

**UNITED STATES DISTRICT COURT  
DISTRICT OF MAINE**

**ADAM JOHNSTON, a minor,** )  
**by SUSAN JOHNSTON, his mother** )  
**and next friend, and SUSAN** )  
**JOHNSTON and GARNETT** )  
**JOHNSTON,** )

**PLAINTIFFS** )

**v.** )

**DEERE & COMPANY,** )  
 )  
**DEFENDANT** )

**CIVIL No. 96-192-P-H**

**ORDER ON MOTION FOR RECONSIDERATION**

On April 9, 1997, I granted the defendant's motion for summary judgment on the plaintiffs' punitive damages claim in this matter. The plaintiffs have now moved for reconsideration contending, in essence, that I granted the defendant summary judgment on punitive damages by ruling on an issue the defendant had not raised.

I quote from the initial legal memoranda and my Order in response. First, the defendant's motion seeking summary judgment for punitive damages stated in its argument heading:

SUMMARY JUDGMENT SHOULD BE GRANTED ON THE  
PLAINTIFFS' CLAIM FOR PUNITIVE DAMAGES BECAUSE  
[AMONG OTHER THINGS] THERE IS NO EVIDENCE OF  
MALICE TO MEET THE "CLEAR AND CONVINCING"  
STANDARD.

Def.'s Mot. Summ. J. Based on Maine State Law at 15. The brief went on to state:

Nor is there any basis in the facts or in the law to permit a claim for punitive damages based upon Deere's decision to equip the lawn tractor with a no-mow-in-reverse device.

“A plaintiff may recover exemplary damages based upon tortious conduct only if he can prove by clear and convincing evidence that the defendant acted with malice.” See Tuttle v. Raymond, 494 A.2d 1353, 1363 (Me. 1985) (reversing punitive damage award where motorist was speeding, ran a red light, and collided so forcefully with plaintiff's vehicle that she sheared it in half because court found that defendant's conduct was not accompanied by malice). Here, the Plaintiffs have alleged that Deere acted with implied malice but there is no evidence to support that allegation, much less the “requisite quantum of evidence to enable [them] to reach the jury with [their] claim.” See Kelleher v. Boise Cascade Corp., 683 F. Supp. 858, 860 (D. Me. 1988) (granting summary judgment on claim for punitive damages arising from failure to warn).

Id. at 15-16. In other words, this appeared to be a typical Celotex-type argument, see Celotex v. Catrett, 477 U.S. 317 (1986), at the close of all discovery maintaining that the party with the burden of proof did not have evidence to support its position—here, the claim for punitive damages (that Maine law requires to be shown by clear and convincing evidence, see Tuttle, 494 A.2d at 1363). Thus, when I turned to the plaintiffs' response I expected to see what, if any, evidence the plaintiffs had been able to gather during discovery to demonstrate that they could get to a jury on this issue. In the plaintiffs' response, I found the following argument heading on punitive damages:

SUMMARY JUDGMENT SHOULD NOT BE GRANTED ON THE CLAIM FOR PUNITIVE DAMAGES: [AMONG OTHER THINGS] THERE IS ADEQUATE EVIDENCE OF MALICE TO MEET THE CLEAR AND CONVINCING STANDARD.

Pls.' Objection Def.'s Mot. Summ. J. Based on Maine State Law at 17. Indeed, the plaintiffs seemed to agree that implied malice was the issue at stake here and quoted from Justice Alexander's Maine

treatise on jury instructions concerning the definition of implied malice. See Alexander, Maine Jury Instruction Manual § 7-63, Instr. 2-2 (3d ed. 1996). The plaintiffs' brief then went on to say:

To meet the "clear and convincing" standard, Justice Alexander proposes that the jury must conclude that it is "highly probable that the facts sought to be proven are the correct view of the events at issue." Id.

In this case, there is no dispute as to the principal allegations of the plaintiffs, specifically that for at least 25 years prior to the injury in question, defendant was aware of studies showing that reverse operation of lawn tractors was a frequent cause of grievous injuries to, and deaths of, hundreds of young children each year. Nevertheless, Deere, individually and as part of its OPEI activities, refused to install a no-mow-in-reverse device. Such a device had been in production since at least 1982 by MTD, a Deere competitor, at a cost of approximately \$6.00 to \$8.00. Since adopting a no-mow-in-reverse [sic], MTD has had no serious accidents involving backover of young children. Deere has admitted the feasibility of installing a no-mow-in-reverse device on its product at the time of manufacture. Steve Eklund, a Deere engineer, admitted that installation of such a device might constitute a competitive disadvantage to Deere, presumably resulting in loss of profits. (See Exhibit C, Eklund Deposition, p. 102) Despite minimal costs, Deere has failed to direct its distributors to apply new warning decals to older machines, or to otherwise conduct any post-sale warnings.

Deere's personnel had acknowledged that, in the absence of a no-mow-in-reverse device, some number of children are likely to be killed or grievously injured by their machines. (See Exhibit E, Arfstrom Deposition, Vol. 1, pp. 181-182) While Deere contends that it does not know how often this might occur, Id., plaintiffs' expert has calculated, based on CPSC records, that approximately 1 in every 5700 machines produced by Deere will, at some point in its useful life, be involved in a backover injury. (See Exhibit F, Reed Deposition, pp. 49-50, 54-59) Such corporate behavior constitutes "deliberate conduct . . . almost certain[] [to] result in injury to the plaintiff or other persons." Inasmuch as Deere does not contest either the product hazard, the feasibility of a solution, or the likelihood of harm, it is "highly probable" that the facts sought to be proven will be.

Id. at 18-19. As is apparent, the plaintiffs provided only three record citations for their various factual assertions. Specifically, they gave me a single page reference to the Eklund Deposition for a Deere engineer's recognition of a competitive disadvantage to installing the device in question; a two-page deposition reference for the acknowledgment that "some number of children are likely to be killed or grievously injured by their machines" without a no-mow-in-reverse device, but denying knowledge of how often this might occur; and finally, the plaintiffs' own expert's calculation concerning the frequency of backover injuries. No other assertions were documented.<sup>1</sup> Under this District's Local Rules, a party is required specifically to document from the record every relevant fact in summary judgment practice, see Local Rule 56, so that the court need not search the record on its own. See Stepanischen v. Merchants Despach Transp. Corp., 722 F.2d 922, 931-32 (1st Cir. 1983); see also CMM Cable Rep, Inc. v. Ocean Coast Properties, Inc., 97 F.3d 1504, 1526 (1st Cir. 1996) (judges have "no obligation to rummage through" the record, and "cannot be expected to be mind readers") (quoting McCoy v. Massachusetts Inst. of Tech., 950 F.2d 13, 22 (1st Cir. 1991), cert. denied, 504 U.S. 910 (1992)).

I examined carefully the portions of the record cited by the plaintiffs and stated in my opinion granting the defendant summary judgment on punitive damages:

Here, there is no evidence of express malice, so I am left to consider whether a jury may imply malice under Maine's standard of "clear and convincing" evidence. [Tuttle, 494 A.2d] at 1363.

I find that there is not sufficient evidence to meet this standard. At best the Johnstons have made a showing of reckless conduct on the part of Deere. Contrary to the Johnstons' argument in their brief, they have pointed to no evidence in the record that Deere was aware of "hundreds of young children each year" dying due to

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<sup>1</sup> The Statement of Material Facts likewise contained none.

mowing in reverse. Pls.' Objection Def.'s Mot. Dismiss at 18. The most that Deere has said in the deposition excerpts that the Johnstons refer to is that the company would expect some amount of back-over accidents per year, Arfstrom Dep. at 181-82, and that it may be competitively disadvantageous to install a no-mow-in-reverse device, Eklund Dep. at 102.

The Johnstons' expert calculates that one mower out of every 5700 that is produced will be involved in a back-over accident at some time in its life, and that these accidents were happening in the early 1980s at a rate of 120 to 150 accidents per year. Reed Dep. at 49. The expert relies on figures from a study by the Consumer Product Safety Commission ("CPSC"). *Id.* The Johnstons' complaint implies that Deere had this same knowledge at least in part through an industry trade group, the Outdoor Power Equipment Institute ("OPEI"). Am. Compl. ¶ 46. However, nowhere in the record [meaning the record as documented by the plaintiffs under Local Rule 56] is Deere's awareness of the CPSC figures established, nor is there any other link between the CPSC study and Deere. I do not find from this record that knowledge of CPSC information may be imputed to Deere to support a finding of malice.

I find as a matter of law, therefore, that this the [sic] record cannot support a finding that Deere acted with malice.

Order of April 9, 1997, at 6.<sup>2</sup>

The ruling was clearly correct as a matter of both law and procedure. Now, however, the plaintiffs claim that in fact they do have abundant documentation (they seek leave to file "voluminous attachments" to their motion) supporting their assertions that the defendant had full knowledge of the nature and extent of the backover hazard. They suggest that the only reason they

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<sup>2</sup> In fact, in a one-page reply argument on the punitive damages issue, the defendant pointed out that Consumer Product Safety Commission death data indicates "four to six deaths occur annually to children under age 10 due to runover." Def.'s Reply Supp. Mot. Summ. J. Based on Maine State Law at 3. In their motion for reconsideration, the plaintiffs state that their earlier assertion concerning hundreds "was inartfully constructed. Plaintiffs did not mean to suggest that hundreds of children died each year; they did mean to suggest that hundreds suffered grievous injuries, and that some died of them." Pls.' Mem. Supp. Mot. Partial Recons. at 2 n.1.

did not refer me to the record previously was because they always believed that there was “no realistic dispute” on the issue. Pls.’ Mem. Supp. Mot. Partial Recons. at 2.

It is too late for such an argument. I have no pleasure in ruling against a party if in fact it has sufficient evidence<sup>3</sup> to take a matter to trial, but judicial resources are simply inadequate to permit the kind of revisiting of issues that reconsideration motions like this request. When a judge rules on a dispositive motion, he or she tries to review intensively all the supporting materials and arguments provided. Many hours of reading and research on the part of the judge and his or her law clerks are involved, as well as much drafting and redrafting. A judge devotes concentrated energy to become fully familiar with the facts and law of the particular case in question, and then moves to the next case—often on a wholly different subject matter. It is reasonable, therefore, to expect the lawyers to present all the relevant arguments and materials at one time. CMM Cable Rep, Inc., 97 F.3d at 1526 (“courts are entitled to expect represented parties to incorporate all relevant arguments in the papers that directly address a pending motion”). It simply will not do to require a court to revisit an issue whenever the losing lawyer or party wishes to supply an earlier omission or develop an argument he or she neglected to make earlier. Id. at 1527 (“We are particularly reluctant to diverge from our customary practice given that CMM’s trademark arguments challenging the grant of summary judgment came not only two weeks after the district court’s summary judgment decision

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<sup>3</sup> Without meaning to denigrate the plaintiffs’ efforts, I observe that even now the plaintiffs seem unfamiliar with the quality of evidence they must adduce in order to resist a motion for summary judgment. First, they attribute knowledge on the part of their own expert to the defendant. Pls.’ Mem. Supp. Mot. Partial Recons. at 2. Second, they rely on assertions that are not of evidentiary quality. For example, they assert as a basis for the defendant’s knowledge: “Defendant’s other expert, Cliff Boylston, confirmed that such knowledge was widely available in the industry, and *presumably* to Deere.” Id. at 4 (emphasis added). As other evidence of Deere’s knowledge they cite this testimony: “I would guess [Deere was] provided a copy by the OPEI, but I don’t know.” Id. The plaintiffs refer to other evidence that is sufficient to meet Rule 56 standards, but these examples clearly do not meet the standards, and should not be used in an effort to resist a motion.

but also because, in all probability, they were advanced in response to the district court's explicit observation that CMM failed to advance any trademark-related arguments in opposition to WPOR's motion for summary judgment."'). This may seem harsh to the losing party, but any other procedure (1) unfairly consumes the judicial resources that have to be allocated to other cases; (2) is unfair to the opposing party who has devoted all of his or her attention to the argument as originally framed; and (3) perhaps most importantly, creates havoc for future cases if lawyers can raise new arguments when their first attempt is unsuccessful.

For all these reasons, the plaintiffs' motion for reconsideration is **DENIED** and the motion to file additional material is **DENIED**.

**SO ORDERED.**

**DATED THIS 18<sup>TH</sup> DAY OF APRIL, 1997.**

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**D. BROCK HORNBY**  
**UNITED STATES CHIEF DISTRICT JUDGE**