

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION**

RANDY J. AFRICANO,

Plaintiff,

v.

ATRIUM MEDICAL CORPORATION,

Defendant.

Case No. 17-cv-7238

Judge Mary M. Rowland

ORDER

For the reasons stated below, this Court finds that New Hampshire law applies to the issue of Plaintiff's entitlement to punitive damages.

STATEMENT

The parties' proposed jury instructions [330] raise a choice of law issue ripe for adjudication. Plaintiff requests a punitive damages instruction based on Illinois law. Defendant, on the other hand, argues that New Hampshire law governs punitive damages and that its application forecloses Plaintiff's entitlement to punitive damages.¹

Courts consider choice of law on an issue-by-issue basis, so different states' law may govern different issues in a case. *Kleronomos v. Aim Transfer & Storage Inc.*, No. 19-CV-01844, 2021 WL 1546428, at *1 (N.D. Ill. Apr. 20, 2021). As a federal court sitting in Illinois, this Court applies Illinois choice of law rules to determine which state's law governs Plaintiff's request for punitive damages. *Mathis v. Metro. Life*

¹ The parties agree that Illinois law applies to the remaining claims (manufacturing defect based upon a strict liability theory and failure to warn) and to Plaintiff's request for compensatory damages.

Ins. Co., 12 F.4th 658 (7th Cir. 2021), *reh'g denied* (Sept. 24, 2021). An Illinois court engages in a choice of law analysis only if there exists an outcome-determinative conflict between two state's laws. *Bd. of Forensic Document Examiners, Inc. v. Am. Bar Ass'n*, 922 F.3d 827, 831 (7th Cir. 2019).

There exists a clear conflict here. Illinois allows a plaintiff to recover punitive damages in product liability cases, *Townsend v. Sears, Roebuck & Co.*, 879 N.E.2d 893, 899 (Ill. 2007), and such damages serve to punish the defendant and deter the defendant and others from engaging in similar conduct. *Baier v. Bostitch*, 611 N.E.2d 1103, 1110 (Ill. App. Ct. 1993). In contrast, New Hampshire law provides that “No punitive damages shall be awarded in any action, unless otherwise provided by statute.” N.H. Rev. Stat. Ann. § 507:16; *see Micro Data Base Sys., Inc. v. Dharma Sys., Inc.*, 148 F.3d 649, 653 (7th Cir. 1998) (“New Hampshire unlike most states does not recognize a common law right to seek punitive damages.”). Plaintiff has not identified any statutory basis for punitive damages here, and thus, he cannot recover punitive damages if New Hampshire law applies. Because there exists an outcome-determinative conflict, this Court must determine which state's law to apply.

Illinois follows the Second Restatement of Conflict of Laws which focuses upon determining the state with the most significant relationship to the parties and to the dispute. *Cont'l Vineyard, LLC v. Vinifera Wine Co., LLC*, 973 F.3d 747, 758 (7th Cir. 2020); *Kleronomos*, 2021 WL 1546428, at *3. Courts consider the following factors in assessing the most significant relationship: (1) the place where the injury occurred; (2) the place where the conduct causing the injury occurred; (3) the parties' domiciles,

residences, place of incorporation, and places of business; and (4) the place where the parties' relationship, if any, is centered. *Inventus Power, Inc. v. Shenzhen Ace Battery Co.*, No. 20-CV-3375, 2021 WL 1978342, at *7 (N.D. Ill. May 18, 2021). The test presumes that the law of the place of Plaintiff's injury applies unless another state has a more significant relationship with the occurrence and the parties. *Esser v. McIntyre*, 661 N.E.2d 1138, 1141 (Ill. 1996); *Abad v. Bayer Corp.*, 563 F.3d 663, 670 (7th Cir. 2009).

Applying those factors, the place of Plaintiff's injury occurred in Wisconsin, where Plaintiff's claims to have been implanted with Defendant's unsterile mesh. This is the case even if, as an Illinois resident, Plaintiff experiences the continuing effects of his alleged injury in Illinois. *See Robinson v. McNeil Consumer Healthcare*, 615 F.3d 861, 866 (7th Cir. 2010) (observing under Illinois choice of law rules that “the initial place of the injury is properly deemed the place in which the injury occurred”) (emphasis added). The location of the conduct causing the alleged injury occurred in New Hampshire, where Defendant maintains its headquarters and its factory. These first two factors thus point to either Wisconsin or New Hampshire, not Illinois. The last two factors do not weigh in favor of either Illinois or New Hampshire. The third factor is a wash: while Plaintiff is an Illinois resident, Defendant is incorporated in Delaware and maintains its principal place of business in New Hampshire. [67] ¶¶ 1–2. And, as to where the parties' relationship is centered, that factor also “does not figure into the Court's analysis” because the

parties did not have a relationship prior to Plaintiff's alleged injury. *Kleronomos*, 2021 WL 1546428, at *5.

Courts also evaluate these factors “in light of the policies underlying the laws of those jurisdictions.” *Esser*, 661 N.E.2d at 1141; see *In re Testosterone Replacement Therapy Prod. Liab. Litig. Coordinated Pretrial Proc.*, No. 14 C 1748, 2017 WL 1836435, at *22 (N.D. Ill. May 8, 2017) (“The Court also takes into consideration the relevant policies of the forum, the relevant policies of the interested states, and the relative interests of those states in the determination of the particular issue.”). Punitive damages “serve a public goal of punishing the defendant for its wrongdoing and protecting the public from future misconduct, either by the defendant or by others,” and thus, “the state in which a defendant is domiciled . . . tends to have a stronger policy interest in whether punitive damages are available than the state in which the plaintiff's injury occurred.” *In re Testosterone Replacement Therapy*, 2017 WL 1836435, at *22; see also *Kleronomos*, 2021 WL 1546428, at *5 (finding that, although the plaintiff is an Illinois resident and sustained his injury in Illinois, Wisconsin law governed punitive damages where the alleged tortious conduct concerned a Wisconsin corporation's hiring and management decisions).

Applying those principles, this Court finds that New Hampshire clearly has the stronger interest in governing punitive damages than Illinois (where Plaintiff lives) or even Wisconsin (where Plaintiff sustained his injury). Defendant is headquartered in New Hampshire. The conduct that allegedly caused Plaintiff's injury occurred in Defendant's headquarters and in its New Hampshire factory, the

places where Defendant's officers and/or employees allegedly made decisions about product warnings and where Defendant made the product that allegedly injured Plaintiff. New Hampshire would have a greater interest in determining whether to punish and deter conduct occurring within its borders.

At the final pretrial conference, Plaintiff emphasized *Smith v. I-Flow Corp.*, 753 F. Supp. 2d 744 (N.D. Ill. 2010). There, Judge Kennelly considered whether the plaintiff, a Michigan citizen, could recover punitive damages from a California corporation based upon allegations that the defendant's medical device injured her after it was implanted in her shoulder during surgery in her home state of Michigan. *Id.* at 748. The decision of whether to apply Michigan and California law to punitive damages was, as here, outcome-determinative because Michigan generally disallows punitive damages while California permits them. *Id.* at 747. Judge Kennelly ultimately concluded that California has the "significant[ly] greater interest than Michigan in deciding whether to punish a tortfeasor that operates, and engaged in the allegedly wrongful conduct, within California's boundaries," and thus, that the plaintiff had rebutted the presumption in favor of applying the law of the state of her injury—Michigan. *Id.* at 749. Citing this case at the final pretrial conference, Plaintiff suggested that Judge Kennelly's analysis hinged upon determining which state had a stronger interest in allowing the *plaintiff* the best chance at recovering punitive damages. To the contrary, Judge Kennelly specifically explained that, because punitive damages serve as "punishment, not compensation," the proper focus is upon the state where the defendant "is headquartered" because that state's interest

in “regulating the conduct of its resident corporations far outweighs whatever interest” the plaintiff’s home state had in deciding whether to punish a non-resident corporation.

Applying *Smith*’s reasoning, New Hampshire, Defendant’s home state, clearly has a more significant interest in determining whether and how to punish its own corporations. Accordingly, Defendant has rebutted the presumption under Illinois choice of law rules that the place of injury applies to Plaintiff’s entitlement to punitive damages. Under New Hampshire law, Plaintiff cannot recovery punitive damages.

Instead, as reflected in Defendant’s proposed jury instruction, New Hampshire recognizes that when “an act is wanton, malicious, or oppressive, the aggravating circumstances may be reflected in an award of enhanced compensatory damages.” *Stewart v. Bader*, 907 A.2d 931, 942 (N.H. 2006) (quoting *Figlioli v. R.J. Moreau Cos., Inc.*, 866 A.2d 962, 966 (N.H. 2005)). The mere fact that an intentional tort occurred does not support an award of enhanced compensatory damages; rather, there must be evidence of ill will, hatred, hostility, or evil motive on the part of the defendant. *Id.* The purpose of enhanced compensatory damages—also referred to by courts as liberal compensatory damages—serves *not* to punish the defendant but to reflect aggravating circumstances of a plaintiff’s injury. *McKinnon v. Harris*, No. CIV. 1:05-CV-93-JAW, 2005 WL 2335350, at *2 (D.N.H. Sept. 21, 2005). Thus, although Plaintiff is not entitled to punitive damages, he might still be entitled to recover enhanced compensatory damages, if the evidence at suffices to warrant such an instruction. *See Precourt v. Fairbank Reconstruction Corp.*, 856 F. Supp. 2d 327, 345

(D.N.H. 2012) ("If the evidence at trial is sufficient to warrant an instruction on enhanced compensatory damages, the jury will be given an instruction with proper definitions of the relevant terms. If the evidence is insufficient, as a matter of law, the jury will not be instructed on enhanced compensatory damages.").

E N T E R:

Dated: October 4, 2021

A handwritten signature in black ink that reads "Mary M Rowland". The signature is written in a cursive style with a large, looped initial "M".

MARY M. ROWLAND
United States District Judge