GROSS NEGLIGENCE.

SCARY WORDS, BUT WHAT IS IT REALLY?

BY: FRANK SEDITA

Plaintiff attorneys seem to have all collectively decided that dropping this phrase into every petition will scare defendants into offering more money to settle, or to scare them out of defending the case entirely. Sure, sometimes it makes sense to plead. Those instances where the defendant driver chose to get behind the wheel after getting blackout drunk at the neighborhood bar, or those instances where the bouncer decided to live out his Fight Club fantasies on the unsuspecting patron are potentially valid reasons to allege gross negligence against the defendants. But the car accident which happened when grandma backed out of the HEB spot without adequately checking her surroundings, or the instance where the cashier hadn't yet gotten to aisle 20 and dealt with the detergent on the floor? Maybe those aren't the right times to drop the anvil.

Gross negligence matters. If proven, a finding of gross negligence can lead to the imposition of punitive damages. Punitive damages are an important doctrine in Texas law developed over the years to allow the courts to redress the worst of wrongs and protect against the most egregious of conduct. As the name implies, they are a punishment to deter future wrongdoing.

Unfortunately, the plaintiff bar has chosen to reference gross negligence so often in every pleading that they have essentially lost all meaning as a concept. Two of the most frequently asked questions at the inception of litigation is what the phrase does mean and is this "that" case where we need to be on guard against those allegations.

In light of this, we wanted to set the record straight and talk about what the concept of gross negligence really is under Texas law for both individuals, and for companies who are responsible for employees-for example a company with a driver who is in the course and scope of his employment when they have an accident.

In Texas, gross negligence means a reckless disregard for the safety of others, exceeding ordinary negligence. To prove gross negligence, a claimant must demonstrate both an extreme degree of risk and the company's subjective awareness of that risk, but conscious indifference to the safety of others. This is an intentionally high bar set by the Texas Legislature to be sure that not every case triggers the imposition of punitive damages.

To break this down, under Texas Law, the injured party must prove, by clear and convincing evidence (the burden for ordinary negligence is only a preponderance of the evidence), that:

1. When viewed objectively from the defendant's standpoint at the time of the event, the act or omission involved an extreme degree of risk, considering the probability and magnitude of the potential harm to others, and
2. the defendant had actual, subjective awareness of the risk involved, but nevertheless proceeded with conscious indifference to the rights, safety, or welfare of others.[1]

To be found grossly negligent, **Evidence of simple negligence is not enough to prove either the objective or subjective elements of gross negligence.**[2] Further, a company's conduct must have departed from the ordinary standard of care to such an extent that they created an extreme degree of risk of harm to others.

As the Texas Supreme Court recently noted, even taken together, multiple failures to exercise ordinary care do not equate to gross negligence: "[A]ny of multiple negligent acts here are common ingredients in a garden-variety car accident…**[T]hose failures, even taken together, do not amount to gross negligence."** [3]

To give some clarity, the Texas Supreme Court repeatedly has emphasized that "what separates ordinary negligence from gross negligence is the defendant's state of mind; in other words, the plaintiff must show that the defendant knew about the peril, but his acts or omissions demonstrate that he did not care."[4]

Of note for clients potentially facing vicarious liability due to an employment or control relationship, it's very difficult to impute the gross negligence of an individual employee into that of the corporation.

Generally, a corporation may not be held liable for punitive damages for gross negligence unless the corporation itself (1) commits gross negligence, (2) authorized or ratified an agent's gross negligence, (3) was grossly negligent in hiring an unfit agent, or (4) committed gross negligence through the actions or inactions of a vice-principal.[5]

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[1] Civ. Prac & Rem. Code §41.0001(11),
[2] *Ellender*, 968 S.W.2d at 921; *Ardoin*, 267 S.W.3d at 503 (noting that neither the objective nor subjective element of gross negligence may be satisfied through proof of ordinary negligence or even bad faith).
[3] Medina v. Zuniga, 593 S.W.3d 238, 250 (Tex. 2019)
[4] *Diamond Shamrock Ref. Co. v. Hall*, 168 S.W.3d 164, 173 (Tex. 2005); *Ellender*, 968 S.W.2d at 921 (same); *Louisiana Pacific Corp. v. Andrade*, 19 S.W.3d 245, 246-47 (Tex.1999) (same). "Conduct that is 'merely thoughtless, careless, or not inordinately risky' is not grossly negligent." *Ardoin v. Anheuser-Busch, Inc.,* 267 S.W.3d 498, 503 (Tex. App.—Houston [14th Dist.] 2008, no pet.) (*quoting Transp. Ins. Co. v. Moriel*, 879 S.W.2d 10, 22 (Tex. 1994)).
[5] *657 *R & R Contractors v. Torres,* 88 S.W.3d 685, 708 (Tex.App.—Corpus Christi 2002, no pet.); *Ellender,* 968 S.W.2d at 921–22 (citations omitted)

To break that down further, a corporation may be liable in punitive damages for gross negligence only if the corporation itself commits gross negligence. A corporation is liable for gross negligence if the alleged acts were committed by a vice principal or "if the corporation authorizes or ratifies an agent's gross negligence or if its grossly negligent in hiring an unfit agent."[6]

A "vice principal" is either a) corporate officer; b) those who have authority to employ, direct and discharge employees of the corporation, c) those engaged in the performance of nondelegable or absolute duties of the corporation; and d) those to whom the corporation has confided the management of the whole or a department or a division of the business."[7]

To be considered a vice principal, the employee has to be at management or ownership level, generally with the ability to hire and terminate employees, thus a company driver is likely not a vice principal of a corporation.

Furthermore, using commercial trucking as an example, gross negligence in hiring an unfit agent requires more evidence than that the employer failed to inquire into or check their driver's driving record. Courts require evidence that the driver was incompetent or habitually reckless, and the owner knew or should have known that the driver was incompetent or reckless.[8]

In summary, gross negligence is a commonly pled allegation by the plaintiff bar, but not one which should be considered commonly applicable by defendants. It is always worth taking note of in a petition because of the significant ramifications, but it should not cause undue concern most of the time when a defensive strategy is being developed at the inception of a case.

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Frank brings extensive experience in civil litigation, focusing on insurance defense, personal injury, wrongful death, premises liability, product liability, first-party property claims, and general business litigation. Over the years, he has successfully defended major corporations in complex, high-stakes litigation while also gaining valuable experience as a plaintiff's attorney, handling countless personal injury matters.

[6] *Ellender at 921.*
[7] *Ellender at 922.*
[8] *Williams v. Steves Indus., Inc.,* 699 S.W.2d 570, 573, also see, *TXI Transp. Co.,* 224 S.W.3d at 919–20