

SUPERIOR COURT OF NEW JERSEY

CHAMBERS OF
JESSICA R. MAYER, J.S.C.
JUDGE



MIDDLESEX COUNTY COURT HOUSE
P.O. Box 964
NEW BRUNSWICK, NJ 08903-0964

NOT FOR PUBLICATION WITHOUT THE APPROVAL OF THE COMMITTEE ON OPINIONS

Memorandum of Decision on Defendant's Motion Regarding Choice-of-Law

Charles S. Irby v. Novartis Pharmaceuticals Corp. [Docket No. MID-L-1815-08]
(In re: Aredia® and Zometa®, Case No. 278)

For Defendant: Gregory Chernak, Esq., Hollingsworth LLP

For Plaintiff: Robert Germany, Esq., Pittman, Germany, Roberts & Welch, L.L.P.

Dated: November 18, 2011

Background

In this products liability litigation, Plaintiff Charles Irby (“Plaintiff” or “Mr. Irby”), a resident of Virginia, alleges that he developed osteonecrosis of the jaw (“ONJ”) after ingesting Zometa®, a pharmaceutical manufactured by Defendant Novartis Pharmaceutical Corporation (“NPC” or “Defendant”). Plaintiff seeks both compensatory and punitive damages. The parties have stipulated that Virginia law governs Plaintiff’s claims for failure to warn, defective design, breach of implied warranty, negligence, and consumer fraud. The parties disagree, however, on which state’s law—that of Virginia or New Jersey—should govern Plaintiff’s punitive damage claim. NPC argues that since Defendant’s alleged wrongdoings occurred at its corporate headquarters in New Jersey, this state has the most significant relationship to the issue of punitive damages. Conversely, Plaintiff argues that, because the harm was suffered in Virginia,

and because the decisions underlying the alleged wrongdoings occurred in Switzerland and *not* in New Jersey, Virginia has a stronger interest than New Jersey on the issue of punitive damages.

The facts relevant to this motion are as follows: Plaintiff has lived in Virginia since 1979. Plaintiff's Brief in Opposition to the Motion Regarding Choice-of-Law ("Pl. Opp.") at 3. He was first prescribed Zometa[®] on March 1, 2002 while being treated for hypocalcemia at Halifax Regional Hospital in Halifax County, Virginia. *Ibid.* In December of 2003, Mr. Irby saw an ear nose and throat specialist because he was experiencing pain on both sides of his jaw. *Id.* at 4. The specialist observed exposed bone and subsequently referred Mr. Irby to an oral surgeon. *Ibid.* Plaintiff underwent extensive treatment for his jaw problem, including hyperbaric oxygen treatment and surgery. *Ibid.* In April of 2004, Mr. Irby's doctors allegedly learned of an association between Zometa[®] and ONJ, and therefore ceased his Zometa[®] treatment. Pl. Opp. at 4. NPC manufactures, labels, markets, tests, distributes, promotes, and sells Zometa[®]. Answer and Defenses of Defendant Novartis Pharmaceuticals Corporation to Plaintiff's Complaint at 1. NPC markets and distributes Zometa[®] throughout the United States, including Virginia and New Jersey. *Id.* at 11. NPC is incorporated in Delaware and its principle place of business is in New Jersey. *Id.* at 2.

Defendant contends that the relevant facts applicable to the choice-of-law analysis in this case are identical to the facts presented to this court in Meng v. Novartis Pharms. Corp., No. L-7670-07 MT (Law Div. November 23, 2009). Thus, NPC argues that New Jersey law should be applied to Plaintiff's claim for punitive damages. In Meng, plaintiffs Meng and Bagley alleged that they developed ONJ after ingesting Zometa[®]. Meng, *supra*, at 1. The plaintiffs in Meng argued that their claims for punitive damages, like their claims for compensatory damages, should be governed by the law of the place of injury—namely, Mississippi and Maine,

respectively. Id. at 2-3. After conducting the required choice of law analysis, this court held that the Meng claims for punitive damages were governed by New Jersey law, even though the laws of Maine and Missouri governed plaintiffs' compensatory damage claims. Id. at 19-20.

Defendant points out that the predicate for punitive damages in Meng was essentially the same as in this case. Defendant's Brief in Support of the Motion Regarding Choice-of-Law ("Def. Br.") at 2. Like the plaintiffs in Meng, demand for punitive damages in this case is premised on alleged wrongdoing by NPC at the corporate level, including a failure to disseminate information to the medical community regarding an association between Zometa[®] and ONJ. Id. at 1-2.

In opposition, Plaintiff argues that "Virginia's strong interest in applying its law—demonstrated, *inter alia*, by its fervid adherence to the ancient rule of *lex loci*—is greater than either the interest of Mississippi or Maine in *Meng* and *Bagley* and changes the choice of law analysis under New Jersey choice of law principles."¹ Pl. Opp. at 2; see also id. at 11-14. Plaintiff further argues that NPC's pharmaceutical operation is based in Switzerland, thus undermining Defendant's assertion that the alleged wrongdoing upon which punitive damages is predicated occurred in New Jersey Id. at 7-9.² Moreover, Plaintiff contends that application of New Jersey law would disrupt interstate comity by creating a distinction between Plaintiff and those Virginia citizens who sue NPC in forums where punitive damages are available. Id. at 10-11. Additionally, Mr. Irby argues that the Appellate Division's decision in McDarby v. Merck & Co., Inc., 401 N.J. Super. 10 (App. Div. 2008), holding that punitive damages are unavailable

¹ *Lex loci delicti* is a well-settled rule in Virginia for resolving conflicts of law. See Maryland v. Coard, 175 Va. 571, 580-81 (Va. 1940). According to that doctrine, "the substantive rights of the parties in a multistate tort action are governed by the law of the place of the wrong." McMillan v. McMillan, 219 Va. 1127, 1128 (Va. 1979)

² The Meng plaintiffs also raised this argument. However, in Meng, this court found that "[p]laintiffs failed to cite support for their assertion that NPC's decision-making was made in Switzerland, rather than in New Jersey." Meng, supra, at 4 n.2. Here, Plaintiff provided evidence to the court, under seal, that was not available in Meng and which purports to demonstrate that NPC's decision-making occurred in Switzerland rather than in New Jersey.

in product liability cases involving pharmaceuticals approved by the United States Food and Drug Administration (“FDA”), frustrates the true goals of the New Jersey tort system, undermining this state’s interest in applying its punitive damages laws to the present case. Pl. Opp. at 13-14. Finally, Plaintiff states that Defendant’s argument in favor of application of New Jersey punitive damage laws has been “largely unsuccessful” in other forums. Id. at 14-15.

In response, NPC argues that Plaintiff has failed to establish that decision-making regarding the marketing, distributing, and selling of Zometa[®] actually occurred in Switzerland. Def. Reply at 2-4. NPC further argues that the discrepancies in applicable law among similar cases filed in different jurisdictions is misguided—the choice of law rules of the jurisdiction where the case is filed should govern, even though some substantive variation might result. Def. Reply at 4. Accordingly, Defendant asserts that Virginia’s adoption of the *lex loci delicti* doctrine in its own choice-of-law analysis does not trump New Jersey’s choice of law rules or New Jersey’s interest in applying its laws to cases filed in New Jersey. Id. at 4-5. Furthermore, Defendant argues that the McDarby ruling does not frustrate the purposes of the tort litigation but rather expresses the New Jersey’s interest in regulating the availability of punitive damages. Id. at 5-6. Finally, Defendant contends that, contrary to the Plaintiff’s assertion, the majority of the courts faced with choice of law motions involving Zometa[®] and the issue of punitive damages have agreed with the position espoused by NPC and this court’s decision in Meng. Id. at 6.

Analysis

When a lawsuit is filed in New Jersey, this state’s choice-of-law rules apply. Erny v. Estate of Merola, 171 N.J. 86, 94 (2002). It should be noted at the outset that, when determining which laws to apply to a case, “the law of one jurisdiction may apply to one issue in a matter and

the law of a second jurisdiction to another.” Grossman v. Club Med Sales, Inc., 273 N.J. Super. 42, 51 (App. Div. 1994). In this case, “the law governing the right to [punitive] damages need not necessarily be the same as the law governing the measure of compensatory damages. . . .,” because one state may have “the dominant interest with respect to the issue of compensatory damages and another state ha[ve] the dominant interest with respect to the issue of [punitive] damages.” Restatement (Second) of Conflict of Laws § 171 comment d; see also, e.g., Clawans v. United States, 75 F. Supp.2d 368, 374-75 (D.N.J. 1999) (applying New Jersey law to issue of damages and Maryland law to issue of fault apportionment); In re Consolidated Parlodel Litig., 182 F.R.D. 441, 448 (D.N.J. 1998) (“New Jersey’s choice of law rules incorporate the doctrine of *dépeçage* whereby the laws of different states may apply in the same case to different issues in the case”) (citing In re B.S. Livingston & Co., Inc., 186 B.R. 841, 863 (D.N.J. 1995); Williamson v. Lazeration, 1988 U.S. Dist. LEXIS 15004 (D.N.J. Dec. 20, 1988) (“New Jersey allows *dépeçage*, wherein different states’ laws may govern different issues at trial”). Consequently, this court will focus the choice-of-law analysis on the particular issue of punitive damages, rather than inquiring as to which state’s law should apply to the case as a whole.

As to New Jersey’s rules for determining choice-of-law, in 2008, the New Jersey Supreme Court adopted the significant relationship test enunciated in the Restatement (Second) of Conflict of Laws (1971). See P.V. ex rel. T.V. v. Camp Jaycee, 197 N.J. 132 (2008). Under the “significant relationship test,” there is a presumption that the law of the place of injury governs, unless another state has a more significant relationship to the issue at bar. Id. at 143. The first question under the Camp Jaycee analysis is whether there is an actual conflict in the laws of the interested states. Ibid. Absent a conflict, there is no choice-of-law issue to be resolved. However, if there is a conflict, the first contact to examine is the place where the

injury occurred, as the law of the place where the injury occurred is presumed to apply. Id. at 143-44 (citing Restatement (Second) of Conflict of Laws § 146).

Nevertheless, the presumption that the law of the place of injury governs may be overcome if another state has a more significant interest in the matter than the state where the injury occurred. Id. at 144. Thus, the next step is to determine if such an interest exists. Id. at 145. In making that determination, the court should examine the location of the conduct causing the injury, the domicile of the parties involved, and the place where the relationship is centered. Id. at 145-147 (citing Restatement (Second) of Conflict of Laws § 145)

In this case, the court concludes that there is an actual conflict between New Jersey (where Defendant does business) and Virginia (where Plaintiff resides) on the issue of punitive damages. First, the two states' punitive damages laws differ by their plain language: New Jersey caps punitive damages at the greater of \$350,000 or five times the compensatory damages award, N.J.S.A. § 2A:15-5.14b, while Virginia law caps punitive damages at \$350,000, Va Code Ann. §8.01-38.1. But more significantly, in New Jersey, pursuant to the Appellate Division's decision in McDarby, punitive damages in cases involving FDA-approved pharmaceuticals are preempted by the Federal Food Drug and Cosmetic Act ("FDCA"), 21 U.S.C. §§ 301 to 399. McDarby, supra, 401 N.J. Super. at 87-94. As to the present case, applying the punitive damages laws of Virginia could potentially yield a punitive damages award of up to \$350,000, whereas applying the punitive damages laws of New Jersey could exclude the availability of punitive damages. Therefore, the parties and this court agree that there is a conflict between the punitive damages laws of New Jersey and Virginia.

Because a conflict exists, the court must then examine the location of the injury, the law of which is presumed to apply under Camp Jaycee. Id. at 144 (citing Restatement (Second) of

Conflict of Laws §146 (1971)). Plaintiff resided in Virginia at the time that he was prescribed Zometa[®] and developed ONJ. Plaintiff has never lived in New Jersey. Thus, a presumption that Virginia law will govern the issue of punitive damages has been established. See Camp Jaycee, *supra*, 197 N.J. at 143. However, this presumption may be overcome if New Jersey bears a more significant interest on the issue of punitive damages. *Id.* at 144-45. In ascertaining such an interest, the court must examine the location of the conduct causing the injury, the domicile of the parties involved, and the place where the relationship is centered. *Id.* at 145-47 (citing Restatement (Second) of Conflict of Laws § 145).

Before addressing these factors, it should first be noted that, according to Camp Jaycee, “[t]he place of injury becomes less important when it is simply fortuitous.” *Ibid.* (quoting Fu v. Fu, 160 N.J. 108, 125-26 (1999)); see also Restatement (Second) of Conflicts of Laws § 145 comment d). The place of the injury is fortuitous when “it bears little relation to the occurrence and the parties with respect to the particular issue.” Camp Jaycee, *supra*, 197 N.J. at 146 (quoting Restatement (Second) of Conflicts of Laws § 145 comment e) (internal quotations omitted).

Here, the location of the injury bears little relation to the issue of punitive damages. NPC is headquartered in New Jersey and Zometa[®] was widely distributed throughout the United States. While the harm that Defendant is alleged to have caused Plaintiff occurred in Virginia, nothing in NPC’s sales, marketing, or distribution practices suggests that the alleged injury was more likely to occur in Virginia than in any other state and neither Plaintiff nor Defendant argue otherwise. Consequently, this court finds that the place of Plaintiff’s alleged injury was “fortuitous” because the place of injury bears little relation to Defendant’s alleged punitive conduct.

Having assessed where the injury occurred, the next matter to be examined is the location of the conduct that caused the injury. *Id.* at 145 (citing Restatement (Second) of Conflicts of Laws §145. NPC asks this court to apply Meng and find that Plaintiff's claims stem from Defendant's business activities in New Jersey. See Meng, *supra*, at 12; Def. Br. at 4. Plaintiff counters that Virginia is where the product with allegedly inadequate warnings was marketed, prescribed, and sold. Pl. Opp. at 8. Furthermore, Plaintiff argues that the conduct responsible for the alleged injury occurred in Basel, Switzerland, where the head of NPC's North American operation is located, and not NPC's headquarters in New Jersey. Pl. Opp at 7-8. Plaintiff reasons that because "operating decisions for Defendant are made in Basel," New Jersey bears no relationship to the conduct that caused the injury, thereby tipping the scales in favor of Virginia law. *Id.* at 7.

The same argument, with the same evidence, was presented to the federal court in the Eastern District of New York.³ In Deutsch, the federal court found that plaintiffs "failed to rebut Novartis's plausible claim that the corporate decisions at issue were made from the company's corporate headquarters in New Jersey." Deutsch v. Novartis Pharms. Corp., 723 F. Supp.2d 521, 525 (E.D.N.Y. 2010). The federal court judge wrote:

In an apparent effort to show that these corporate decisions were made outside of New Jersey, the Plaintiffs point to the deposition testimony of Dr. Rainer Boehm, an executive at Novartis Oncology. The Plaintiffs claim that Dr. Boehm's testimony establishes that "all decisions" at Novartis "are and were made in Basel, Switzerland," where Novartis's pharmaceutical division is apparently based. However, the referenced testimony merely indicates that David Epstein, the President and CEO of Novartis Oncology, heads the pharmaceutical division from Basel, Switzerland. This testimony does not establish the broad proposition that all corporate decisions are made in Basel. Even if it did, under the proper choice

³ In addition to the cases pending before this court, there are cases pending in federal courts as part of a federal multi-district litigation ("MDL") involving Zometa[®] and Aredia[®]. Several MDL courts have decided choice of law motions premised on the same arguments raised in this case. Significantly, in Deutsch v. Novartis Pharms. Corp., 723 F. Supp.2d 521 (F.D.N.Y. 2010), the MDL court reviewed the exact same deposition testimony submitted, under seal, to this court.

of law analysis, this would simply mean that Swiss law governing punitive damages would apply in this case. However, the Plaintiffs have not urged the Court to apply Swiss law, and for an obvious reason: punitive damages are not permitted under Swiss law.

[Deutsch, supra, 723 F. Supp.2d at 525 (citation omitted).]⁴

This court agrees with the MDL judge's well reasoned opinion in Deutsch. While not bound by the federal court's decision, this court finds Deutsch to be persuasive.

Here, Plaintiff failed to demonstrate that the relevant conduct at issue occurred in Switzerland and not in New Jersey. As this court found in Meng, Plaintiff's claims stem from Defendant's business activities in New Jersey regarding the marketing, distributing, and selling of Zometa[®]. See Meng, supra, at 12. Defendant's interactions with the FDA and the medical and dental community, including correspondence with the FDA and "Dear Doctor" letters, originated from Defendant's corporate headquarters in New Jersey. Thus, the location of the conduct causing the injury weighs in favor of applying New Jersey law on punitive damages.

Next, this court must examine "the domicile, residence, nationality, place of incorporation and place of business of the parties." Id. at 146 (citing Restatement (Second) of Conflicts of Laws § 145(2)(c)). Plaintiff has been a resident of Virginia for over 30 years. As to Defendant, its principal place of business is New Jersey and its place of incorporation is

⁴ Rule 1:38-11 permits the sealing of information by court order for "good cause". The Rule provides that "good cause" is satisfied where "[d]isclosure will likely cause a clearly defined and serious injury to any person or entity". See Rule 1:38-11(b)(i). During oral argument on October 18, 2011, the court, sua sponte, asked counsel for the parties if the deposition testimony of Dr. Rainer Boehm, M.D. and Mr. David Epstein contained confidential and proprietary information as to NPC that, if disclosed absent an order to seal, would "likely cause a clearly defined and serious injury" to Defendant. On the record, both counsel stated that the deposition testimony contained such information and agreed that the "good cause" showing of Rule 1:38-11 was satisfied in order for the court to issue an order sealing the deposition testimony of Dr. Boehm and Mr. Epstein.

Having sealed the deposition testimony of Dr. Boehm, dated February 1, 2010, and Mr. Epstein, dated February 9, 2010, the court was able to review the same deposition testimony presented to the court in Deutsch. Upon reviewing the deposition testimony, Dr. Boehm and Mr. Epstein, the court is unable to conclude that corporate decision-making for the selling, distributing, manufacturing and marketing of Zometa[®] was undertaken in Switzerland. Rather the deposition testimony supports this court's conclusion that "global", or large-scale, financial and budget issues occurred in Switzerland and that day-to-day decisions regarding specific drugs were undertaken in New Jersey.

Delaware. As between a corporation's principal place of business and place of incorporation, decisional law places more weight on a corporation's place of business in applying choice of law reasoning. Camp Jaycee, supra, 197 N.J. at 146 (citing Restatement (Second) of Conflicts of Laws § 145 comment e). Accordingly, because Plaintiff is from Virginia and Defendant is from New Jersey, this factor has a neutral effect on this court's choice-of-law analysis.

Under the Restatement (Second) of Conflicts of Laws §145 analysis, the place where the relationship between the parties is centered must also be considered by this court. Camp Jaycee, supra, 197 N.J. at 147. Again, although NPC allegedly failed to warn the medical and dental community of Virginia of a purported association between Zometa[®] and ONJ, Plaintiff's claims stem from Defendant's New Jersey business activities. As explained above, Defendant's interactions with the FDA, and with the medical and dental community, including "Dear Doctor" letters, originate from Defendant's corporate headquarters in New Jersey. Therefore, the relationship between Defendant and Plaintiff is centered on Defendant's actions in New Jersey.

The significant relationship test does not end with the foregoing analysis. Because the significant relationship test is "qualitative, not quantitative," and "the inquiry does not focus solely on the number of contacts with each state," Camp Jaycee, supra, 197 N.J. at 143 (citing Henry v. Richardson-Merrell, Inc., 508 F.2d 28, 32 (3d Cir. 1975)), the aforementioned factors are to be assessed as to the particular issue (punitive damages) and in light of the §6 principles of the Restatement. Id. at 132, 143 (citing Erny, supra, 171 N.J. at 101-02). Accordingly, this court must next examine the aforementioned contacts in light of the Restatement's §6 principles. Under §6 of the Restatement (Second) of Conflicts of Laws, the principles are: "(1) the interests of interstate comity; (2) the interests of the parties; (3) the interests underlying the field of tort

law; (4) the interests of judicial administration; and (5) the competing interests of the states.” Camp Jaycee, supra, 197 N.J. at 147 (quoting Erny, supra, 171 N.J. 86, 101-02).

In considering the interest of interstate comity, this court must evaluate “whether application of a competing state’s law would frustrate the policies of other interested states.” Id. at 152 (citing Fu, supra, 160 N.J. at 122). At first glance, the two states’ punitive damages laws do not appear to reflect differing underlying policies: New Jersey caps punitive damages at the greater of \$350,000 or five times the compensatory damages award, N.J.S.A. § 2A:15-5.14b, while Virginia law caps punitive damages at \$350,000, Va Code Ann. §8.01-38.1. However, in New Jersey, pursuant to the Appellate Division’s decision in McDarby, punitive damages in cases involving FDA-approved pharmaceuticals are preempted by the FDCA. McDarby, supra, 401 N.J. Super. at 87-94. As such, it cannot be disputed that the punitive damages laws of New Jersey have underlying policies that differ substantially from those of Virginia.

In support of the application of Virginia law, Plaintiff argues two points relevant to the interest of interstate comity: first, that because the McDarby decision expresses a policy contrary to that intended by the legislators who drafted the New Jersey Products Liability Act (“NJPLA”), N.J.S.A. §§ 2A:58C-1 to -11, applying Virginia law would not offend interstate comity but rather would effectuate the New Jersey legislature’s true intentions, Pl. Opp. at 9-10; and second, that applying New Jersey law to the issue of punitive damages would create undesirable variation among similarly situated plaintiffs who file suit in Virginia, Pl. Opp at 10-11.

As to Plaintiff’s first point, McDarby was decided in 2009 and is binding on this court. Unless and until the legislature enacts legislation overturning McDarby, this court remains bound by the case law. As to the second point, Plaintiff elected to file suit in New Jersey. Suits filed in New Jersey are subject to New Jersey’s choice of law analysis. Suits filed in Virginia may be

subject to a different choice of law analysis and, as a result, may indeed be governed by a different state's punitive damages laws. Such a discrepancy would be natural and anticipated and does not in itself offend interstate comity.

Furthermore, punitive damages are generally intended to regulate conduct within the bounds of an interested state. Interstate comity (and the unique policies of interested states) would be frustrated if one state were to extend its conduct-regulating punitive damages laws to activities that occurred within another state's bounds. Here, because this court finds that the alleged misconduct occurred in New Jersey, interstate comity would be least offended by the application of New Jersey law to the issue of punitive damages.

Next, this court must examine the interests of the parties in applying the punitive damages law of a chosen state. This principle calls for examining the reasonable expectations of the parties and addresses the need for a foreseeable result. As this court explained in Meng, the imposition of punitive damages, generally, is not intended to address the expectations of a plaintiff. Meng, supra at 14. Instead, a plaintiff's interest is addressed through the award of compensatory damages. Id. Here, Plaintiff's interest in and expectation of being adequately compensated for his alleged injury will be served through compensatory damages awarded pursuant to Virginia law. On the other hand, NPC should reasonably expect to be governed by and punished under the punitive damage laws of the state in which it maintains its principal place of business. In light of these reasonable expectations, this factor favors application of New Jersey law on punitive damages.

Regarding the interests underlying the field of tort law, this analysis focuses on whether the fundamental tenets of tort law—compensation and deterrence—would be furthered if the law of New Jersey were applied. As to compensating Plaintiff, that interest is addressed by the

compensatory damages that Plaintiff may be awarded under Virginia law. See McDarby, *supra*, 401 N.J. Super. at 91 (“In contrast [to punitive damages], the purpose of compensatory damages is to make the individual plaintiff whole. That purpose, in a personal injury compensation context, is neither to reward the plaintiff, nor to punish the defendant, but to replace plaintiff’s losses.”) (quoting Caldwell v. Haynes, 136 N.J. 422, 433 (1994) (internal citations and quotations omitted)).

As to the underlying interest in deterring misconduct, this will be accomplished by applying New Jersey’s punitive damages law. Punitive damages are designed specifically to punish and deter wrongful conduct. See Tarr v. Bob Ciasulli’s Mack Auto Mall, Inc., 194 N.J. 212, 218 (2008). “Deterrence of egregiously wrongful conduct is . . . what punitive damages are all about.” Almog v. Israel Travel Advisory Service, Inc., 298 N.J. Super. 145, 158-59 (App. Div. 1997); see also McDarby, *supra*, 401 N.J. Super. at 90 (“the purpose of a punitive damage award is ‘to punish the defendant and to deter that defendant from repeating such conduct.’”) (quoting N.J.S.A. § 2A:15-5.14). If there was willful corporate misconduct on the part of NPC that occurred in New Jersey, then New Jersey should punish Defendant to prevent such conduct in the future.

Plaintiff counters that the McDarby holding frustrates the deterrent goal of tort law, and that application of Virginia tort law would foster the fundamental principles of tort law as recognized by both New Jersey and Virginia. Pl. Opp. at 13. But a state’s decision to limit the availability of punitive damages does not necessarily “frustrate” the fundamental goals of tort law. Indeed, limiting punitive damages may be necessary to ensure that the law continues to address tort law goals consistent with legislative enactments. Accordingly, the interests

underlying the field of tort law will be furthered through the application of New Jersey law as to punitive damages and Virginia law as to compensatory damages.

In evaluating the interests of judicial administration, this court must focus on the issues of “practicality and ease of application, factors that in turn further the values of uniformity and predictability.” Camp Jaycee, supra, 197 N.J. at 155 (citing Erny, supra, 171 N.J. at 102; Fu, supra, 160 N.J. at 124). In this case, a New Jersey trial court applying New Jersey law on the issue of punitive damages to an injury caused by a pharmaceutical company doing business in New Jersey would be in the best interest of judicial administration. As this court explained in Meng:

This mass tort litigation consists of plaintiffs from 41 states throughout the country. Each of these states has its own law on punitive damages, and it would not aide judicial administration to apply a different punitive damages law for each plaintiff based on where that plaintiff originates. It is more practical and administratively sound to apply New Jersey’s punitive damages law to each plaintiff in this litigation.

[Meng, supra, at 17.]

As to the competing interests of the states, this factor requires courts to consider whether application of an individual state’s law under the circumstances will advance the policies that that particular law was intended to promote. Fu, supra, 160 N.J. at 125 (stating that this factor is “the most significant factor in the tort field”) (quoting Pfizer, Inc. v. Employers Ins., 154 N.J. 187, 198 (1998)). In general, the determination as to which state law to apply “should be the state which has the dominant interest in the determination of the particular issue,” rather than the case as a whole. Erny, supra, 171 N.J. at 96 (quoting Restatement (Second) of Conflicts of Laws § 171 comment b); see also Fu, supra, 160 N.J. at 125; White v. Smith, 398 F. Supp. 130, 134 (D.N.J. 1975) (“In order to determine which state has the greatest interest in the application of its own law, each issue must be analyzed separately”). Thus, if a state’s statute provides for

punitive damages under certain circumstances, a court should consider that state's legislative interest in having its law apply. See Pfizer, supra, 154 N.J. at 198). As such, the aforementioned factors will be analyzed as to the issue of punitive damages, rather than the case as a whole.

With regard to punitive damages, New Jersey, as the state where the alleged conduct occurred, has the prevailing interest in determining whether such damages should be awarded in this case:

[A]n important factor in determining which is the state of most significant relationship is the purpose sought to be achieved by the rule of tort law involved. If this purpose is to punish the tortfeasor and thus to deter others from following his example, there is better reason to say that the state where the conduct occurred is the state of dominant interest and that its local law should control than if the tort rule is designed primarily to compensate the victim for his injuries.

[Restatement (Second) of Conflict of Laws § 146 comment e; see also Restatement (Second) of Conflict of Laws § 145 comment c (“If the primary purpose of the tort rule involved is to deter or punish misconduct . . . , the state where the conduct took place may be the state of dominant interest and thus that of most significant relationship”).]

In particular, as the New Jersey Appellate Division wrote in McDarby, “[t]he State [of New Jersey] has a legitimate interest in punishing unlawful conduct and deterring its repetition.” McDarby, supra, 401 N.J. Super. at 90 (quoting Tarr, 194 N.J. at 218).

Plaintiff argues that the McDarby court's rejection of punitive damages in product liability cases involving FDA-approved pharmaceuticals is contrary to New Jersey's tort law policies as embodied case law and statutory law, and undermines New Jersey's interest in applying its punitive damages laws. But a policy of declining to apply punitive damages in certain cases does not undermine the state's legitimate interest in regulating and deterring particular conduct. The NJPLA expresses New Jersey's interest in the application of punitive damages to certain suits. The fact that the NJPLA has been interpreted by the McDarby court as disallowing punitive damages in a particular type of suit does not nullify this state's interest in

governing the application of punitive damages where the purported misconduct occurred within its bounds.

Plaintiff further argues that Virginia's substantial interest in the issue of punitive damages is demonstrated by its adherence to the choice-of-law doctrine of *lex loci delecti*. Pl. Opp. at 12. Under that doctrine, the *lex loci delecti* (the law of the place of injury) governs as to all substantive legal issues, while the *lex fori* (the law of the place where the legal action is brought) governs as to the procedural issues. See Jones v. R. S. Jones & Assocs., 246 Va. 3, 5 (Va. 1993). This court agrees with Plaintiff's contention that had this suit been brought in Virginia, the doctrine of *lex loci* would have been applied, and the law of the place of injury—the law of Virginia—would have governed the issue of punitive damages. However, this aspect of Virginia's own choice of law rules does not suggest that Virginia has a stronger interest in applying its *own* law, but rather that it has a policy of applying the law of the place of injury, whether that of Virginia or any other state. Indeed, the Virginia Supreme Court explained that it adheres to the rule for reasons of judicial expediency—for its “uniformity, predictability, and ease of application.” McMillan v. McMillan, 219 Va. 1127, 1131 (Va. 1979). Such a policy does not demonstrate a particularly strong interest on the part of Virginia in having its *own* law applied to the issue of punitive damages. Accordingly, New Jersey has a stronger interest in applying its own punitive damages laws in this case.

On a final note, Plaintiff argues that NPC has been “largely unsuccessful” in arguing for application of New Jersey law to the issue of punitive damages before other courts. Pl. Opp. at 14. To support this proposition, Plaintiff cites three cases: first, Forman v. Novartis Pharms. Corp., ___ F.Supp.2d ___, 2011 WL 255936 (E.D.N.Y. June 27, 2011), wherein the court applied New Jersey law to punitive damages, but decided that it was not bound to follow McDarby;

second, Baldwin v. Novartis Pharms. Corp., 2:06-CV-04049-NKL (W.D. Mo. Aug. 26, 2011), wherein the court, in a three sentence decision, applied Missouri law to plaintiff's punitive damages claim, noting Defendant's failure to cite "a Missouri tort case that applied Missouri law on every issue but punitive damages;" and third, White v. Novartis Pharms. Corp., No. Civ. 06-665 WBS GGH (E.D. Cal Feb 9, 2011), wherein the court declined to decide Defendant's motion with respect to punitive damages prior to trial.

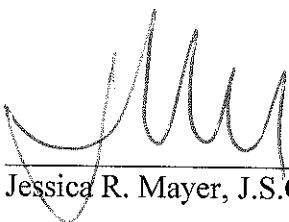
In response, Defendant cites three cases in various courts that held for NPC on this very issue: first, Meng v. Novartis Pharmaceuticals Corp., *supra*, wherein this court applied New Jersey law to the issue of punitive damages even though Maine and Mississippi law governed the liability issues; second, Deutsch v. Novartis Pharms. Corp., 723, F. Supp.2d 521 (E.D.N.Y. 2010), wherein the court applied New Jersey law to the issue of punitive damages even though New York law governed the liability issues; and third, Talley v. Novartis Pharms. Corp., 2011 US Dist. LEXIS 70201, (W.D.N.C. June 28, 2011), wherein the court, citing both Meng and Deutsch, applied New Jersey law to the issue of punitive damages even though North Carolina law governed liability issues. In light of the number of courts that have ruled for NPC on this issue, this court disagrees with Plaintiff's assertion that Defendant has been "largely unsuccessful" on this issue.

Applying the foregoing analysis to the pending motion, New Jersey law shall govern punitive damages because New Jersey has a more significant relationship as to that issue. New Jersey has an interest in imposing punitive damages for the purpose of punishing a wrongdoing defendant and deterring such a defendant from repeating wrongful conduct. See N.J.S.A. § 2A:15-5.14. If Defendant committed conduct warranting punishment, then New Jersey's law would be the proper vehicle through which to deter such behavior.

Conclusion

Under this analysis, New Jersey has the most significant relationship on the matter of punitive damages and, therefore, the laws of the State of New Jersey shall apply as to this issue.

The court will sign the order submitted by Defendant.



Jessica R. Mayer, J.S.C.