stojkovic* has been grouped with those jurisdictions that require a showing of only reckless indifference.

167. *See* Olson v. Walker, 781 P.2d 1015, 1018 (Ariz. Ct. App. 1989) ("An evil mind can be inferred when the defendant's conduct is so outrageous . . . that it can be assumed he . . . consciously disregarded the substantial risk of harm created by his conduct."); Holmes v. Hollingsworth, 352 S.W.2d 96, 99 (Ark. 1961) (wanton disregard of the rights and safety of others); Taylor v. Superior Court, 598 P.2d 854, 856 (Cal. 1979) (conscious disregard); Beal v. Braunecker, 364 S.E.2d 308, 310 (Ga. Ct. App. 1987) (conscious indifference), *cert. denied*, 185 Ga. App. 909 (1988); Hill v. Sampson, 628 So. 2d 81, 84 (La. Ct. App. 1993) (conscious indifference to the consequences); Hawkinson v. Geyer, 352 N.W.2d 784, 788 (Minn. Ct. App. 1984) (willful indifference to the rights or safety of others); Allers v. Willis, 643 P.2d 592, 596 (Mont. 1982) ("conscious and deliberate disregard of the interests of others") (citing Taylor v. Superior Court, 598 P.2d 854, 894-95 (Cal. 1979)); Porter v. Funkhouser, 382 P.2d 216, 218 (Nev. 1963) ("conscious disregard of danger and probable injury to others"); McMahon v. Chryssikos, 528 A.2d 104, 105 (N.J. Super. Ct. Law Div. 1986) ("willful and wanton disregard of the rights of others"); Flockhart v. Wyant, 467 N.W.2d 473, 478 (S.D. 1991) ("There must be facts that [show that defendant] consciously realized that his conduct would *in all probability, as distinguished from possibility,* . . . bring harm to the plaintiff."); Miskin v. Carter, 761 P.2d 1378, 1379 (Utah 1988) ("knowing and reckless disregard

plaintiff to show that the defendant acted with malice.[168] The other jurisdictions may award punitive damages merely upon a showing of implied malice.[169] "Implied malice," however, does not mean recklessness, as it did during Maryland's implied malice phase.[170] Jurisdictions that use the term "implied malice" often mean "inferred malice," because a malicious state of mind may be inferred from the defendant's conduct.[171]

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for the rights of others") (quoting Johnson v. Rogers, 763 P.2d 771, 774 (Utah 1988)); Puent v. Dickens, 427 S.E.2d 340, 342 (Va. 1993) ("conscious disregard of the rights of others") (quoting Baker v. Marcus, 114 S.E.2d 617, 621 (Va. 1960)); *see also* LA. CIV. CODE ANN. art. 2315.4 (West 1995) ("wanton or reckless disregard for the rights and safety of others"); MINN. STAT. ANN. § 549.20 (West Supp. 1995) ("deliberate disregard for the rights or safety of others").

A small number of states allow a plaintiff to recover punitive damages only upon a showing of gross negligence. *See* Bryant v. Alpha Entertainment Corp., 508 So. 2d 1094, 1098-99 (Miss. 1987) (action against liquor establishment which sold beer to driver of car who was underage); McElroy v. Fitts, 876 S.W.2d 190, 197 (Tex. Ct. App. 1994) (negligent entrustment case); Crider v. Appelt, 696 S.W.2d 55, 58 (Tex. Ct. App. 1985) ("[D]riving while intoxicated was one of the elements which the jury properly should have considered . . . in determining whether defendant was *grossly negligent.*") (emphasis added). However, a closer look at the courts' language indicates that something more than gross negligence is required. *See* Jacmar Pac. Pizza Corp. v. Huston, 502 So. 2d 91, 92 (Fla. Dist. Ct. App. 1987) ("extreme degree of negligence *as to parallel an intentional and reprehensible act*") (emphasis added); *see also Bryant*, 508 So. 2d at 1099 ("Punitive damages are ordinarily recoverable only in cases where negligence is so gross as to indicate a wanton disregard for the safety of others.") (quoting United States Indus. v. McClure Furniture Co., 371 So. 2d 391, 393 (Miss. 1979)); *Crider*, 696 S.W.2d at 58 (Trial court's instruction stated that "intoxication, if any, does not lessen or reduce a person's responsibility for conduct, which if he were sober, would evince a conscious indifference to the rights, welfare or safety of the persons affected by it.").

168. *See* Tuttle v. Raymond, 494 A.2d 1353 (Me. 1985); Ruther v. Tyra, 247 P.2d 964 (Okla. 1952).

169. For example, the *Tuttle* court stated:

> [P]unitive damages are available based upon tortious conduct only if the defendant acted with malice. . . . Such malice exists where the defendant's tortious conduct is motivated by ill will toward the plaintiff. . . . Punitive damages will also be available, however, where deliberate conduct by the defendant, although motivated by something other than ill will toward any particular party, is so outrageous that malice toward a person injured as a result of that conduct can be implied.

Tuttle, 494 A.2d at 1361 (citations omitted).

170. See *supra* text accompanying notes 46-92 for a discussion of Maryland's implied malice phase.

171. Because a defendant will rarely, if ever, testify as to his state of mind at the time of the action, every plaintiff must prove, through circumstantial evidence, that the defendant acted with the requisite state of mind. *See* Cooper, *supra* note 6, at 125-27. The plaintiff can prove the defendant's state of mind by

B. Methods of Proof

In general, there are two ways in which a plaintiff can prove the defendant's state of mind at the time of the act in question. Most jurisdictions allow state of mind to be proven by reference to the defendant's general conduct.[172] Fact finders in these jurisdictions look at the totality of the circumstances to determine if the requisite state of mind can be inferred from the defendant's conduct.[173]

Other jurisdictions follow an "aggravating circumstances" approach.[174] These jurisdictions go one step further than merely requiring the jury to infer the requisite state of mind from the particular facts of the case. Under this approach, punitive damages would not be awarded unless a plaintiff could show that there was an "aggravating circumstance" at the time of the alleged accident.[175] Intoxi-

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drawing *inferences* from the defendant's conduct. *Id.*; *see also* Florek v. Kennedy, 618 N.E.2d 760 (Ill. App. Ct. 1993). In *Florek*, the trial court denied the plaintiff's motion to amend her complaint to include a count for punitive damages. *Id.* at 761. The plaintiff argued that there was "a reasonable likelihood that facts [would have been] proved at [t]rial to support an award of punitive damages [because] a jury [could] *infer from [the d]efendant's conduct* that he acted with malice." *Id.* at 762 (emphasis added).

172. *See* Bourgeois v. State Farm Mut. Auto. Ins. Co., 562 So. 2d 1177, 1183 (La. Ct. App. 1990) ("[E]vidence of a specific action on the part of the defendant is [not] necessary. In order to prove 'wanton and reckless disregard,' the plaintiff is required only to prove a 'general state of mind.'"); Huffman v. Love, 427 S.E.2d 357, 360 (Va. 1993) ("[D]efendant's entire conduct must be considered in determining whether [the defendant] showed a conscious disregard for the safety of others."); Danculovich v. Brown, 593 P.2d 187, 191 (Wyo. 1979) ("It may be said as a matter of law that any one of [the facts alleged by the plaintiff] could not support a finding of willfulness or wantonness. *Taken in toto,* they would support such finding.") (emphasis added).

173. *See* Owens-Illinois, Inc. v. Zenobia, 325 Md. 420, 481-83, 601 A.2d 633, 661-65 (1992) (Bell, J., concurring and dissenting) (advocating a "totality of the circumstances" method of proof because it "may reveal conduct on the part of a defendant that is just as heinous as the conduct motivated by . . . actual malice").

174. *See* Beal v. Braunecker, 364 S.E.2d 308, 310-11 (Ga. Ct. App. 1987) ("[A] determination that [defendant's] driving under the influence of alcohol caused [plaintiff's] injuries would support a finding that aggravating circumstances existed."); McMahon v. Chryssikos, 528 A.2d 104, 108 (N.Y. Super. Ct. Law Div. 1986) ("[A]llowance of punitive damages where intoxication is the sole aggravating factor ignores the necessity for willful and wanton misconduct.") (footnote omitted); Lievrouw v. Roth, 459 N.W.2d 850, 853 (Wis. Ct. App. 1990) (holding that punitive damages could not be awarded unless the defendant's conduct was outrageous) "In order for conduct to be 'outrageous' there must be 'aggravating circumstances beyond ordinary negligence.'". *Id.*

175. *See, e.g.,* Beal v. Braunecker, 364 S.E.2d 308, 310-11 (Ga. Ct. App. 1987) (holding that unjustified intoxication, when it causes personal injuries to another, is evidence of aggravating circumstances).

cation alone cannot serve as a basis for punitive damages.[176] Many courts that follow an "aggravating circumstances" approach have explicitly rejected a *per se* approach in dealing with drunk driving cases.[177] These courts are motivated by a desire to avoid an approach that virtually imposes strict liability "where intoxication is involved in an automobile accident."[178]

Some jurisdictions also follow a "causal connection" approach when answering the question of how plaintiffs should prove state of mind. These jurisdictions require plaintiffs to prove that there was a causal connection between the defendant's intoxication and the plaintiff's injuries.[179] The "causal connection" approach is very similar to the "aggravating circumstances" approach.[180] Finally, a few

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176. *Id.* at 310.

177. A *per se* approach allows a plaintiff to prove the defendant's state of mind solely through evidence of the defendant's intoxication. *See* Taylor v. Dyer, 593 N.Y.S.2d 122, 123 (N.Y. App. Div. 1993) (discussing Sweeney v. McCormick, 552 N.Y.S.2d 707, 708-09 (1990), in which the court "rejected an award of punitive damages based solely on the fact that the driver had a blood alcohol level of .11%").

178. *See* McMahon v. Chryssikos, 528 A.2d 104, 108 (N.J. Super. Ct. Law Div. 1986) (criticizing the *per se* approach). Miskin v. Carter, 761 P.2d 1378 (Utah 1988), demonstrates the potential of imposing strict liability under a *per se* approach. The plaintiff in *Miskin* had consumed three or four drinks on the day of the accident. *Id.* at 1379. She had a friend drive her back to her place of work where she waited four hours before driving. *Id.* Her blood alcohol level was at the precise level of legal intoxication, she had no history of DUI arrests, and she was not driving recklessly. *Id.* at 1380. The court decided that this combination of factors could not possibly support an award of punitive damages. *Id.*

179. *See, e.g.*, Beal v. Braunecker, 364 S.E.2d 308, 310 (Ga. Ct. App. 1987) (holding that trial court did not err by charging the jury that should they find a causal connection between defendant's intoxication and plaintiff's injuries, then evidence of defendant's intoxication could be considered as evidence of aggravating circumstances, which were necessary to support an award of punitive damages); Lievrouw v. Roth, 459 N.W.2d 850, 854 (Wis. Ct. App. 1990) ("[P]unitive damages may not be awarded . . . unless the 'outrageous' conduct has caused or contributed to the plaintiff's damages."); *see also* LA. CIV. CODE ANN. art. 2315.4 (1995). The Louisiana Civil Code states:

> [E]xemplary damages may be awarded upon proof that the injuries on which the action is based were *caused by* a wanton or reckless disregard for the rights and safety of others by a defendant whose intoxication while operating a motor vehicle was *a cause in fact* of the resulting injuries.

Id. (emphasis added).

180. Some courts consider a causal connection between the defendant's intoxication and the plaintiff's injuries as an aggravating factor. *See Beal*, 364 S.E.2d at 311 (causal connection between defendant's intoxication and plaintiff's injuries would allow jury to consider defendant's driving under the influence as evidence of aggravating circumstances).

jurisdictions allow plaintiffs to prove state of mind through other methods.[181]

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181. Connecticut adopted the *Nast* sliding-scale that was used by Maryland during Phase II. Seymour v. Carcia, 589 A.2d 7, 11 (Conn. App. Ct. 1991) ("As the degree of impairment by the voluntary consumption of alcohol increases, the need for other aggravating circumstances lessens, and vice versa.") (quoting Nast v. Lockett, 312 Md. 343, 362, 539 A.2d 1113, 1122 (1988)). In Maryland, however, *Nast* was overruled by *Zenobia* and is no longer followed. See *supra* text accompanying notes 77-92 for a discussion of *Zenobia*.

The sliding scale approach further clarifies how aggravating circumstances are to be weighed, and thus is a natural progression from the aggravating circumstances approach. A comparison of the application of the aggravating circumstances approach with the sliding scale approach highlights the differences between them. Under an aggravating circumstances approach, punitive damages will not be awarded if the only proof of negligence is the defendant's blood alcohol content, no matter how high the defendant's degree of intoxication at the time of the alleged accident. *See Beal*, 364 S.E.2d at 310. Under the sliding scale approach, however, intoxication alone could potentially serve as a basis for punitive damages if the defendant's blood alcohol content at the time of the alleged accident was very high. *See Nast*, 312 Md. at 362, 539 A.2d at 1122 ("[A] high degree of impairment calls for other aggravating circumstances, *if any at all*, of a less serious nature.") (emphasis added).

Utah follows a balancing test. In Miskin v. Carter, 761 P.2d 1378 (Utah 1988), the court stated:

> [I]ntoxication combined with the negligent operation of a motor vehicle might justify an award of punitive damages in appropriate circumstances. . . . We think this determination requires a balancing of factors. Under some circumstances, the manner in which a vehicle is operated, when considered in light of the degree of intoxication and the driver's past behavior patterns, may warrant punitive damages.

Id. at 1380.

Virginia has enacted a very specific statute to deal with the imposition of punitive damages in drunk driving cases. VA. CODE ANN. § 8.01-44.5 (Michie 1994). Virginia's statute states that exemplary damages may be awarded when "the defendant acted with malice toward the plaintiff or [when] the defendant's conduct was so willful or wanton as to show a conscious disregard for the rights of others." *Id.* The Virginia legislature was ingenious enough to specify how the plaintiff should prove the defendant's state of mind. The statute states that:

> A defendant's conduct shall be deemed sufficiently willful or wanton as to show a conscious disregard for the rights of others when the evidence proves that (i) the defendant had a blood alcohol content of 0.15 percent or more by weight [or] volume when the incident causing the injury or death occurred, (ii) at the time the defendant began, or during the time he was, drinking alcohol, he knew that he was going to operate a motor vehicle, engine or train and (iii) the defendant's intoxication was a proximate cause of the injury to or death of the plaintiff.

Id.

C. *Burden of Proof*

The third, and final, question to be considered when discussing other jurisdictions is what evidentiary burden must be met before punitive damages will be awarded. Most jurisdictions merely require a plaintiff to prove the defendant's state of mind by a preponderance of the evidence.[182] Other states, however, insist that the plaintiff prove state of mind by clear and convincing evidence.[183] Courts that advocate a clear and convincing standard have increased the plaintiff's burden of proof because of the extreme penal nature of punitive damages.[184] One jurisdiction, Colorado, even requires a plaintiff to prove his case beyond a reasonable doubt before punitive damages will be imposed.[185] A small number of jurisdictions impose their own unique evidentiary burdens on plaintiffs seeking punitive damages in drunk driving cases.[186]

V. ALTERNATIVE APPROACHES

Komornik v. Sparks[187] is troubling for two reasons. First, the holding requires plaintiffs seeking punitive damages to prove that a

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182. *See, e.g.*, Holmes v. Hollingsworth, 352 S.W.2d 96, 98 n.2 (Ark. 1961) (quoting with favor jury instructions given in Miller v. Blanton, 210 S.W.2d 293, 294 (Ark. 1948), which used a preponderance of the evidence standard).

183. *See* Olson v. Walker, 781 P.2d 1015, 1018 (Ariz. Ct. App. 1989); Tuttle v. Raymond, 494 A.2d 1353, 1362-63 (Me. 1985); Hawkinson v. Geyer, 352 N.W.2d 784, 788 (Minn. Ct. App. 1984); Ruther v. Tyra, 247 P.2d 964, 968 (Okla. 1952); Lievrouw v. Roth, 459 N.W.2d 850, 853-54 (Wis. Ct. App. 1990); *see also* ALA. CODE § 6-11-20 (1993).

184. *See Tuttle*, 494 A.2d at 1355-60, 1362-63. The court increased the plaintiff's burden of proof to the clear and convincing standard due to the criticism associated with punitive damages, which includes the argument that punitive damages, which are meant to punish and to deter, have no place in tort law. *Id.*

185. COL. REV. STAT. ANN. § 13-25-127 (West 1989); Mince v. Butters, 616 P.2d 127, 129 (Colo. 1980).

186. For example, South Dakota requires that:

> In any claim alleging punitive or exemplary damages, before any discovery relating thereto may be commenced and before any such claim may be submitted to the finder of fact, the court shall find, after a hearing and based upon clear and convincing evidence, that there is a reasonable basis to believe that there has been willful, wanton or malicious conduct on the part of the party claimed against.

S.D. CODIFIED LAWS ANN. § 21-1-4.1 (1987). The *Flockhart* court explained that a plaintiff must prove, by clear and convincing evidence, only that a *reasonable basis* exists for the imposition of punitive damages. Flockhart v. Wyant, 467 N.W.2d 473, 475 (S.D. 1991). The jury, however, may award punitive damages even if it is convinced by only a preponderance of the evidence that the defendant was willful, wanton or malicious. *Id.* Iowa requires plaintiffs to prove their case by a "preponderance of clear, convincing, and satisfactory evidence." IOWA CODE ANN. § 668A.1 (West 1994).

187. 331 Md. 720, 629 A.2d 721 (1993).

drunk driver has acted with actual malice, and second, the holding provides little guidance as to how plaintiffs should prove the requisite state of mind.

The *Komornik* court was, in all likelihood, motivated by a desire to improve or reform the structure of punitive damages in Maryland.[188] Strict adherence to *Zenobia*'s actual malice standard and the application of a higher burden of proof help to alleviate two of the problems associated with the implied malice standard: (1) the increased number of punitive damage awards in Maryland,[189] and (2) the ineffectiveness of the implied malice standard in meeting the objectives of punitive damages.[190]

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188. Requiring plaintiffs to prove that a drunk driver acted with actual malice furthers the reform of punitive damages that began with the court of appeals's holding in *Zenobia*. *See id.* at 735, 629 A.2d at 728 (Chasanow, J., concurring); Owens-Illinois, Inc. v. Zenobia, 325 Md. 420, 450-52, 455-60, 601 A.2d 633, 647-49, 650-53 (1992); *see also* Victor E. Schwartz & Mark A. Behrens, *Punitive Damage Reform—State Legislatures Can and Should Meet the Challenge Issued by the Supreme Court of the United States in* Haslip, 42 AM. U. L. REV. 1365 (1993). Schwartz and Behrens discuss the desirability of reforming punitive damage awards in light of Pacific Mutual Life Insurance Company v. Haslip, 499 U.S. 1 (1991). *Id.* at 1370-72. The authors discussed two "key reforms" that the Court of Appeals of Maryland has begun to implement through *Zenobia* and its progeny. The first key reform is "articulat[ing] a clear and strong standard for juries to apply in evaluating whether a defendant's conduct warrants punitive damages." *Id.* at 1374-75 ("States that allow punitive damages awards for less than intentional or conscious wrongdoing are vulnerable to due process objections, including, for instance, states that permit punitive damages awards for 'gross negligence.'") (footnotes omitted). The second reform discussed was "chang[ing] the burden of proof that a plaintiff must show to establish that a defendant's conduct warrants punitive damages." *Id.* at 1380-82. *Zenobia* increased both the state of mind and the burden of proof required to support an award of punitive damages in Maryland. *See Zenobia*, 325 Md. at 460, 469, 601 A.2d at 652, 657.

    For a discussion of the controversy surrounding punitive damage reform in Maryland, see Jane Bowling, *GOP Gains Unlikely to Trigger Major Shift on Tort Reform*, THE DAILY RECORD, Nov. 15, 1994 at 1, 12. There are two major groups, offering competing views, that advocate tort reform. The Maryland Trial Lawyers Association submitted an amicus curie brief on behalf of Komornik in which it sought to keep liability limits and restrictions out of state courts, whereas the Punitive Damage Reform Coalition, in its brief, wanted the court of appeals to expand *Zenobia*. *Id.*

189. *Zenobia*, 325 Md. at 450, 601 A.2d at 648.

190. *Id.* at 454-59, 601 A.2d at 649-52. The *Zenobia* court discussed the shortcomings of the standards in place prior to its decision and stated: "The irrational and inconsistent application of a punitive damages standard undermines the objective of deterrence because persons cannot predict, and thus choose to abstain from, the type of behavior that is sanctioned by a punitive damages award." *Id.* at 455, 601 A.2d at 650. Additionally, the court believed that awarding punitive damages based on gross or even reckless conduct was inconsistent with our society's view that punishment should be given only when conduct is morally reprehensible. *Id.* at 454, 457, 629 A.2d at 650-51.

By adopting an actual malice standard, the court of appeals significantly lessened the possibility of recovering punitive damages in drunk driving cases because a plaintiff would rarely, if ever, be able to prove that a drunk driver acted with malice. Malice is defined, in Maryland, as "evil motive, intent to injure, ill will, or fraud."[191] These concepts are inconsistent with non-intentional behavior. Malice implies intentional behavior,[192] and negligence is a non-intentional tort.[193]

The *Komornik* decision satisfies the high court's desire to curb the proliferation of punitive damage awards by increasing the degree of culpability necessary to support a punitive damage award.[194] Nevertheless, the actual malice standard will be just as ineffective as the implied malice standard in meeting the goals of punishment and deterrence if the court does not provide further guidance as to how the standard is to be applied in drunk driving cases. The *Komornik* court should have made clear exactly how plaintiffs must prove that a drunk driver acted with actual malice by specifying the type of conduct that would be equated with malice.[195]

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191. *Zenobia*, 325 Md. at 460 n.20, 601 A.2d at 652 n.20.

192. For example, proving that an intoxicated driver acted with actual malice is virtually impossible. A drunk driver is rarely coherent enough to intend any of his actions. If the drunk driver intends anything, it is to arrive home safely, without being arrested for driving while intoxicated. The drunk driver's wrongful conduct takes place when the driver voluntarily makes the decision to drink after having voluntarily placed himself in a position where he will have to drive. If the driver actually intended to harm anyone, the driver would be committing an intentional tort, such as battery. *See* KEETON, *supra* note 3, § 31.

193. Professor Keeton states:

> It is helpful to an understanding of the negligence concept to distinguish it from intent. In negligence, the actor does not desire to bring about the consequences which follow, nor does he know that they are substantially certain to occur, or believe that they will. There is merely a risk of such consequences . . . .

Id.

194. Increasing the burden of proof will also decrease the number of successful punitive damage claims. *See* Kagan, *supra* note 41, at 781-82 ("Procedural barriers reduce the number of times a jury will actually consider the question of punitive damages . . . .").

195. Clarifying the method by which state of mind should be proved is important for two reasons. First, potential plaintiffs require instruction on the manner in which malice must be proved in non-intentional tort cases because malice involves the element of intent. *See supra* note 164 and accompanying text. Second, potential defendants must be warned of behavior that will subject them to liability. *Zenobia*, 331 Md. at 459 n.19, 601 A.2d at 652 n.19 (citing 2 L. SCHUTER & K. REDDEN, PUNITIVE DAMAGES, App. B, at 418-19 (2d ed. 1989)).

Arguably, defendants are already aware that "malicious" behavior will possibly subject them to punitive damages. It is unclear, however, what type

There are two methods,[196] currently used in other jurisdictions, by which state of mind can be proven: (1) the totality of the circumstances approach,[197] and (2) the aggravated circumstances approach.[198] The first method, used by many jurisdictions, is problematic because it does not provide the guidance needed by potential plaintiffs and defendants. If Maryland were to adopt this approach, any and all circumstances could be used by a plaintiff to prove that the defendant acted with malice. Under the totality of the circumstances approach, defendants cannot predict the type of conduct that will subject them to liability, and cannot, therefore, take precautions to avoid such conduct. Furthermore, deserving plaintiffs will not recover due to the difficulty of proving actual malice without more specific guidelines.

Other jurisdictions use the aggravated circumstances approach.[199] This is the approach that should have been adopted by the court in *Komornik*. Under the aggravated circumstances approach, only certain circumstances give rise to a punitive damage award. These particular circumstances are specifically delineated by the court. Adoption of an aggravated circumstances approach, therefore, would

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of behavior is malicious. Perhaps Gregory Sparks would have been malicious if he had not tried to stop his truck. *See Komornik,* 331 Md. at 721-22, 629 A.2d at 721-22. Perhaps his behavior would have been malicious if he had been traveling at four times the speed limit. *See id.* at 726, 629 A.2d at 724 (Sparks was not traveling at an excessive speed). Finally, perhaps Sparks would have been acting maliciously if he had driven himself to the bar where he preceded to get drunk, knowing he was going to drive home. *See id.* at 723, 629 A.2d at 722 (Sparks's friend drove him to and from the bar; Sparks made the decision to drive after he was drunk.).

196. Some states follow a *per se* approach, which was explicitly rejected by the *Komornik* court as a matter of public policy. *Komornik*, 331 Md. at 730 n.6, 629 A.2d at 726 n.6; *see* McMahon v. Chryssikos, 528 A.2d 104 (N.J. Super. Ct. Law Div. 1986) (adopting an aggravating circumstances approach after comparing the *per se* approach and the aggravating circumstances approach). The causal connection approach is a variation of the aggravated circumstances approach. See *supra* Section IV. B. for a discussion of the causal connection approach and the aggravating circumstances approach.

197. *See supra* text accompanying notes 172-73.

198. *See supra* text accompanying notes 174-78.

199. *See* Beal v. Braunecker, 364 S.E.2d 308, 310-11 (Ga. Ct. App. 1987) ("[A] determination that [defendant's] driving under the influence of alcohol caused [plaintiff's] injuries would support a finding that aggravating circumstances existed."); McMahon v. Chryssikos, 528 A.2d 104, 108 (N.Y. Super. Ct. Law Div. 1986) ("[A]llowance of punitive damages where intoxication is the sole aggravating factor ignores the necessity for willful and wanton misconduct.") (footnote omitted); Lievrouw v. Roth, 459 N.W.2d 850, 853 (Wis. Ct. App. 1990) (holding that punitive damages could not be awarded unless the defendant's conduct was outrageous and finding that "[i]n order for conduct to be 'outrageous' there must be 'aggravating circumstances beyond ordinary negligence'").

give potential defendants warning of proscribed conduct while providing potential plaintiffs with a method by which they could prove actual malice in drunk driving cases.[200]

VI. CONCLUSION

Komornik v. Sparks has diminished significantly the possibility of recovering punitive damages in drunk driving cases because proving actual malice in non-intentional tort actions, such as drunk driving, is difficult. An increase in the degree of culpability required to support a punitive damage award was necessary because, under the old, "implied malice" approach, gross negligence and recklessness were allowable bases for recovering punitive damages. The court of appeals's first solution, subjecting defendants to liability on the basis of gross negligence and recklessness, however, resulted in inconsistent application and frustrated the objectives of punitive damages. It was, therefore, necessary to adopt the actual malice standard to further the dual goals of punishment and deterrence. Nevertheless, these goals will continue to be frustrated without proper guidance from the court regarding the method by which actual malice should be proven in drunk driving cases. Ambiguity in this area places a great burden on the plaintiff seeking punitive damages and on the potential defendant, who deserves to know the gravity of his actions. Adopting an aggravating circumstances approach would provide the necessary guidance and would relieve this burden.

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200. By using the concepts of knowledge and intent, it is possible to develop a list of aggravating circumstances from which malice may be inferred in Maryland drunk driving cases. For example, the existence of past drinking and driving offenses, evidence of time spent in rehabilitation centers, and warnings not to drive given by third parties could be used to show that the defendant had knowledge of the dangers of drinking and driving. *See* Appellant's Brief at 10-11, Komornik v. Sparks, 331 Md. 720, 629 A.2d 721 (1993) (No. 91-350). Similarly, evidence of the defendant's blood alcohol level can be used to show that the defendant intended to and did ignore the possible dangers. *See id.* at 11. Finally, a causal connection between the defendant's intoxication and the plaintiff's injury can be used to show that the possibility of injury became a reality. *See* Olson v. Walker, 781 P.2d 1015, 1018 (Ariz. Ct. App. 1989); Tuttle v. Raymond, 494 A.2d 1353, 1362-63 (Me. 1985); Hawkinson v. Geyer, 352 N.W.2d 784, 788 (Minn. Ct. App. 1984); Ruther v. Tyra, 247 P.2d 964, 968 (Okla. 1952); Lievrouw v. Roth, 459 N.W.2d 850, 853-54 (Wis. Ct. App. 1990); *see also* ALA. CODE § 6-11-20 (1993). The combination of these particular circumstances can, therefore, be used to show that the defendant acted maliciously.