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Vandevender v. Sheetz, Inc.: A Closer Look at the Framework for Review of Punitive Damages Awards

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I. INTRODUCTION

Cheryl L. Vandevender was working for a Sheetz convenience store when she suffered a back injury while opening a large pickle jar.¹ After undergoing back surgery, Ms. Vandevender was prevented from working by Sheetz, unless she was “100%.”² Due to the fact that Sheetz’ company policy did not allow her to return to work, she was subsequently fired in accordance with Sheetz’ one-year absence policy.³

As a result, Ms. Vandevender filed a civil action against Sheetz for refusing to rehire her in violation of the anti-discrimination provisions of the West Vir-

¹ See *Vandevender v. Sheetz Inc.*, 490 S.E.2d 678, 682 n.1 (W. Va. 1997) (per curiam).

² *Id.* at 632.

³ See *id.* at 683.

ginia Workers' Compensation Act⁴ and the West Virginia Human Rights Act⁵, and for unlawful reprisal in violation of the West Virginia Human Rights Act.⁶ Following a three-day jury trial, Ms. Vandevender was awarded \$2,699,000 in punitive damages.⁷ Sheetz filed motions for judgment notwithstanding the verdict or, in the alternative, a new trial or remittitur.⁸ The circuit court denied these motions and Sheetz appealed.⁹

In *Vandevender v. Sheetz, Inc.*¹⁰ ("Vandevender"), the West Virginia Supreme Court of Appeals considered whether the \$2,699,000 punitive award against Sheetz for unlawful termination/failure to rehire and retaliation was unconstitutionally excessive.¹¹ The *Vandevender* Court upheld the punitive damages awarded for the retaliation claim, but found that the punitive damages awarded for the unlawful termination and failure to rehire claims were excessive under its prior holdings.¹² The West Virginia Supreme Court of Appeals concluded that the damages awarded for the unlawful termination and failure to rehire claims could not be upheld under its ruling in Syllabus Point fifteen of *TXO Production Corp. v. Alliance Resources Corp.*¹³

The *Vandevender* Court reasoned that because the record lacked evidence that the unlawful termination/failure to rehire claims were prompted by malice or intent to cause specific harm and because the evidence on these claims failed to demonstrate fraud, trickery, or deceit on Sheetz' part, it could not uphold the punitive to compensatory ratio of seven-to-one.¹⁴ The Court then reduced this portion of the award by the amount of \$466,260 so that the punitive to compensatory ratio would be roughly five-to-one.¹⁵ The Court did not reduce the amount of punitive

⁴ W. VA. CODE §§ 23-5A-1 to -3 (1998).

⁵ W. VA. CODE §§ 5-11-1 to -19 (1994 & Supp. 1998).

⁶ W.VA. CODE § 5-11-9(7)(C) (Supp. 1998).

⁷ See *Vandevender*, 490 S.E.2d at 684.

⁸ See *id.* Remittitur is defined as "[t]he procedural process by which an excessive verdict of the jury is reduced." BLACK'S LAW DICTIONARY 1295 (6th ed. 1990).

⁹ See *Vandevender*, 490 S.E.2d at 684.

¹⁰ *Id.* at 678.

¹¹ *Id.* at 682.

¹² See *id.*

¹³ *TXO Production Corp. v. Alliance Resources Corp.*, 419 S.E.2d 870 (W. Va. 1992), *aff'd*, 509 U.S. 443, (1993) (plurality opinion).

The outer limit of the ratio of punitive damages to compensatory damages in cases in which the defendant has acted with extreme negligence or wanton disregard but with no actual intention to cause harm and in which compensatory damages are neither negligible nor very large is roughly 5 to 1. However, when the defendant has acted with actual evil intention, much higher ratios are not *per se* unconstitutional. See *id.* at 874 Syl. Pt.15.

¹⁴ *Vandevender*, 490 S.E.2d at 693.

¹⁵ See *id.*

damages awarded for the retaliation claim, despite a fifteen-to-one ratio, because the evidence showed willful, mean-spirited acts demonstrating an intent to cause physical or emotional harm to Ms. Vandevender.¹⁶ The *Vandevender* Court examined the trial court's review of the award and found that they properly engaged in the required review and that the facts supporting the retaliation claim warrant upholding the fifteen-to-one ratio without offending due process principles.¹⁷

This Comment examines the *Vandevender* decision. Part II addresses the historical development and reasoning for punitive awards in America. Part III provides a summary of the recent constitutional challenges to punitive damages, focusing on the challenges brought under the Due Process Clause of the Fourteenth Amendment. The Comment tracks the development of a framework for examining punitive awards which attempts to ensure due process. This framework lays the foundation for West Virginia's punitive damages jurisprudence utilized in *Vandevender*.

Part IV provides a summary of the *Vandevender* case, and undertakes an analysis of the majority per curiam opinion and the dissenting opinion. Finally, Part V explores the *Vandevender* decision's limitations and impact on future litigation involving punitive damages in West Virginia.

II. HISTORICAL DEVELOPMENT OF PUNITIVE DAMAGES

In ancient times, punitive damages¹⁸ existed in the form of multiple damages, which were awarded as a punitive remedy under The Code of Hammurabi, the Hindu Code of Manu, the Bible, and other legal systems throughout the world.¹⁹ However, punitive damages as a modern legal doctrine is attributed to the devel-

¹⁶ See *id.*

¹⁷ See *id.* at 693-94.

¹⁸ "Punitive damages are damages, other than compensatory or nominal damages, awarded against a person to punish him for his outrageous conduct and to deter him and others like him from similar conduct in the future." RESTATEMENT (SECOND) OF TORTS § 908 (1979).

¹⁹ See John Zenneth Lagrow, Comment, *BMW of North America, Inc. v. Gore: Due Process Protection Against Excessive Punitive Damages Awards*, 32 NEW ENG. L. REV. 157, 160 (1997) [hereinafter Lagrow] (citing LINDA L. SCHLUETER & KENNETH R. REDDEN, PUNITIVE DAMAGES § 1.0 at I (3rd ed. 1995) [hereinafter SCHLUETER & REDDEN]). Ancient codes such as the Hittite Law and the Hindu Code of Manu provided for multiple damages. See *id.* at 160 n.16 (citing SCHLUETER & REDDEN *supra* § 1.1 n.2). One of the earliest known codified legal systems, the Code of Hammurabi, dating back to 2000 B.C., provided multiple damages exceeding the compensation for actual harm suffered. See *id.* at 160 n.16 (citing SCHLUETER & REDDEN *supra* § 1.1 at 1-2). The Bible states that a man who steals and kills or sells an ox or a sheep shall restore five ox for an ox and four sheep for a sheep. See *id.* at 160 n. 16 (citing SCHLUETER & REDDEN *supra* § 1.1 n.7 (quoting *Exodus* 22:1)). Under the Code of Hammurabi, a common carrier who failed to deliver the goods paid five times the cost of the goods as multiple damages, and a man who stole an ox from the temple or palace paid thirty fold. See Mimi Bass Miller, Note, *Torts-Punitive Damages: A New Finish on Punitive Damages. BMW of North America, Inc. v. Gore*, 116 S.Ct. 1589 (1996), 19 U. ARK. LITTLE ROCK L. J. 519, 523 n.38 (1997) [hereinafter Miller] (citing SCHLUETER & REDDEN *supra* § 1.1 n.1). Under the Babylonian Code, a delivery person paid five times the cost of the goods if he was guilty of conversion. See *id.* at 523 n.39 (citing SCHLUETER & REDDEN *supra* § 1.1 n.2).

opments that occurred in thirteenth century England.²⁰

In 1278, England became one of the earliest countries to adopt the doctrine of punitive damages into its legal system by utilizing a statute which provided for multiple damages.²¹ Furthermore, England developed a system in which monetary penalties known as “ameracements” were assessed against wrongdoers to punish both civil and criminal wrongdoing and were payable to the king or his representative.²²

Although the English common law had used punitive damages since the thirteenth century,²³ the modern doctrine of punitive damages was first introduced in 1763 in the companion cases of *Wilkes v. Woods*²⁴ (“*Wilkes*”) and *Huckle v. Money*²⁵ (“*Huckle*”). These two cases resulted from the English government’s suppression of the “North Briton,” a newspaper critical of King George II’s Secretary, Lord Halifax.²⁶ In the *Wilkes* case, John Wilkes brought suit for trespass against a member of Parliament for having his property searched and seized with only a general warrant and requested exemplary damages arguing that actual damages would not fully deter future misconduct.²⁷ Wilkes was awarded £1000 in punitive damages.²⁸ In *Huckle*, the court awarded punitive damages²⁹ when the publisher’s employee brought suit alleging false imprisonment, trespass, and assault after the King had ordered all publishers and printers seized.³⁰ The term “exemplary damages” was introduced in the *Huckle* case by Lord Camden when he stated, “I think they have done right in giving exemplary damages. To enter a man’s house by virtue of a nameless warrant, in order to procure evidence, is worse than the Spanish Inquisition.”³¹ The modern doctrine of punitive damages was born through these two deci-

²⁰ See Miller, *supra* note 19, at 523 (citing RICHARD L. BLATT, PUNITIVE DAMAGES: A STATE-BY-STATE GUIDE TO LAW AND PRACTICE 23 (1991)) [hereinafter BLATT].

²¹ See Nathan C. Prater, Comment, *Punitive Damages in Alabama: A Proposal for Reform*, 26 CUMB. L. REV. 1005, 1008 (1995-96) [hereinafter Prater].

²² *Id.*

²³ See Miller, *supra* note 19, at 523 (citing BLATT, *supra* note 19, at 23). In the thirteenth century, the English government enforced ameracements. Currently, the United States idea of punitive damages is based on the ameracement system. See *id.* at 523 n.40 (citing BLATT, *supra* note 20, at 23).

²⁴ 98 Eng. Rep. 489 (K.B.1763).

²⁵ 95 Eng. Rep. 768 (K.B. 1763).

²⁶ *Wilkes*, 98 Eng. Rep. at 493-94; *Huckle*, 95 Eng. Rep. at 768.

²⁷ *Wilkes*, 98 Eng. Rep. at 489-90.

²⁸ See *id.* at 499. The Court stated that punitive “[d]amages are designed not only as a satisfaction to the injured person, but likewise as punishment to the guilty, to deter from any such proceeding for the future and as a proof of the detestation of the jury to the action itself.” *Id.* at 498-99.

²⁹ *Huckle*, 95 Eng. Rep. at 768. *Huckle*’s detainment lasted only six hours and although his actual damages were approximately £20, he was awarded £300. See *id.*

³⁰ *Id.*

³¹ *Id.* at 769. In upholding the award of exemplary damages, the court noted that “the law has not

sions, and the doctrine was further broadened to meet societal needs not addressed by the common law.³²

Soon after the doctrine of punitive damages became widespread in England, the United States borrowed the doctrine from English Common Law and integrated it into America's legal system.³³ The first American cases to articulate the doctrine of punitive damages were *Genay v. Norris*³⁴ ("Genay"), in 1784, and *Coryell v. Colbough*³⁵ ("Coryell"), in 1791. At this period in time, punitive damages served both to punish the defendant, and compensate the plaintiff.³⁶ Punitive damages' role as a deterrent was not well established until the early eighteenth century when their compensatory function began to decrease.³⁷ By the mid-nineteenth century, punitive damages were awarded for the purposes of punishment and deterrence.³⁸

In 1851, the United States Supreme Court recognized, in dicta, that punitive damages are "an integral part of the American justice system."³⁹ The Court

laid down what shall be the measure of damages in actions of tort; the measure is vague and uncertain, depending on a vast variety of causes, facts, and circumstances," and chose not to "intermeddle" in the determination of damages. *Id.* at 769. "[I]t must be a glaring case indeed of outrageous damages in a tort, and which all mankind at first blush must think so, to induce a Court to grant a new trial for excessive damages." *Huckle*, 95 Eng. Rep. at 768-769. A comparable approach was taken in the following English cases. *See, e.g., Grey v. Grant*, 95 Eng. Rep. 794, 795 (K. B. 1764); *Benson v. Frederick*, 97 Eng. Rep. 1130 (K. B. 1766).

³² *See Miller, supra* note 19, at 524 (citing SCHLUETER & REDDEN, *supra* note 19, at § 1.3(A)). Many different theories explaining the expansion of the doctrine existed, including justification for excessive awards, deterrence, compensation for mental anguish, and revenge. *See Miller, supra* note 19, at 524 n. 49 (citing SCHLUETER & REDDEN, *supra* note 19, at § 1.3(B)). *See also* Stephen Daniels & Joanne Martin, *Myth and Reality in Punitive Damages*, 75 MINN. L. REV. 1, 6-7 (1990) (discussing the historical development of punitive damages).

³³ *See Michael J. King, Casenote, Punitive Damages & Due Process: Pacific Mutual Life Insurance Company v. Haslip*, 25 CREIGHTON L. REV. 323, 335 (1991) [hereinafter King].

³⁴ 1 S.C.L. (1 Bay) 6 (1784). In *Genay*, the plaintiff and defendant decided to settle their argument by a duel with pistols. *Id.* Prior to the duel, the defendant put something in the plaintiff's drink which caused the plaintiff great pain and the court held that the plaintiff was entitled to exemplary damages. *See id.* at 7.

³⁵ 1 N.J.L. 90 (1791). In *Coryell*, the defendant broke his promise to marry the plaintiff whom he had impregnated and, as a result, the jury was instructed that they should not determine the damages "by any particular proof of suffering or actual loss; but to give damages for example's sake, to prevent such offences [sic] in [the] future; and also to allow liberal damages for the breach of a sacred promise and the great disadvantages which must follow to her through life." *Id.* at 91. The court went on to say that "such a sum . . . would mark (the jury's) disapprobation, and be an example to others." *Id.*

³⁶ *See Miller, supra* note 19, at 524-525 (citing SCHLUETER & REDDEN, *supra* note 19, § 1.4(A)).

³⁷ *See id.*

³⁸ *See id.*

³⁹ *Day v. Woodworth*, 54 U.S. (13 How.) 363, 371 (1851).

We are aware that the propriety of this doctrine has been questioned by some writers; but if repeated judicial decisions for more than a century are to be received as the best exposition of what the law is, the question will not admit of argument. By the common as well as by statute law, men are often punished for aggravated misconduct or lawless acts by means of civil action and the damages inflicted by way of penalty or punishment, given to the party injured.

went on to say that “[i]t is a well-established principle of the common law, that in actions of trespass and all actions on the case of torts a jury may inflict what are called exemplary, punitive, or vindictive damages upon a defendant, having in view the enormity of his offence [sic] rather than the measure of compensation to the plaintiff.”⁴⁰ However, the United States Supreme Court has recently noted that “the Day case did not present any issue of punitive damages; the Court discussed them merely as a sidelight to the costs-and-fees issue presented.”⁴¹ Nonetheless, the doctrine of punitive damages is now firmly rooted in American jurisprudence.

Generally, punitive damages are supposed to punish the defendant and deter that defendant and others from engaging in similar conduct in the future.⁴² Other policies for the doctrine rationalize that punitive awards also provide compensation for uncompensable loss and protection for the consumer.⁴³ Forty-seven states allow for the assessment of punitive damages.⁴⁴ However, the standard of conduct necessary to warrant assessment of punitive damages varies from state to state.⁴⁵ Generally, it must be proven that the defendant’s actions constituted at least one of the following: (1) malice, (2) conduct exceeding gross negligence but not requiring malice, (3) gross negligence, or (4) various statutorily defined requirements.⁴⁶

Due to concern that punitive damages are “run[ning] wild,”⁴⁷ many of the states allowing punitive damages have attempted to limit the amount of punitive damages that may be assessed through various means.⁴⁸ For example, some states use a bifurcated trial where juries first determine a defendant’s liability and amount of compensatory damages, and then assess punitive damages only after the defen-

Id. See generally *Missouri Pacific R. Co. v. Humes*, 115 U.S. 512 (1885); *Minneapolis and St. Louis R. Co. v. Beckwith*, 129 U.S. 26 (1889); *Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238 (1984).

⁴⁰ *Id.*

⁴¹ *Smith v. Wade*, 461 U.S. 30, 41 (1983) (affirming the awarding of punitive damages under 42 U.S.C. § 1983, and the common law scheme to determine the amount of the award).

⁴² See Brian Timothy Beasley, Survey, *North Carolina’s New Punitive Damages Statute: Who’s Being Punished Anyway?*, 74 N.C. L. REV. 2174, 2188 (1996) [hereinafter Beasley]. “Courts widely agree that these two purposes are the definitive goals of punitive damages.” *Id.* at 2175 n.17. See also *International Brotherhood of Electric Workers v. Foust*, 442 U.S. 42, 48 (1979) (stating that punitive awards are civil fines imposed to punish reprehensible conduct and to deter such conduct in the future).

⁴³ See Prater, *supra* note 21, at 1034-1037. Connecticut and Michigan both consider that a primary purpose of punitive damages is to compensate for otherwise uncompensable loss. See *id.* at 1034.

⁴⁴ See Beasley, *supra* note 42, at 2202-13. Punitive damages are constitutionally prohibited in Nebraska. NEB. CONST. art. VIII, § 5; See *Distinctive Printing and Packaging Co. v. Cox*, 443 N.W.2d 566, 573-74 (1989). Punitive damages are outlawed in New Hampshire. See N. H. REV. STAT. ANN. § 507:16 (1986). Washington has prohibited punitive damages. See *Spokane Truck & Dray Co. v. Hoefler*, 25 P. 1072, 1073-74 (Wash. 1891).

⁴⁵ See *Id.* (listing each state’s conduct required of a defendant before punitive damages can be awarded).

⁴⁶ See *Id.* (listing conduct that must be shown in various states for a jury to assess punitive damages).

⁴⁷ *Pacific Mutual life Insurance Co. v. Haslip*, 499 U.S. 1, 18 (1991).

⁴⁸ See Andrea A. Curico, *Painful Publicity—An Alternate Punitive Damage Sanction*, 45 DEPAUL L. REV. 341, 353 n.31 (1996) [hereinafter Curico].

dant is found liable.⁴⁹ Many states have limited punitive awards by raising the standard of proof for finding conduct warranting punitive damages from a preponderance of the evidence to the higher standard of clear and convincing proof.⁵⁰ Some state statutes that require part of the punitive damage award to be placed in a state fund.⁵¹ Also, a few states have placed statutory maximums, or caps, on punitive damages awards.⁵²

Critics of placing caps on punitive damages contend that these caps give “predictability to a doctrine whose real value lies in unpredictability.”⁵³ They further argue that once an award becomes predictable, defendants, especially large businesses, can simply absorb the cost of likely awards by factoring it into the cost of doing business.⁵⁴ Thus, corporations who can factor potential punitive damage awards into their business expenses would not be deterred from producing an unsafe yet profitable product.⁵⁵ These critics further argue that statutorily designated punitive damage awards would unfairly disadvantage smaller businesses if they were forced to pay the same amount of punitive damages as large businesses.⁵⁶

Another criticism of unchecked punitive damages, particularly in the products liability area, is the potential chilling effect on new product research and development.⁵⁷ Critics of the doctrine also point to the increasing costs and declining availability of liability insurance resulting from the greater frequency and size of punitive awards.⁵⁸

Regardless of the policy arguments for and against punitive damages, both proponents and critics alike should recognize that serious constitutional issues arise whenever punitive damages are awarded.

III. CONSTITUTIONAL CHALLENGES TO PUNITIVE DAMAGES

In many states, juries are afforded nearly unlimited discretion in determining whether the conduct of the defendant entitles the plaintiff to a punitive damage

⁴⁹ See King, *supra* note 33, at 337-38.

⁵⁰ See Curico, *supra* note 48, at 353.

⁵¹ See *id.*

⁵² See Beasley, *supra* note 42, at 2202-13.

⁵³ *Id.* at 2198, (citing Sandra N. Hurd & Frances E. Zollers, *State Punitive Damages Statutes: A Proposed Alternative*, 20 J. LEGIS. 191, 200 (1994)).

⁵⁴ See *id.* at 2198.

⁵⁵ See *id.*

⁵⁶ See *id.* at 2198-99.

⁵⁷ See *Blankenship v. General Motors Corp.*, 406 S.E. 2d 781, 783 n.4 (W. Va. 1991).

⁵⁸ See Linda Himelstein, *Jackpots from Alabama Juries*, BUS. WK., Nov. 28, 1994, at 83, 84 (noting that ten insurance carriers were not getting involved with new businesses in Alabama as a result of large punitive awards).

award, and the amount of the award.⁵⁹ It is argued that such unbridled jury discretion violates due process because “the touchstone of due process is protection of the individual against arbitrary action of government.”⁶⁰ As the frequency and size of punitive damage awards has increased, the litigation surrounding punitive damages has focused on whether such awards are constitutional.⁶¹ Punitive damage awards have been attacked as unconstitutional under both the Eighth Amendment and the Fourteenth Amendments.⁶²

A. *The Eighth Amendment Challenge*

The Eighth Amendment came into effect in 1791 as a part of the Bill of Rights.⁶³ In 1977, the United States Supreme Court ruled that the Eighth Amendment does not apply to civil proceedings and “was only designed to protect those convicted of crimes.”⁶⁴ In the case of *Aetna Life Insurance Co. v. Lavoie* (“*Lavoie*”), the Supreme Court recognized that the Eighth Amendment challenge to punitive damage awards was an important issue that should be dealt with when the matter is brought before them in a proper case.⁶⁵ Less than two years after *Lavoie*, the Supreme Court again declined to address an Eighth Amendment challenge to a punitive damage award in the case of *Bankers Life & Casualty Co. v. Crenshaw*⁶⁶ (“*Crenshaw*”), because the issue was not properly raised in the lower court.⁶⁷

⁵⁹ See Beasley, *supra* note 42, at 2201-2213 (reviewing standards of proof needed and restraints on punitive damages among the various states).

⁶⁰ *Daniels v. Williams*, 474 U.S. 327, 331 (1986) (quoting *Wolff v. McDonnell*, 418 U.S. 539, 558 (1974)).

⁶¹ See Miller, *supra* note 19, at 524-525 (citing BLATT, *supra* note 20, at 26). See also Michael Rustad & Thomas Koenig, *The Historical Continuity of Punitive Damages Awards: Reforming the Tort Reformers*, 42 AM. U. L. REV. 1269, at 1309 (1993). Although punitive damage awards have increased in frequency and amount, the modern function of the doctrine remains grounded in the historical function of controlling the misuse of wealth and power. See *id.* It has been noted that this idea has been proliferated for the protection of consumers from the abuses of the corporate world. See *id.*

⁶² See John Calvin Jeffries, *A Comment on the Constitutionality of Punitive Damages*, 72 VA. L. REV. 139, 147-59 (commenting on both Eighth and Fourteenth Amendment challenges to punitive damages).

⁶³ The Eighth amendment provides that “[e]xcessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.” U.S. CONST. amend. VIII.

⁶⁴ *Ingraham v. Wright*, 430 U.S. 651, 664 n. 40 (1977). “Eighth Amendment scrutiny is appropriate only after the State has complied with the constitutional guarantees traditionally associated with criminal prosecutions.” *Id.* at 671.

⁶⁵ 475 U.S. 813, 828-29 (1986). In *Lavoie*, the defendant contested a \$3,500,000 punitive damage award under the Eighth Amendment Excessive Fines Clause and the Fourteenth Amendment Due Process Clause. *Id.* at 828. It was unnecessary for the Court to address the Eighth Amendment or the Fourteenth Amendment Challenge because the case was remanded due to procedural error of the trial court where the judge should have recused himself due to bias. See *id.* The Court noted that challenges to the Eighth and Fourteenth Amendments “raised important issues which, in an appropriate setting, must be resolved.” *Id.*

⁶⁶ 486 U.S. 71 (1988).

⁶⁷ *Id.* at 77-78.

In *Browning-Ferris v. Kelco Disposal, Inc.*⁶⁸ (“*Browning-Ferris*”), an Eighth Amendment challenge was raised in an antitrust action.⁶⁹ The Supreme Court finally addressed the Eighth Amendment challenge and held that punitive damages awarded in a civil suit between private parties are not constrained by the Excessive Fines Clause.⁷⁰ The Court reasoned that the Excessive Fines Clause of the Eighth Amendment could not be violated by a punitive damage award “when the government neither has prosecuted the action nor has any right to receive a share of the damages awarded.”⁷¹ The Court noted that the history of the Eighth Amendment “convinces us that the Excessive Fines Clause was intended to limit only those fines directly imposed by, and payable to, the government.”⁷²

B. The Fourteenth Amendment Challenge

The Due Process Clause of the Fourteenth Amendment⁷³ is interpreted as consisting of two parts, a substantive part and a procedural part.⁷⁴ Procedural due process examines whether the legal process was “fundamentally fair” and “rationally related to legitimate purposes,” while a substantive due process analysis ques-

⁶⁸ 492 U.S. 257 (1989).

⁶⁹ *Id.* at 259. In *Browning-Ferris*, the owner of a waste collection company received punitive damages from a defendant found in violation of antitrust law. *Id.* at 260. *Browning-Ferris* tried to monopolize a local market by putting Kelco Disposal, its competitor, out of business. *See id.*

⁷⁰ *See id.* at 275-76.

⁷¹ *Id.* at 264. *But see* Theodore B. Olson & Theodore J. Boutrous, Jr., *Constitutional Restraints on the Doctrine of Punitive Damages*, 17 PEPP. L. REV. 907 (1990). The authors suggest that the Eighth Amendment argument could be analogized to the Court’s reasoning in *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974), where the Court held that punitive damage awards can’t be given in libel cases absent actual malice due to the chilling effect that such awards could have on free speech. *See id.* at 921. The authors contend that since large awards threaten the First Amendment protection of free speech through self-suppression, such punitive awards similarly threaten the values protected by the Eighth Amendment’s Excessive Fines Clause. *See id.*

⁷² *Id.* at 268. The Court found that the language and history of the Eighth Amendment addressed bails, fines, and punishments, which were typically applicable to criminal cases. *See id.* at 262.

⁷³ Section One of The Fourteenth Amendment states:

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law. Nor deny to any person within its jurisdiction the equal protection of the laws.

U.S. CONST. amend. XIV.

⁷⁴ Substantive due process focuses on the size of the award in determining whether the award is an arbitrary deprivation of property. *See TXO Production Corp.*, 509 U.S. at 453-54. Procedural due process in a punitive damages setting concentrates on subjects such as proper jury instructions and post-verdict mechanisms for reviewing the award at the trial court and appellate levels. *See Haslip*, 499 U.S. at 19-21. *See also* *Honda Motor Co. v. Oberg*, 512 U.S. 415 (1994) (describing the distinction between the two ideas of due process).

tions whether the law itself that was applied was reasonable.⁷⁵ Thus, under a substantive due process framework, if the law is irrational and has deprived an individual of their rights, then a due process violation has occurred regardless of the fairness of the procedures administering that law.

Since the early twentieth century, the United States Supreme Court has acknowledged that the substantive component of the Due Process clause guards against awards which are “grossly excessive”⁷⁶ or “plainly arbitrary and oppressive.”⁷⁷ Nevertheless, until the 1996 case of *BMW of North America, Inc., v. Gore*⁷⁸ (“*BMW*”), the Supreme Court had not actually set aside a punitive damage award for being “grossly excessive” since 1915.⁷⁹

The Supreme Court had declined to rule on the due process issues raised in both *Lavoie* or *Crenshaw*.⁸⁰ However, the *Browning-Ferris* Court clearly recognized in dictum that authority exists⁸¹ supporting the argument that the Fourteenth Amendment places “outer limits” on the amount of punitive damages awarded.⁸² Again the Court refused to address the Fourteenth Amendment challenge because the petitioner failed to raise the issue in the lower court or in its petition for certiorari.⁸³ Justice Brennan, with whom Justice Marshall joined in concurrence, stated:

⁷⁵ Miller, *supra* note 19, at 528 (citing BLATT, *supra* note 20, at 27).

⁷⁶ *Waters-Pierce Oil Co. v. Texas*, 212 U.S. 86, 111 (1909) (stating that the Supreme court will not interfere with awards unless the fines were so “grossly excessive as to become a deprivation of property without due process of law”).

⁷⁷ *Southwestern Tel. & Tel. Co. v. Danaher*, 238 U.S. 482, 490-91 (1915) (setting aside a \$6,300 punitive damage award the Court held that where the defendant was acting in good faith, with no intent to harm, that the punitive damage award was “so plainly arbitrary and oppressive” as to amount to an arbitrary taking of property without due process of law); *Missouri Pacific railway Co. v. Tucker*, 230 U.S. 340, 351 (1913) (overturning a statutory penalty of \$500 against a common carrier who overcharged passengers \$3.02 as it was “grossly” disproportionate to the actual damages and so “arbitrary and oppressive” as to be a violation of the Fourteenth Amendment’s Due Process Clause); *But see St. Louis, Iron Mountain & S. Ry. Co. v. Williams*, 251 U.S. 63, 64-67 (1919) (upholding statutes authorizing passengers overcharged to recover penalties from common carriers ranging from \$50 to \$300).

⁷⁸ 517 U.S. 559 (1996).

⁷⁹ *See Danaher*, 238 U.S. at 490-91.

⁸⁰ *Crenshaw*, 486 U.S. at 88 (O’Connor, J., concurring in part and concurring in judgment). In her concurring opinion, Justice O’Connor remarked that the wholly standardless grant of discretion given juries in the award of punitive damages presented the Court with a due process question that should be addressed when a case appropriate for a determination of the issue was before it. *See id.*

⁸¹ *Id.* at 276. *See, e.g., St. Louis, I. M. & S. R. Co. v. Williams*, 251 U.S. 63, 66-67 (1919).

⁸² *Browning-Ferris*, 492 U.S. at 276-77.

There is some authority in our opinions for the view that the Due Process Clause places outer limits on the size of a civil damages award made pursuant to a statutory scheme. . . . but we have never addressed the precise question presented here: whether due process acts as a check on undue jury discretion to award punitive damages in the absence of an express statutory limit.

Id.

⁸³ *See id.* at 277. The Supreme Court, in passing on the Fourteenth Amendment issue, indicated that

"I join the Court's opinion on the understanding that it leaves the door open for a holding that the Due Process Clause constrains the imposition of punitive damages in civil cases brought by private parties."⁸⁴ After *Browning-Ferris*, the United States Supreme Court granted certiorari in four cases involving due process challenges to punitive damages.⁸⁵ One of these landmark cases originated in West Virginia.⁸⁶ Prior to their decision in *Vandevender*, the West Virginia Supreme Court of Appeals twice grappled with the law emerging from this period of Supreme Court review in an attempt to ensure that West Virginia's punitive damage law did not violate due process.⁸⁷

1. Pacific Mutual Life Insurance Co. v. Haslip

In *Pacific Mutual Life Insurance Co. v. Haslip*⁸⁸ ("Haslip"), the Court finally addressed whether a punitive damage award was "grossly excessive."⁸⁹ The plaintiffs claimed damages for fraud where an insurance agent collected premium payments of the insureds but did not remit them to the insurers, thus allowing the policies to lapse without any notice to the policyholder.⁹⁰ An Alabama jury awarded the plaintiffs roughly \$200,000 in compensatory damages and \$840,000 in punitive damages.⁹¹ Pacific Mutual contended that the punitive damages awarded were "the product of unbridled jury discretion" and faulty processes, and thus an unconstitutional violation of the Due Process Clause of the Fourteenth Amend-

excessive punitive damages violate due process by remarking that "it is not disputed that a jury award may not be upheld if it was the product of bias or passion, or if it was reached in proceedings lacking basic elements of fundamental fairness." *Id.* at 276-77.

⁸⁴ *Id.* at 280 (Brennan, J., concurring).

Several of our decisions indicate that even where a statute sets a range of possible civil damages that may be awarded to a private litigant, the Due Process Clause forbids damage awards that are "grossly excessive" or "so severe and oppressive as to be wholly disproportionate to the offense and obviously unreasonable."

Id. at 280-81.

⁸⁵ See generally *BMW*, 517 U.S. 559; *Oberg*, 512 U.S. 415; *TXO*, 509 U.S. 443; *Haslip*, 499 U.S.

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⁸⁶ See generally *TXO*, 509 U.S. 443.

⁸⁷ See generally *Alkire v. First National Bank of Parsons*, 475 S.E. 2d 122 (W.Va. 1996); *Games v. Fleming Landfill, Inc.*, 413 S.E. 2d 897 (W.Va. 1991).

⁸⁸ 499 U.S. 1.

⁸⁹ *Id.* at 18.

⁹⁰ See *id.* at 5-6. The facts showed that Haslip was hospitalized, and because the hospital was unable to verify her health insurance, it obtained a judgment against her. See *id.* Haslip brought suit alleging fraud on Pacific Mutual's part because its agent had pocketed the premiums, causing her health insurance to lapse. See *id.* at 6. The case went to the jury based on *respondeat superior* and on appeal the Alabama Supreme Court affirmed the verdict. See *Haslip*, 499 U.S. at 7.

⁹¹ See *id.* at 8.

ment.⁹²

The United States Supreme Court upheld the award, recognizing that unlimited discretion in assessing punitive damages “may invite extreme results that jar one’s constitutional sensibilities.”⁹³ However, the Court went on to say that “[w]e need not, and indeed cannot, draw a mathematical bright line between the constitutionally acceptable and the constitutionally unacceptable that would fit every case.”⁹⁴ The Court stated that general concerns of reasonableness and adequate jury guidance from the court should be properly kept in mind when reviewing the constitutionality of a punitive damage award.⁹⁵ After acknowledging the consistent history of the doctrine which was well established even before the enactment of the Fourteenth Amendment, the Court held that the common-law method for assessing punitive damages is not so inherently unfair as to deny due process and be per se unconstitutional.⁹⁶ The Court engaged in a very restrained substantive due process review that looked at the ratio of punitive damages to the compensatory award, but chose to focus their attention on the procedures used by the Alabama Supreme Court in a procedural due process analysis.⁹⁷

After examining the procedures that the Alabama Supreme Court used in reviewing punitive damages, the Supreme Court explicitly found that the jury instructions placed reasonable constraints on the jury’s discretion, the trial court’s post-verdict hearing ensured meaningful and adequate review of the award, and the petitioner received the benefit of appropriate review by the state Supreme Court.⁹⁸ Thus, the Court held that the punitive award was not an arbitrary deprivation of property because Alabama’s procedural safeguards provided Pacific Mutual with the requisite procedural due process.⁹⁹

First, the Court specifically found that the instructions given the jury confined them to the state policy concerns of punishment and deterrence by expressly describing the purposes and factors to consider in assessing punitive damages, thus

⁹² *Id.* at 7-8.

⁹³ *Haslip*, 499 U.S. at 18 (citing *Waters-Pierce Oil Co.*, 212 U.S. at 111).

⁹⁴ *Id.* at 18.

⁹⁵ *See id.* at 18-19.

⁹⁶ *See id.* at 17-18. The common law method for assessing punitive damages was well established before the enactment of the Fourteenth Amendment, and nothing in that Amendment’s text or history indicates an intention by the drafters to overturn the prevailing method. *See id.* *But see Williams v. Illinois*, 399 U.S. 235, 239 (1970) (remarking that “[N]either the antiquity of a practice nor the fact of steadfast legislative and judicial adherence to it through the centuries insulates it from constitutional attack . . .”).

⁹⁷ *See id.* at 19-24. The necessary procedures include: proper jury instructions considering punitive damages’ purpose, availability of post-trial procedures and specific factors for a court to consider in reviewing punitive damage awards, the trial court’s power to remit awards, and availability of appellate review. *See id.*

⁹⁸ *See Haslip*, 499 U.S. at 22.

⁹⁹ *See id.*

giving them significant but not unlimited discretion.¹⁰⁰ The Court stated that if the jury's discretion is exercised within reasonable constraints, then due process is satisfied.¹⁰¹

Second, the trial court's post-verdict review conformed with standards set forth in the earlier Alabama case of *Hammond v. City of Gadsden*¹⁰² ("*Hainmond*"). In *Hammond*, the Alabama Supreme Court stated that trial courts are to show in the record the reasons for interfering with or upholding a jury verdict on grounds of excessiveness of the damages, providing a list of factors appropriate for the trial court's consideration.¹⁰³ The Supreme Court believes that the *Hammond* test ensures meaningful and adequate review by the trial court whenever a jury has awarded punitive damages.¹⁰⁴

Third, the Supreme Court found that the Alabama Supreme Court provides an additional check on the jury's discretion by applying detailed substantive standards developed via the *Hammond* standards, as well as all relevant factors recited in *Green Oil Co. v. Hornsby*¹⁰⁵ ("*Green Oil*"), to ensure that punitive damages are reasonable.¹⁰⁶ This test is known in Alabama as the *Green Oil* test.¹⁰⁷ These standards were enumerated and refined by the Alabama Supreme Court to determine whether a punitive award is reasonably related to the goals of retribution and deterrence.¹⁰⁸

¹⁰⁰ See *id.* at 19. The Court further noted that the instructions enlightened the jury as to punitive damages' nature and purpose, identified the damages as punishment for the civil wrong, and explained that the imposition of the penalty was not compulsory. See *id.* at 19. The Court stated that these instructions reasonably accommodated Pacific Mutual's interest in rational decision making and the State's interest in meaningful assessment of appropriate retribution and deterrence. See *id.* at 20. The discretion granted for determining punitive damages under Alabama law is similar to many familiar areas of the law, such as determining "the best interests of the child," or "reasonable care," or "due diligence," or proper compensation for pain and suffering or mental anguish. *Id.*

¹⁰¹ See *id.* at 20.

¹⁰² 493 So. 2d 1374 (Ala. 1986).

¹⁰³ *Id.* at 1379. Some of the factors deemed appropriate for the trial court's consideration include: "the culpability of the defendant's conduct," the "desirability of discouraging others from similar conduct," the "impact upon the parties," and "other factors, such as the impact on innocent third parties." *Id.*

¹⁰⁴ See *Haslip*, 499 U.S. at 20.

¹⁰⁵ 539 So. 2d 218 (Ala. 1989).

¹⁰⁶ See *Haslip*, 499 U.S. at 22.

¹⁰⁷ See David Carr & Rachel Sanders Cochran, *Punitive Damages and Pre-Verdict Procedures, Life of Georgia: A Bold New Frontier*, 57 ALA. LAW 225, 225-28 (1996) (giving a general background on the punitive damages procedures used in Alabama as well as a history of the *Green Oil* test).

¹⁰⁸ See *Central Alabama Electric Cooperative v. Tarpley*, 546 So. 2d 371, 376-77 (Ala. 1989); *Hornsby*, 539 So. 2d at 223-24. The following could be taken into consideration when determining whether an award was excessive or inadequate: (1) whether there is a reasonable correlation between the punitive damage award and the harm likely to result from the defendant's conduct as well as the actual harm; (2) the degree of reprehensibility of the defendant's conduct, the duration of that conduct, the defendant's awareness, any concealment, and the existence and frequency of similar past conduct; (3) the profitability to the defendant of the wrongful conduct and the desirability of removing that profit and of having the defendant also sustain a loss; (4) the financial position of the defendant; (5) the costs of litigation; (6) the imposition of

The *Haslip* Court concluded that the application of these standards imposes a significantly definite and meaningful constraint on the discretion of Alabama fact finders in awarding punitive damages.¹⁰⁹ The Court stated that Alabama's standards provide for a rational relationship in determining whether a particular award is greater than reasonably necessary to punish and deter.¹¹⁰ Although the punitive damage award in *Haslip* far exceeded the amount of any fine that could be imposed and was more than four times the compensatory damages, the Court found that the award did not "cross the line into the area of constitutional impropriety," but "may be close to the line."¹¹¹

The *Haslip* case was decided, essentially, on procedural due process grounds, and although no test was established for substantive due process violations, the Court's statement that a four-to-one punitive to compensatory ratio may be "close to the line" appeared to enhance the likelihood that someday an award would be set aside as "grossly excessive."

2. *Garnes v. Fleming Landfill, Inc.*

The West Virginia case of *Garnes v. Fleming Landfill, Inc.*¹¹² ("*Garnes*"), was remanded by the United States Supreme Court for reconsideration in light of the *Haslip* decision.¹¹³ The West Virginia Supreme Court reversed based on *Haslip*,¹¹⁴ holding that a jury may not award punitive damages without finding any compensatory damages.¹¹⁵ The *Garnes* Court found that the guidelines used by the trial court in reviewing the award "were neither meaningful nor adequate under the standards established in *Haslip*."¹¹⁶

criminal sanctions on the defendant for its conduct, these to be considered in mitigation; and (7) other civil awards against the defendant for the same conduct, these also to be considered in mitigation. *See Green Oil*, 539 So. 2d at 223-24.

¹⁰⁹ *Haslip*, 499 U.S. at 22.

¹¹⁰ *See id.* The Court stated that "[t]he Alabama Supreme Court's post-verdict review ensures that punitive damage awards are not grossly out of proportion to the severity of the offense and have some understandable relationship to compensatory damages." *Id.* These standards, when used in post-verdict review, have resulted in reduction of punitive awards. *See, e.g., Wilson v. Dukona Corp.*, 547 So. 2d 70, 74 (Ala. 1989); *United Services Automobile Assn. v. Wade*, 544 So. 2d 906, 917 (Ala. 1989).

¹¹¹ *Haslip*, 499 U.S. at 23-24.

¹¹² 413 S.E. 2d 897 (W.Va. 1991).

¹¹³ *Id.* at 900.

¹¹⁴ *See id.*

¹¹⁵ *See id.* at 909 (overruling *Syllabus Point Three of Wells v. Smith*, 297 S.E. 2d 872 (W.Va. 1982)).

¹¹⁶ *Id.* at 908. The trial court limited its review to very unrestrictive standards, stating that "[c]ourts must not set aside jury verdicts as excessive, unless they are monstrous, enormous, beyond all measure, unreasonable, outrageous, and manifestly show jury passion, impartiality [sic], prejudice or corruption." *Garnes*, 413 S.E.2d at 908 (citing *Muzelak v. King Chevrolet, Inc.*, 368 S.E. 2d 710 (1988)). The trial court further stated that "[o]nly where the award of punitive damages has no foundation in the evidence so as to evince passion, prejudice or corruption in the jury should the award be set aside as excessive." *Id.* (citing *Wells v. Smith*, 297 S.E. 2d 872).

Therefore, the West Virginia Supreme Court of Appeals announced a new system for the review of punitive damages in West Virginia, bringing West Virginia law in line with *Haslip*.¹¹⁷ The Court in *Garnes* noted that “although *Haslip* may not have created the clear, bright line rules that we would all like, it is the beginning of national common law development in this area and not the end.”¹¹⁸ The West Virginia Supreme Court of Appeals adopted the guidelines established through the Alabama cases of *Hammond* and *Green Oil* which focus concern on placing reasonable constraint on jury discretion and providing meaningful and adequate trial court and appellate review.¹¹⁹

The *Garnes* Court revamped the instructions to the jury, noting that the court should carefully explain the factors to be considered in assessing punitive damages.¹²⁰ These factors, inferred from *Haslip*, are the principles which instruct the jury as well as guide the post-verdict trial and appellate review.¹²¹ A West Virginia fact finder should consider the following factors: (1) punitive damages should bear a reasonable correlation to the potential and actual harm; (2) the reprehensibility of the defendant’s conduct; (3) if the defendant profited from the wrongful conduct; (4) punitive damages should bear a reasonable relationship to compensatory damages; and (5) the defendant’s financial position.¹²² The *Garnes* Court noted that the U. S. Supreme Court was satisfied that the Alabama jury instructions which described the purposes of punitive damages, provided reasonable limits on jury discretion and thereby satisfied the Due Process Clause of the Fourteenth Amendment.¹²³

The West Virginia Supreme Court of Appeals further required that West Virginia trial courts thoroughly set out the reasons for changing or upholding a reviewed award.¹²⁴ This principle was articulated by the Alabama Supreme Court in *Hammond*,¹²⁵ and upheld by the Supreme Court which found that the *Hammond* guidelines insured a meaningful and adequate review of an award by the trial court.¹²⁶

When a West Virginia trial court engages in the review of an award it should consider not only the factors explained to the jury but the following factors, as well: (1) the costs of litigation; (2) any criminal sanctions; (3) any other similar

¹¹⁷ See *Garnes v. Fleming Landfill, Inc.*, 413 S.E.2d 897 (W.Va. 1991).

¹¹⁸ *Id.* at 907.

¹¹⁹ See *id.* at 908.

¹²⁰ *Id.* at 908-909.

¹²¹ See *id.* at 909.

¹²² See *Garnes*, 413 S.E.2d at 909.

¹²³ *Id.* at 904.

¹²⁴ See *id.* at 910.

¹²⁵ 493 S.E. 2d at 1379.

¹²⁶ See *Haslip*, 499 U.S. at 20.

civil actions; and (4) the appropriateness of punitive damages to encourage fair and reasonable settlements when a clear wrong has been committed.¹²⁷ The *Garnes* Court found that the detailed trial court and appellate review provided by the Alabama Supreme Court by its use of the *Green Oil* test is important in guaranteeing due process by insuring “that awards do not exceed an amount that will accomplish society’s goals of punishment and deterrence.”¹²⁸

After the trial court has examined and ruled on the award, the losing party may petition for appeal.¹²⁹ When reviewing the petition, the West Virginia Supreme Court of Appeals will consider the same factors considered by the jury and trial court.¹³⁰ All petitions must address each and every factor, as assignments of error related to a factor not specifically addressed in the petition will be waived.¹³¹

The West Virginia Supreme Court further noted that *Haslip* offers more than mere platitudes and represents a major step in the unification of America’s decisional law on punitive damages where the separate states are unable to craft a set of rational rules.¹³² The Court in *Garnes* noted that at least two courts have cited *Haslip* in overturning punitive awards.¹³³ The *Garnes* Court also discussed the importance of deterrence and its emerging prevalence in product liability cases.¹³⁴ However, the *Garnes* Court recognized that while punitive damage awards can serve an important regulatory function as with the Ford Pinto automobile, unchecked punitive awards can have a detrimental, chilling effect on new product research and development.¹³⁵

The West Virginia Supreme Court recognized that due process demands not only that penalties be abstractly fair, but also that a person not be punished without reasonable warning of the consequences of the wrongful conduct.¹³⁶ The *Green Oil* factors, which take into consideration the degree of reprehensibility of the defendant’s conduct, the duration of this conduct, the degree of awareness of any hazard, any concealment of that hazard, and the existence and frequency of

¹²⁷ See *Garnes*, 413 S.E.2d at 909.

¹²⁸ *Id.* at 905.

¹²⁹ See *id.* at 910.

¹³⁰ See *id.*

¹³¹ See *id.*

¹³² See *Garnes*, 413 S.E.2d at 905-06.

¹³³ *Id.* See generally *Mattison v. Dallas Carrier Corp.*, 947 F. 2d 95 (4th Cir. 1991); *Alexander & Alexander, Inc., v. B. Dixon Evander & Assoc., Inc.*, 596 A. 2d 687 (Md. 1991).

¹³⁴ *Garnes*, 413 S.E. 2d at 902.

¹³⁵ *Id.* A court in California awarded \$125 million in punitive damages (later remitted to \$3.5 million) to discourage Ford from future similar acts when it found that Ford knew that the gas tanks in its Pinto automobiles were dangerously defective, but chose not to redesign them because the costs of losing lawsuits when a few people died was cheaper than recalling the defective vehicles. See *id.* (citing *Grimshaw v. Ford Motor Company*, 119 Cal. App. 3d 757 (Cal. 1981)).

¹³⁶ See *id.* at 909.

similar past conduct, seem to further the due process goal of assuring that the defendant had notice.

While the incorporation of the *Haslip* standards represents an attempt to establish criteria for determining whether a particular award is violative of due process, the protections gained in West Virginia are, as in *Haslip*, primarily procedural. The factors which consider the size of the award itself, such as the requirement that punitive awards bear a reasonable relationship to compensatory damages as well as the actual and potential harm caused by the defendant's conduct, may afford at least some measure of substantive due process analysis in determining if the award was fundamentally fair. Therefore, a court may determine that the mechanical process by which the law was applied is fair and satisfies procedural due process, but may alter the result by finding a substantive due process violation.

As there is no standard for determining the reasonableness of the law itself, the court cannot engage in a substantive due process review of the abstract law of punitive damages because the common law exists as it is applied to a particular set of facts. Thus, a substantive due process review within a punitive damages framework amounts to an assessment by the court of whether the common law, as applied to the particular case, resulted in a fair decision. In other words, if a court finds that a punitive damage award violates substantive due process, it appears that the court is merely replacing the reasoning of the jury with their own, and thus subverting the role of the jury.

3. TXO Production Corp. v. Alliance Resources Corp.

Less than two years after stating that a four-to-one ratio of punitive to compensatory damages ran "close to the line," the United States Supreme Court, in a plurality opinion, affirmed a 526-to-one ratio in the West Virginia case of *TXO Production Corp. v. Alliance Resources Corp.*¹³⁷ ("*TXO*"), where the punitive damages amounted to \$10 million and the compensatory damages were only \$19,000.¹³⁸

The Supreme Court granted certiorari to decide whether the award violated due process on the grounds that it was either excessive or the product of unfair procedure, thus promising both a substantive and procedural due process analysis.¹³⁹ The Court again remarked that the Due Process Clause places "substantive limits beyond which penalties may not go."¹⁴⁰ However, the Court restated their unwillingness to "draw a mathematical bright line between the constitutionally

¹³⁷ 509 U.S. at 443.

¹³⁸ *Id.* at 446. The punitive award was "over 20 times greater than any punitive damages award in West Virginia history, and 10 times greater than the largest punitive damages award for slander of title in any jurisdiction." Miller, *supra* note 19, at 173 (quoting ROBERT L. DUNN, RECOVERY OF PUNITIVE DAMAGES FOR FRAUD § 7.20, at 334 (2d ed. 1995)).

¹³⁹ *See id.* at 446. TXO contended that the punitive damage award violated the Due Process Clause because the award was excessive or resulted from unfair procedure. *See id.*

¹⁴⁰ *Id.* at 453-54 (citing *Seaboard Air Line R. Co. v. Seegers*, 207 U.S. 73, 78 (1907)).

acceptable and the constitutionally unacceptable that would fit every case.”¹⁴¹ The Court noted that “no two cases are truly identical,” and thus, “meaningful comparisons of punitive damage awards are difficult to make.”¹⁴²

The Court declined to create an objective test for examining the constitutionality of punitive damage awards, instead choosing to look at the award with a general “concern for reasonableness in mind.”¹⁴³ A reasonableness analysis is an intermediate standard of review where, in a punitive damages setting, the legitimate interests of the state are balanced against the interests of the party at fault on whom the loss falls.

The West Virginia Supreme Court of Appeals affirmed the punitive award¹⁴⁴ where TXO, an oil and gas developer, was found liable for slander of title.¹⁴⁵ In reviewing this decision, the United States Supreme Court employed a reasonable relationship test which considered the potential harm that TXO could have caused, the maliciousness of the conduct, and the punishment necessary to discourage similar misconduct in the future.¹⁴⁶

In rejecting TXO’s due process claim, the Court noted the dramatic disparity between the actual damages and the punitive award, but justified their decision due to the “amount of money potentially at stake, the bad faith of petitioner, the fact that the scheme employed in this case was part of a larger pattern of fraud, trickery and deceit, and petitioner’s wealth.”¹⁴⁷ The Court approved of considering

¹⁴¹ *Id.* at 458 (citing *Haslip*, 499 U.S. at 18).

¹⁴² *TXO*, 509 U.S. at 457.

¹⁴³ *Id.* at 458 (citing *Haslip*, 499 U.S. at 18). The Court was urged by respondents to adopt a rational basis standard which it rejected stating “that apparently any award that would serve the legitimate state interest in deterring or punishing the wrongful” act would be acceptable regardless of its size. *Id.* at 456. The Court also rejected the use of heightened scrutiny to review punitive awards as unnecessary because of the built-in safeguards of the jury system. *See id.* at 456-57. The Court further remarked that “[a]ssuming that fair procedures were followed, a judgment that is a product of that process is entitled to a strong presumption of validity.” *Id.* at 457.

¹⁴⁴ *See id.* at 499 (O’Connor, J., dissenting) (noting that, unfortunately for TXO, the *Garnes* case was decided after TXO’s trial took place and, although the West Virginia Supreme Court of Appeals recognized that TXO did not get the protections of *Garnes* and *Haslip*, it refused to remand the case, indicating it would be “especially diligent” in reviewing the award, and reciting language from both *Garnes* and *Haslip*).

¹⁴⁵ *See id.* at 452. TXO filed suit requesting a declaratory judgment to clear the title of an interest in oil and gas rights, and Alliance counterclaimed for slander of title. *See id.* at 447. The trial court awarded Alliance costs for defending the declaratory judgment action and \$10,000,000 in punitive damages. *See id.* at 451.

¹⁴⁶ *See id.* at 453 (citing *TXO*, 419 S.E. 2d at 889).

¹⁴⁷ *TXO*, 509 U.S. at 462.

The type of fraudulent action intentionally undertaken by TXO in this case could potentially cause millions of dollars in damages to other victims. As for the reprehensibility of TXO’s conduct, we can say no more than we have already said, and we believe the jury’s verdict says more than we could say in an opinion twice this length. Just as important, an award of this magnitude is necessary to discourage TXO from continuing its pattern and practice of fraud, trickery, and deceit.

Id. at 453 (quoting *TXO*, 419 S.E.2d at 889).

the potential harm that might result from the defendant's conduct as being consistent with the decision in *Haslip*.¹⁴⁸ Thus, the Court did not consider the substantial difference between the actual damages and the punitive damages to be controlling in a case of this character.¹⁴⁹ The Court rejected TXO's argument that they were given no notice of the possibility that the award could be divorced from a compensatory award, by stating that "the notice component of the Due Process Clause is satisfied if prior law fairly indicated that a punitive award might be imposed in response to egregiously tortious conduct."¹⁵⁰

Although the plurality promised both substantive and procedural due process analysis,¹⁵¹ the Court again merely acknowledged that due process puts substantive limits on punitive awards,¹⁵² and reaffirmed the procedural standards from *Haslip* without providing any guidance as to when an award may be "grossly excessive."¹⁵³

The Court provided no new guidance to characterize the vague standard of "reasonableness," and instead decided the case on its particular facts.¹⁵⁴ Thus, after

¹⁴⁸ See *id.* at 460. The Alabama Supreme Court had previously stated that one of the factors for review of a punitive damage award to be considered was "whether there is a reasonable relationship between the punitive damages award and the harm likely to result from the defendant's conduct as well as the harm that actually occurred." *Id.*, citing *Haslip*, 499 U.S. at 21.

¹⁴⁹ See *id.* at 462. The Court in *TXO* decided that the plaintiff's actual damages could have reached "\$4 million, or \$2 million, or even \$1 million" and therefore reduced the 526-to-one ratio considerably. *Id.* at 462. Justice O'Connor disagreed with this line of reasoning, stating that "the potential harm theory is little more than an after-the-fact rationalization invented by counsel to defend this startling award on appeal" and was never directed to the jury's attention. *Id.* at 484-85 (O'Connor, J., dissenting).

¹⁵⁰ *Id.* at 465-66.

¹⁵¹ See *id.* at 472-73 (O'Connor, J., dissenting) (recognizing that in *Haslip* the Court held out the promise that punitive damage awards would receive proper constitutional scrutiny to prevent what is becoming an arbitrary and oppressive system, and that today's judgment renders *Haslip*'s promise a false one).

¹⁵² See *TXO*, 509 U.S. at 453-54. Justice Scalia, who has consistently stated that substantive due process is an oxymoron, stated that the "Due Process Clause of the Fourteenth Amendment, despite its textual limitation to procedure, incorporates certain substantive guarantees specified in the Bill of Rights; but I do not accept the proposition that it is the secret repository of all sorts of other, unenumerated, substantive rights . . ." *Id.* at 470 (Scalia, J., concurring).

It is particularly difficult to imagine that "due process" contains the substantive right not to be subjected to excessive punitive damages, since if it contains that it would surely also contain the substantive right not to be subjected to excessive fines, which would make the Excessive Fines Clause of the Eighth Amendment superfluous in light of the Due Process Clause of the Fifth Amendment.

Id. at 471 (Scalia, J., concurring). "To say (as I do) that 'procedural due process' requires judicial review of punitive damages awards for reasonableness is not to say that there is a federal constitutional right to a substantively correct 'reasonableness' determination—which is, in my view, what the plurality tries to assure today." *Id.* at 471 (Scalia, J., concurring). Justice Scalia explained that he could not "join the plurality opinion, since it makes explicit what was implicit in *Haslip*: the existence of a so-called 'substantive due process' right that punitive damages be reasonable." *Id.* at 470 (Scalia, J., concurring).

¹⁵³ See *Id.* at 480 (O'Connor, J., dissenting). Justice O'Connor stated that "the plurality opinion erects not a single guidepost to help other courts guide their way through this area." *TXO*, 509 U.S. at 480 (O'Connor, J., dissenting).

¹⁵⁴ See *id.* at 480 (O'Connor, J., dissenting) (stating that "the plurality abandons all pretense of pro-

Haslip and *TXO*, the Supreme Court's focus on the "reasonableness" of the award provided a reviewing court little more guidance than its own subjective reaction to the result of an application of existing punitive damages law to the specific facts of the case.¹⁵⁵ The significance of the ratio of punitive to compensatory damages, along with the apparent beginnings of a substantive due process analysis in *Haslip*, were both clouded by the *TXO* decision.

4. Honda Motor Co. v. Oberg

One year after their decision in *TXO*, the United States Supreme Court again attempted to clarify the punitive damages dilemma in the products liability case of *Honda Motor Co. v. Oberg*¹⁵⁶ ("*Oberg*"). Honda was found liable for manufacturing a defective three-wheeled all-terrain vehicle and Oberg was awarded \$919,390 in compensatory damages and \$5 million in punitive damages.¹⁵⁷ Honda claimed that the punitive award was excessive and that "Oregon courts lacked the power to correct excessive verdicts" thus violating Honda's due process rights.¹⁵⁸

The Court again reaffirmed that substantive due process places limits on the size of punitive damages.¹⁵⁹ However, as that issue was not properly before the Court, it did not address the criteria for reviewing whether a punitive award is unconstitutionally excessive, and focused only on Oregon's lack of common-law procedures.¹⁶⁰ The Court stressed the importance of the procedural component of the Due Process Clause to guard against arbitrary deprivations of property.¹⁶¹ The Court cautioned that "[j]ury instructions typically leave the jury with wide discretion in choosing amounts."¹⁶² As a result, jury awards of punitive damages "pose an

viding instruction and moves directly into the specifics of this case").

¹⁵⁵ See *id.* at 466-467 (Kennedy, J., concurring). Justice Kennedy stated that "[t]his type of review, far from imposing meaningful, law-like restraints on jury excess, could become as fickle as the process it is designed to superintend. Furthermore, it might give the illusion of judicial certainty where none in fact exists, and, in so doing, discourage legislative intervention that might prevent unjust punitive awards." *Id.* at 467 (Kennedy, J., concurring).

¹⁵⁶ 512 U.S. 415 (1994). Oberg was injured while riding a three-wheeled all-terrain vehicle; Oberg sued under a products liability theory. See *id.* at 418.

¹⁵⁷ See *id.* at 418.

¹⁵⁸ *Id.*

¹⁵⁹ See *id.*

¹⁶⁰ See *Oberg*, 512 U.S. at 420. The Court stated that "[i]n the case before us today we are not directly concerned with the character of the standard that will identify unconstitutionally excessive awards; rather, we are confronted with the question of what procedures are necessary to ensure that punitive damages are not imposed in an arbitrary manner." *Id.*

¹⁶¹ See *id.* at 420. The Court stated that "[t]he opinions in both *Haslip* and *TXO* strongly emphasized the importance of the procedural component of the Due Process Clause." *Id.* The Court noted that "judicial review of the size of punitive damage awards has been a safeguard against excessive verdicts for as long as punitive damages have been awarded." *Id.* at 421.

¹⁶² *Oberg*, 512 U.S. at 432.

acute danger of arbitrary deprivation of property.”¹⁶³

An amendment to Oregon’s Constitution prohibited judicial review of punitive damages awarded by a jury unless the court could affirmatively say that there was no evidence to support the verdict.¹⁶⁴ The Court reversed and remanded the case to the Oregon Supreme Court, holding that Oregon’s prohibition of judicial review denied Honda their due process rights.¹⁶⁵ Thus, the amendment to the Oregon Constitution was struck down as unconstitutional because it was inconsistent with the Due Process Clause of the Fourteenth Amendment.¹⁶⁶

The *Oberg* decision demonstrated that an absence of common law procedures for judicial review overcomes the presumption of validity given most jury verdicts, and gives rise to a presumption of a violation of the Due Process Clause.¹⁶⁷ Although the *Oberg* Court once again asserted that substantive due process indeed places limits on punitive damage awards, because the case was decided on procedural grounds, the Court offered no standards or guidance to determine when an award is “grossly excessive.”

Haslip, *TXO*, and *Oberg* laid the foundation for the Supreme Court to address whether due process placed substantive limits on the size of punitive damages. The appropriate facts for dealing with this issue finally arrived in the case of *BMW of North America, Inc. v. Gore*.¹⁶⁸

5. BMW of North America, Inc., v. Gore

In *BMW*,¹⁶⁹ the Supreme Court, in a five-to-four opinion, held that the \$2,000,000 punitive damage award was so “grossly excessive as to transcend the constitutional limit.”¹⁷⁰ BMW sold a car to Dr. Gore without revealing that its original finish had been repainted due to acid rain damage.¹⁷¹ The Alabama jury

¹⁶³ *Id.*

¹⁶⁴ The amendment stated:

In actions of law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury shall be otherwise re-examined in any court of this State, unless the court can affirmatively say there is no evidence to support the verdict.

OR. CONST. art. VII, § 3.

¹⁶⁵ See *Oberg*, 512 U.S. at 432 and 435. The Supreme Court noted that “Oregon’s abrogation of a well-established common-law protection against arbitrary deprivations of property raises a presumption that its procedures violate the Due Process Clause.” *Id.* at 430.

¹⁶⁶ See *id.* at 432.

¹⁶⁷ *Id.* at 430.

¹⁶⁸ 517 U.S. 559.

¹⁶⁹ *Id.*

¹⁷⁰ *Id.* at 585-86.

¹⁷¹ See *id.* at 563. The facts established that after driving the vehicle for roughly nine months and noticing no flaws in its finish, Dr. Gore took the car to “Slick Finish,” an independent detailer, which noticed

awarded Dr. Gore \$4,000 in compensatory damages and \$4,000,000 in punitive damages, finding that BMW's disclosure policy amounted to "gross, oppressive or malicious" fraud under the Alabama statute.¹⁷²

The Alabama Supreme Court reduced the punitive award to \$2,000,000,¹⁷³ finding that the jury improperly calculated the award amount by multiplying Dr. Gore's compensatory damages by the number of similar sales in other jurisdictions.¹⁷⁴ The Alabama Supreme Court's explanation of their remittitur expressly disclaimed any reliance on other jurisdictional acts,¹⁷⁵ but did not indicate whether the \$2,000,000 represented an independent assessment of the proper amount of punitive damages or a finding of the maximum award allowable under the Due Process Clause.¹⁷⁶

The Supreme Court granted certiorari to help illuminate when a punitive award is unconstitutionally excessive.¹⁷⁷ The Court began its excessiveness inquiry with an identification of the state interests that punitive damages are intended to protect.¹⁷⁸ The Court acknowledged that punitive damage awards advance the legitimate state interests of punishing and deterring wrongful conduct.¹⁷⁹ However, the Court further recognized that when a punitive award may fairly be categorized as "grossly excessive" in relation to the state's interests, the award violates the Due Process Clause of the Fourteenth Amendment.¹⁸⁰

Although the Court acknowledged that Alabama had a legitimate interest in shielding its residents from deceptive trade practices, it held that the Alabama court could protect the interests of its citizens only.¹⁸¹ Thus, the punitive award could not be based on BMW's actions in other jurisdictions because Alabama had

that the car had been repainted. *Id.*

¹⁷² *BMW*, 517 U.S. at 565. See ALA. CODE §§ 6-11-20, 6-11-21 (1993).

¹⁷³ In ordering the remittitur, the Alabama Supreme Court held "that a constitutionally reasonable punitive damages award in this case is \$2,000,000." *Id.* 567 (citing, *BMW of North America, Inc. v. Gore*, 646 So. 2d 619, 629 (Ala. 1994)).

¹⁷⁴ See *id.* at 567.

¹⁷⁵ See *id.*

¹⁷⁶ See *BMW*, 517 U.S. at 567 n.10.

¹⁷⁷ See *id.* at 568.

¹⁷⁸ See *id.*

¹⁷⁹ See *id.*

In our federal system, states necessarily have considerable flexibility in determining the level of punitive damages that they will allow in different classes of cases and in any particular case. Most states that authorize exemplary damages afford the jury similar latitude, requiring only that the damages awarded be reasonably necessary to vindicate the state's legitimate interests in punishment and deterrence.

Id. (citing *TXO*, 509 U.S. at 456; *Haslip*, 499 U.S. at 21,22).

¹⁸⁰ *BMW*, 517 U.S. at 568 (citing *TXO*, 509 U.S. at 456).

¹⁸¹ See *id.* at 567-73

no authority to interfere with the policies of other states.¹⁸² Therefore, the Court concluded that the award must be reviewed based on BMW's actions in Alabama, as opposed to the interests of consumers nationwide.¹⁸³

The Court continued their analysis by addressing the argument that BMW failed to receive fair notice not only of the conduct which would subject them to penalty but also of the harshness of the punishment that Alabama might impose.¹⁸⁴ In deciding that BMW did not receive adequate notice, the Court announced three factors, or "guideposts," for determining whether a defendant received adequate notice of the size of the penalty that might be assessed.¹⁸⁵ The three "guideposts" were announced as follows: (1) the degree of reprehensibility of the defendant's conduct; (2) the ratio of actual and potential harm to the punitive damages awarded; and (3) the difference between the punitive remedy and the civil penalties authorized in similar cases.¹⁸⁶ Application of these three factors led the Court to conclude that BMW did not receive adequate notice of the penalty Alabama might impose, and that the punitive award was grossly excessive.¹⁸⁷

The Court stated that the degree of reprehensibility of the defendant's conduct may be the most significant consideration in examining the reasonableness of a punitive award.¹⁸⁸ The Court noted that the record reveals no deliberate false statements, intentional misconduct, or concealment of evidence of improper motive, such as were found in *Haslip* and *TXO*.¹⁸⁹ The Supreme Court found that because none of the aggravating factors associated with particularly reprehensible conduct were present, BMW's conduct was not deserving of the \$2,000,000 penalty.¹⁹⁰

The Court next addressed the ratio between compensatory and punitive damages.¹⁹¹ The Court concluded that the disparity in this case was dramatically

¹⁸² See *id.* The Court noted that "[t]o punish a person because he has done what the law plainly allows him to do is a due process violation of the most basic sort." *Id.* at 573 n.19 (citing *Bordenkircher v. Hayes*, 434 U.S. 537, 363 (1978)). While "Congress has ample authority to enact such a policy for the entire nation, it is clear that no single state could do so, or even impose its own policy choice on neighboring states." *Id.* at 571.

¹⁸³ See *BMW*, 517 U.S. at 572-73. Alabama can require BMW to adhere to its own disclosure policy, but it cannot punish BMW for lawful conduct in other states. See *id.* at 571-572.

¹⁸⁴ See *id.* at 574.

¹⁸⁵ *Id.* at 574-75.

¹⁸⁶ *Id.*

¹⁸⁷ See *BMW*, 517 U.S. at 574-75.

¹⁸⁸ See *id.* at 575.

¹⁸⁹ See *id.* at 579 (citing *Haslip*, 499 U.S. at 5; *TXO*, 509 U.S. at 453).

¹⁹⁰ See *id.* at 576. The Court found that the harm BMW inflicted on Dr. Gore was purely economic in nature and showed no reckless disregard for the health and safety of others, and thus was not sufficiently reprehensible to justify a significant penalty in addition to compensatory damages. See *id.*

¹⁹¹ See *BMW*, 517 U.S. at 580. The Court noted that this consideration is perhaps the most commonly cited indicium of an unreasonable or excessive punitive award. See *id.*

greater than those considered in *Haslip* and *TXO*.¹⁹² The Court stressed that they have consistently rejected the idea that a constitutional line may be marked by a simple mathematical formula, however, the disparity between Dr. Gore's actual harm and the punitive award measuring 500-to-1 was suspect.¹⁹³

Lastly, the Court analyzed the punitive award in relation to the possible civil and criminal sanctions for similar wrongful conduct.¹⁹⁴ As the punitive award in *BMW* greatly exceeded any of the statutory penalties available in Alabama or any other state,¹⁹⁵ the Court found the punitive award excessive because a lesser sanction could have compelled BMW to comply with Alabama's policies.¹⁹⁶

After several previous assertions that the Due Process Clause places substantive limits on punitive damage awards, the Court in *BMW* finally held that a punitive award exceeded constitutional limits.¹⁹⁷ The Court set out a two-step analysis requiring that a court identify the state interests a punitive award is designed to serve,¹⁹⁸ and then determine, by applying the three "guideposts," whether the defendant was on notice that it could be subject to the amount of damages assessed.¹⁹⁹

Although it remains unclear exactly how big a punitive award must be before it is too big,²⁰⁰ the Court seemingly has provided additional guidance in the

¹⁹² See *id.* at 582.

¹⁹³ See *id.* at 583. The Court reiterated its rejection of a categorical approach, noting that:

Low awards of compensatory damages may properly support a higher ratio than high compensatory awards, if, for example, a particularly egregious act has resulted in only a small amount of economic damages. A higher ratio may also be justified in cases in which the injury is hard to detect or the monetary value of noneconomic harm might have been difficult to determine.

Id. at 582.

¹⁹⁴ See *BMW*, 517 U.S. at 583. Justice O'Connor noted that a court reviewing whether a punitive damage award is excessive should "accord 'substantial deference' to legislative judgments concerning appropriate sanctions for the conduct at issue." *Browning-Ferris*, 492 U.S. at 301 (O'Connor, J., concurring in part and dissenting in part).

¹⁹⁵ See *BMW*, 517 U.S. at 583-84. The Court noted that the maximum fine available under the Alabama Deceptive Trade Practices Act was \$2,000, and the most strict penalties of other states ranged from \$5,000 to \$10,000. See *id.* at 584.

¹⁹⁶ See *id.* at 584-85.

¹⁹⁷ See *id.* at 585-86. In his dissent, Scalia stated that "today's judgment represents the first instance of this court's invalidation of a state-court punitive assessment as simply unreasonably large." *Id.* at 599 (Scalia, J., dissenting).

¹⁹⁸ See *BMW*, 517 U.S. at 568.

¹⁹⁹ See *id.* at 574.

²⁰⁰ See *id.* at 613 (Ginsburg, J., dissenting). In her dissent, Justice Ginsburg stated:

The exercise is engaging, but ultimately tells us only this: too big will be judged unfair. What is the Court's measure of too big? Not a cap of the kind a legislature could order, or a mathematical test this Court can divine and impose. Too big is, in the end, the amount which five Members of the court bridle.

form of the three “guideposts.”²⁰¹ These pliable factors refrain from setting mathematical limits on punitive awards while attempting to clarify standards for engaging in a logical evaluation of whether a punitive award is sufficient to punish and deter wrongful conduct or whether the award violates the defendant’s due process rights.

At first glance, the *BMW* Court’s three “guideposts” appear to be a mere restatement of the existing practice. As a result, it appears that the Court’s substantive due process analysis simply involves applying the same standards used by the jury and appellate courts, and then replacing the jury’s decision with its own when it disagrees with the verdict.²⁰²

However, rather than placing these currently applied factors in a purely procedural due process context as in *Haslip*, these three factors were utilized to determine if the defendant received adequate notice of the conduct which would subject it to penalty and of the size of the punishment that might be assessed.²⁰³ Although the concern of adequate notice is certainly a procedural one, this analysis forces the reviewing court to scrutinize the amount of the award itself. Therefore, in applying the three “guideposts,” a court looks directly at the amount of the punitive damages awarded and decides if the penalty could fairly be imposed on the defendant.

Prior to the United States Supreme Court’s decision in *BMW*, the meaning of the vague terms “reasonableness”²⁰⁴ and “grossly excessive”²⁰⁵ remained confusing. The Court’s lack of clarity regarding due process challenges to punitive damages left lower courts uncertain whether the Constitution assures defendants only procedural rights, or substantive rights as well. *BMW*’s announced “guideposts” were intended to guide courts in assessing whether a punitive award crosses the Constitutional line and becomes grossly excessive. Unfortunately, the inherent flexibility of both the ratio and reprehensibility factors in particular allow courts to

Id. at n. 5. (Ginsburg, J., dissenting).

²⁰¹ See *id.* at 575. There have been several cases which have applied the three guideposts. *Neibel v. Trans World Assurance Co.*, 108 F.3d 1123, 1131-33 (9th Cir. 1997) (applying the three *BMW* factors in finding that the punitive damages award was not “grossly excessive”, and thus did not offend the Fourteenth Amendment); *Lee v. Edwards*, 101 F.3d 805, 809-12 (2d Cir. 1996) (the three factors identified in *BMW* in finding a punitive award excessive); *Patterson v. P.H.P. Healthcare Corp.*, 90 F.3d 927, 943-44 (5th Cir. 1996) (stating that “the quantum of this award does not comply with the three factors set out by the Supreme Court to determine the reasonableness of a punitive damages award”); *Continental Trend Resources, Inc. v. OXY USA Inc.*, 101 F.3d 634, 636-41 (10th Cir. 1996) (stating that the Supreme Court in *BMW* “clarified in several respects the legal standards to be applied” when reviewing a punitive award).

²⁰² See *BMW*, 517 U.S. at 600 (Scalia, J., dissenting). Justice Scalia began his dissent by stating that the Court’s new rule of constitutional law is constrained by nothing but the Justices’ subjective determination of the reasonableness of the punitive award. See *id.* at 599 (Scalia, J., dissenting). Justice Scalia further stated that the “decision, though dressed up in a legal opinion, is really no more than a disagreement with the community’s sense of indignation or outrage expressed in the punitive award of the Alabama jury, as reduced by the State Supreme Court.” *Id.* at 600 (Scalia, J., dissenting). Justice Scalia remarked that the majority’s opinion is a “judgment about the appropriate degree of indignation or outrage, which is hardly an analytical determination.” *Id.* (Scalia, J., dissenting).

²⁰³ See *id.* at 574.

²⁰⁴ *Haslip*, 499 U.S. at 18.

²⁰⁵ *Waters-Pierce Oil Co.*, 212 U.S. at 111.

make subjective determinations regarding an award's constitutionality.²⁰⁶

6. Alkire v. First National Bank of Parsons

The West Virginia Supreme Court of Appeals further clarified the West Virginia standards used in reviewing punitive damage awards in the case of *Alkire v. First National Bank of Parsons*²⁰⁷ ("*Alkire*"). In *Alkire*, the West Virginia Supreme Court of Appeals reversed a circuit court decision that had vacated a punitive damage award.²⁰⁸ After reviewing the record, the *Alkire* Court concluded that a reasonable trier of fact could easily have returned a punitive damage award in favor of Mr. Alkire.²⁰⁹

The Court in *Alkire* followed the two-step paradigm of West Virginia punitive damage jurisprudence by first deciding if the defendant's conduct warranted imposing punitive damages, and then reviewing the award for excessiveness.²¹⁰ After determining that Mr. Alkire was entitled to a punitive award, the *Alkire* Court addressed the question of whether Mr. Alkire was entitled to the punitive award returned by the jury.²¹¹

The West Virginia Supreme Court of Appeals declined to simply reinstate the punitive damage award of \$1,050,000 since it was imperative that the amount of the punitive award be first reviewed by the trial court by applying the model specified in Syllabus points three²¹² and four²¹³ of *Garnes* and Syllabus Point fif-

²⁰⁶ See *TXO*, 509 U.S. at 480-81 (O'Connor, J., dissenting). Justice O'Connor warned that constitutional judgments "should not be, or appear to be, merely the subjective views of individual Justices." *Id.* at 480 (quoting *Rummel v. Estelle*, 445 U.S. 263, 274 (1980) (quoting *Coker v. Georgia*, 433 U.S. 584, 592 (1977)) (O'Connor, J., dissenting)). "Without objective criteria on which to rely, almost any decision regarding proportionality will be a matter of personal preference. One judge's excess very well may be another's moderation." *Id.* at 480-81 (O'Connor, J., dissenting).

²⁰⁷ 475 S.E.2d 122 (W. Va. 1996). The facts of *Alkire* reveal that Mr. Alkire, an employee of the Parsons Texaco, was to take the daily receipts and deposit them in a night depository of the defendant, First National Bank of Parsons (hereinafter the Bank). See *id.* at 125. Unfortunately, the Parsons Texaco deposit was not found, and thus never logged into the Bank's records. See *id.* Following a criminal investigation, the grand jury refused to charge Mr. Alkire with a crime. See *id.* However, the shadow of suspicion surrounding Mr. Alkire resulted in ridicule, embarrassment and shame, ruining Mr. Alkire's reputation in the community. See *id.* at 126. Nearly two and one-half years later, the Bank found the missing deposit, but chose not to inform Mr. Alkire because, according to the Bank, Mr. Alkire was not the customer whose deposit was missing. See *Alkire*, 475 S.E.2d 122. After Mr. Alkire was anonymously informed of the recovery, he filed suit against the Bank, alleging negligence, gross negligence and fraud. See *id.* The jury awarded Mr. Alkire \$210,000 in compensatory damages, and \$1,050,000 in punitive damages. See *id.*

²⁰⁸ *Id.* at 131.

²⁰⁹ *Id.* at 129. The West Virginia Supreme Court of Appeals reaffirmed their commitment to the traditional rule, announcing the type of conduct necessary to find punitive damages "in actions of tort" as: "gross fraud, malice, oppression, or wanton, willful, or reckless conduct or criminal indifference to civil obligations affecting the rights of others, or where legislative enactment authorizes it." *Alkire*, 475 S.E.2d 122 (citing *Mayer v. Frobe*, 22 S.E.2d 58, Syl. Pt. 4 (1895)).

²¹⁰ *Id.* at Syl. Pt.7.

²¹¹ *Id.* at 130.

²¹² See *id.* at 130. Syllabus Point three of *Garnes* provides guidance to courts when instructing juries

teen of *TXO*.²¹⁴ Since the trial court vacated the entire punitive award, no analysis was made concerning the size of the award as required by the *Garnes* decision.²¹⁵ Thus, the required excessiveness analysis needed to be made on remand.²¹⁶ The *Alkire* Court then reiterated that the West Virginia Supreme Court of Appeals will,

on determining the amount of punitive damages to award. It reads as follows:

When the trial court instructs the jury on punitive damages, the court should, at a minimum, carefully explain the factors to be considered in awarding punitive damages. These factors are as follows: (1) Punitive damages should bear a reasonable relationship to the harm that is likely to occur from the defendant's conduct as well as to the harm that actually has occurred. If the defendant's actions caused or would likely cause in a similar situation only slight harm, the damages should be relatively small. If the harm is grievous, the damages should be greater. (2) The jury may consider (although the court need not specifically instruct on each element if doing so would be unfairly prejudicial to the defendant), the reprehensibility of the defendant's conduct. The jury should take into account how long the defendant continued in his actions, whether he was aware his actions were causing or were likely to cause harm, whether he attempted to conceal or cover up his actions or the harm caused by them, whether/how often the defendant engaged in similar conduct in the past, and whether the defendant made reasonable efforts to make amends by offering a fair and prompt settlement for the actual harm caused once his liability became clear to him. (3) If the defendant profited from his wrongful conduct, the punitive damages should remove the profit and should be in excess of the profit, so that the award discourages future bad acts by the defendant. (4) As a matter of fundamental fairness, punitive damages should bear a reasonable relationship to compensatory damages. (5) The financial position of the defendant is relevant.

Alkire, 475 S.E.2d at 130-131 n.10.

²¹³ See *id.* at 130. Syllabus Point four of *Garnes* instructs circuit courts on how to review the propriety of the amount of the punitive award and reads as follows:

When the trial court reviews an award of punitive damages, the court should, at a minimum, consider the factors given to the jury as well as the following additional factors: (1) The costs of the litigation; (2) Any criminal sanctions imposed on the defendant for his conduct; (3) Any other civil actions against the same defendant, based on the same conduct; and (4) The appropriateness of punitive damages to encourage fair and reasonable settlements when a clear wrong has been committed. A factor that may justify punitive damages is the cost of litigation to the plaintiff. Because not all relevant information is available to the jury, it is likely that in some cases the jury will make an award that is reasonable on the facts as the jury know them, but that will require downward adjustment by the trial court through remittitur because of factors that would be prejudicial to the defendant if admitted at trial, such as criminal sanctions imposed or similar lawsuits pending elsewhere against the defendant. However, at the option of the defendant, or in the sound discretion of the trial court, any of the above factors may also be presented to the jury.

Id. at 131 n.10.

²¹⁴ See *id.* at 130. Syllabus Point Fifteen of *TXO* provides as follows:

The outer limit of the ratio of punitive damages to compensatory damages in cases in which the defendant has acted with extreme negligence or wanton disregard but with no actual intention to cause harm and in which compensatory damages are neither negligible nor very large is roughly 5 to 1. However, when the defendant has acted with actual evil intention, much higher ratios are not per se unconstitutional.

Id. at 131 n.12.

²¹⁵ See *id.* at 127.

²¹⁶ See *id.* at 131.

upon petition, review the amount of the punitive award, applying the standard set forth in Syllabus Point five of *Garnes*.²¹⁷ The case was remanded to determine if the punitive award of \$1,050,000 was excessive in light of Syllabus Points three and four of *Garnes* and Syllabus Point fifteen of *TXO*.²¹⁸

The *Alkire* Court solidified the West Virginia standards for jury instructions concerning punitive damages and clearly mandated that every post-trial review of punitive awards for excessiveness be conducted exclusively within the boundaries of *Garnes* and *TXO*.²¹⁹ The *Alkire* decision reaffirmed West Virginia punitive damages jurisprudence, setting the foundation for the analysis performed in *Vandevender v. Sheetz, Inc.*

IV. VANDEVENDER V. SHEETZ, INC.

A. Facts and Procedural History

On June 8, 1989, Ms. Vandevender was hired as a salesperson by Sheetz for one of its convenience stores.²²⁰ Six months later she was promoted to second assistant manager.²²¹ While at work on January 4, 1991, she injured her back while trying to remove the lid from a large pickle jar.²²² Prior to her employment with Sheetz, Ms. Vandevender had injured her back for which she had undergone back surgery.²²³ Ms. Vandevender continued working for several months, and was first examined by a physician for the pickle jar injury on January 21, 1991.²²⁴ She successfully sought relief from the Worker's Compensation Fund and began receiving temporary total disability benefits for the injury on July 30, 1991.²²⁵ She underwent

²¹⁷ *Id.* at 130-31. Syllabus Point five of *Garnes* reads as follows:

Upon petition, this Court will review all punitive damages awards. In our review of the petition, we will consider the same factors that we require the jury and trial judge to consider, and all petitions must address each and every factor set forth in Syllabus Points 3 and 4 of this case with particularity, summarizing the evidence presented to the jury on the subject or to the trial court at the post-judgment review stage. Assignments of error related to a factor not specifically addressed in the petition will be deemed waived as a matter of state law.

Alkire, 475 S.E.2d at 131 n.11.

²¹⁸ *Id.* at 131.

²¹⁹ *Id.* at 130-31.

²²⁰ *See Vandevender*, 490 S.E.2d at 682.

²²¹ *See id.*

²²² *See id.* at n.1.

²²³ *See id.* at n.2.

²²⁴ *See id.* at 682.

²²⁵ *See id.*

back surgery for the injury on October 7, 1991.²²⁶

In late 1992, Ms. Vandevender informed her store manager, Ms. Foltz, that she was able to return to work with a permanent limitation on heavy lifting.²²⁷ Ms. Vandevender was told that she could not return to work until she was “100%,” according to company policy.²²⁸ On March 15, 1993, Ms. Vandevender received a letter from Sheetz stating its policy that a twelve-month absence from work is treated as a resignation.²²⁹ The letter further stated that if she were able to work, she should contact Sheetz’ human resources department, and that she would be eligible for rehire after obtaining a medical release subject to her qualifications and abilities concerning her job duties and responsibilities.²³⁰ She did not contact Sheetz’ human resources department or Ms. Foltz after receipt of this letter.²³¹ Pursuant to Sheetz’ one-year absence policy, Ms. Vandevender was fired in March 1993.²³²

On December 1, 1994, Ms. Vandevender filed suit against Sheetz. She alleged a violation of the anti-discrimination provisions of the West Virginia Workers’ Compensation Act²³³ (“Workers’ Compensation Act”).²³⁴ She also alleged an action for refusing to rehire an employee fired after a work-related injury and for refusing to consider a prior employee for rehire based on an actual or perceived handicap in violation of the West Virginia Human Rights Act²³⁵ (“Human Rights Act”).²³⁶ During the discovery phase of litigation the store manager, Ms. Foltz, testified that Ms. Vandevender could have been accommodated because the job functions listed by Sheetz requiring employees to stand for eight hours a day and lift up to fifty pounds were not actually essential.²³⁷ As a result of this discovery, Ms. Vandevender demanded to be returned to her job.²³⁸

²²⁶ See *id.*

²²⁷ See *Vandevender*, 490 S.E.2d at 682-83.

²²⁸ *Id.* at 683.

²²⁹ See *id.* The letter regarding this policy stated that “[a]ny employee of Sheetz, Inc. who is absent from work due to disability (either work related or non-work related) or illness for a total of twelve (12) consecutive or non-consecutive months shall be considered to have resigned his or her employment with Sheetz, Inc.” *Id.* at n.4.

²³⁰ See *id.* at 683.

²³¹ See *Vandevender*, 490 S.E.2d at 683.

²³² See *id.* at 683.

²³³ W.VA. CODE §§ 23-5A-1 to -3 (1998).

²³⁴ See *Vandevender*, 490 S.E.2d at 683.

²³⁵ W.VA. CODE §§ 5-11-1 to -19 (1994).

²³⁶ See *Vandevender*, 490 S.E.2d at 683.

²³⁷ See *id.* Ms. Foltz was fired five weeks after her deposition. See *id.* at n.7. The trial court, upon objection of Sheetz’ counsel for relevancy, prevented Ms. Vandevender’s counsel from inquiring into the basis of Ms. Foltz’s firing. See *id.*

²³⁸ See *id.*

On February 3, 1995, Sheetz offered to hire Ms. Vandevender as a sales clerk.²³⁹ She returned to work on April 17, 1995.²⁴⁰ On that day the regional manager, Ms. Imler, was present and demanded to be given a written list of Ms. Vandevender's work restrictions.²⁴¹ Although the regional manager was specifically aware of the results of Ms. Vandevender's required medical examination one month prior, Ms. Imler stated that until she received an updated doctor's slip, she did not "see" any restrictions.²⁴² Ms. Imler ordered Ms. Vandevender to obtain a new medical examination by Friday of the upcoming week, even though Ms. Vandevender was scheduled to work every day of that week.²⁴³ Although the store manager, Randy Wallen, cautioned Ms. Vandevender not to lift anything,²⁴⁴ the regional manager ordered Ms. Vandevender to stock the cooler.²⁴⁵ After twenty minutes of stocking the cooler, Ms. Vandevender had to stop due to back spasms.²⁴⁶ She continued working for several more hours, but did not tell anyone of her back pain.²⁴⁷ Ms. Vandevender informed Sheetz the next day that she would not be returning to work on advice of her lawyer.²⁴⁸

In June 1995, Ms. Vandevender amended her complaint to allege that Sheetz violated the Human Rights Act by failing to accommodate her during the period of 1991 to 1995.²⁴⁹ She further amended her complaint to allege that Ms. Imler's request to stock the cooler was an unlawful reprisal²⁵⁰ in violation of the Human Rights Act.²⁵¹

After a three-day trial the jury returned a verdict for Ms. Vandevender.²⁵² She was awarded \$130,066 in compensatory damages, \$170,000 for non-economic damages, and \$2,699,00 in punitive damages.²⁵³ Sheetz filed motions for judgment

239 *See id.*

240 *See Vandevender*, 490 S.E.2d at 683.

241 *See id.* Ms. Vandevender's work restrictions were that she could only lift fifteen pounds at a time and that she had to use a stool to take periodic breaks from standing. *See id.* at 684 n.9.

242 *Id.* at 683-84.

243 *See id.* at 684.

244 *See Vandevender*, 490 S.E.2d at 684 n.10.

245 *See id.* at 684.

246 *See id.* The record shows that Ms. Vandevender did not lift anything heavier than a six-pack or a two-liter bottle of soda while stocking the cooler. *See id.* at n.11.

247 *See id.* at 684.

248 *See Vandevender*, 490 S.E.2d at 684.

249 *See id.*

250 *See id.*

251 W.VA. CODE § 5-11-9 (7)(C).

252 *See Vandevender*, 490 S.E.2d at 684.

253 *See id.*, 490 S.E.2d at 684. The non-economic damages were awarded for "emotional distress,

notwithstanding the verdict, new trial, and remittitur.²⁵⁴ Upon denial of their post trial motions, Sheetz appealed to the West Virginia Supreme Court of Appeals.²⁵⁵

On appeal, Sheetz argued that under the standards enumerated in *BMW*, the punitive award was grossly excessive, and thus violated the Due Process Clause of the Fourteenth Amendment.²⁵⁶ Sheetz further contended that the Circuit Court failed to engage in a meaningful and adequate review of the punitive damage award as mandated by *Garnes*.²⁵⁷

B. The Majority Per Curiam Opinion

The West Virginia Supreme Court of Appeals, in a per curiam opinion,²⁵⁸ concluded that the punitive damages awarded in connection with the theories of unlawful termination and refusal to allow Ms. Vandevender to apply for rehire or return to work were excessive under its prior holdings.²⁵⁹ However, the Supreme Court of Appeals upheld the punitive damages awarded in connection with the theory of retaliation.²⁶⁰

1. Discussion of Applicable Law

The Supreme Court began their analysis with a discussion of federal law regarding punitive damages.²⁶¹ The Court reaffirmed that the due process clause of the Fourteenth Amendment prohibits imposition of a “grossly excessive” punishment on a tortfeasor.²⁶² The Court recognized the three “guideposts” of *BMW*, and the special procedural concern for adequate notice of the severity of the penalty imposed by the award.²⁶³

The Supreme Court next discussed the recent developments in West Virginia law concerning punitive damages.²⁶⁴ The Court outlined the West Virginia

upset, embarrassment, and humiliation.” *Id.* at n.12.

²⁵⁴ See *id.* The circuit court granted Sheetz’ motion for remittitur with regard to \$6,200 of the 13,200 the jury awarded for medical expenses because the evidence presented could not justify such an award. See *id.* at n.13.

²⁵⁵ See *id.*

²⁵⁶ See *Vandevender*, 490 S.E.2d at 684.

²⁵⁷ See *id.*

²⁵⁸ See *Lieving v. Hadley*, 423 S.E.2d 600, 604 n.4 (W. Va. 1992) (noting that a per curiam opinion is not mandatory precedent beyond the syllabus points).

²⁵⁹ See *id.* at 683.

²⁶⁰ See *id.*

²⁶¹ See *id.* at 684.

²⁶² *Vandevender*, 490 S.E.2d at 684 (citing *BMW*, 517 U.S. at 562 (quoting *TXO*, 509 U.S. at 454)).

²⁶³ See *id.* at 684-85.

²⁶⁴ See *id.* at 685.

system for awarding and reviewing punitive damages, noting that proper review was lacking prior to the *Garnes* decision.²⁶⁵

Following a statement of the *Garnes* requirements, the Court noted the important distinction made in *TXO* between defendants who did not intentionally or malevolently harm a plaintiff and those defendants who intentionally and knowingly committed harmful acts.²⁶⁶ The Court concluded its discussion of applicable law with its recent decision in *Alkire*, where the West Virginia punitive damage jurisprudence was announced as a two-step paradigm.²⁶⁷ This two-step paradigm begins by determining whether the defendant's acts justify imposition of punitive damages, and then if an award is warranted, a review is mandated using the established standards to decide if the award is excessive.²⁶⁸

The Court refused to consider Sheetz' argument that punitive damages are not recoverable for violations of the anti-discrimination provisions of the Worker's Compensation Act or the Human Rights Act because Sheetz failed to raise this substantive objection in the lower court.²⁶⁹ In refusing to address these issues for the first time on appeal, the Court remarked that they "will not pass on a nonjurisdictional question which has not been decided by the trial court in the first instance."²⁷⁰

The West Virginia Workers' Compensation Act does not address the relief available for discrimination claims,²⁷¹ but the West Virginia Human Rights Act provides that the remedy "may include but is not limited to, . . . any other legal or equitable relief, as the court deems appropriate."²⁷² The Supreme Court of Appeals recently announced that this statutory provision authorizes punitive damages awards as "equitable relief" under the West Virginia Human Rights Act.²⁷³

²⁶⁵ See *id.* Under the West Virginia system for an award and review of punitive awards, there must be: (1) a reasonable constraint on jury discretion; (2) a meaningful and adequate review by the trial court using well-established principles; and (3) a meaningful and adequate appellate review. See *Garnes*, 413 S.E.2d at 908.

²⁶⁶ See *id.* at 686.

²⁶⁷ See *id.* at 687.

²⁶⁸ See *id.* In the *Alkire* case, the West Virginia Supreme Court of Appeals first engaged in a review of the entire record to determine if the defendant's conduct could be categorized as the type giving rise to imposition of punitive damages. See *Alkire*, 475 S.E.2d at 129. The *Alkire* Court found that the trial court was incorrect in determining that no reasonable jury could have reached a verdict finding punitive damages. See *id.* The *Alkire* Court found instead that the evidence of the defendant's misconduct was such that a reasonable trier of fact could have easily reached a decision returning a punitive award in favor of Mr. Alkire, overturning the trial court's decision. See *id.*

²⁶⁹ See *id.*

²⁷⁰ *Vandevender*, 490 S.E.2d at 687 (quoting *Sands v. Security Trust Co.*, 102 S.E.2d 733, Syl. Pt. 2 (1958)).

²⁷¹ See *id.* at 695 (Maynard, J., dissenting).

²⁷² W.VA. CODE § 5-11-13(c) (Supp. 1998).

²⁷³ *Haynes v. Rhone-Poulenc, Inc.*, 521 S.E.2d 331, Syl. Pt. 5 (W. Va. 1999).

2. Application of West Virginia Punitive Damages Law

After enumerating the standards to be used in deciding this case, the Supreme Court of Appeals began their application of West Virginia punitive damage law to the facts of Ms. Vandevender's case.

a. Conduct Authorizing Assessment of Punitive Damages

The Supreme Court of Appeals first addressed the threshold question of whether Sheetz' conduct justified assessment of punitive damages.²⁷⁴ The standard of proof in West Virginia for finding conduct allowing imposition of punitive damages is a preponderance of the evidence.²⁷⁵ Conduct necessary to recover punitive damages in West Virginia includes: (1) gross fraud; (2) malice; (3) oppression; (4) wanton, willful, or reckless conduct; (5) criminal indifference to civil rights of others; and (6) acts legislatively authorized as deserving of punitive damages.²⁷⁶

The Supreme Court of Appeals found that Sheetz' conduct entitled Ms. Vandevender to a punitive award.²⁷⁷ The Court specifically pointed to Sheetz' admissions of violating state law and public policy by preventing Ms. Vandevender from returning to her job, and failing to accommodate her physical limitations.²⁷⁸ The Court also cited as evidence of improper conduct Sheetz' failure to pay any of Ms. Vandevender's hospital bills despite its stipulation to \$7,000 in medical expenses, and Sheetz' failure to engage in settlement negotiations.²⁷⁹ Furthermore, the evidence of surveillance efforts by Sheetz and the regional manager's feigned ignorance of Ms. Vandevender's physical limitations were cited as improper conduct.²⁸⁰

The *Vandevender* Court approved of the trial court's finding of conduct

²⁷⁴ See *Vandevender*, 490 S.E.2d at 688.

²⁷⁵ See *Beasley*, *supra* note 42, at 2213.

²⁷⁶ See *Mayer*, 22 S.E. 58, Syl. Pt.4.

²⁷⁷ See *Vandevender*, 490 S.E.2d at 688.

²⁷⁸ See *id.* Sheetz' company policy preventing injured employees from working until they are "100%" violated the Workers' Compensation Act which states, in part, that:

It shall be a discriminatory practice within the meaning of section one of this article [W.VA. CODE § 23-5A-1] for an employer to fail to reinstate an employee who has sustained a compensable injury to the employee's former position of employment upon demand for such reinstatement provided that the position is available and the employee is not disabled from performing the duties of such position.

W.VA. CODE § 23-5A-3(b).

²⁷⁹ See *Vandevender*, 490 S.E.2d at 688. Ms. Vandevender had offered to settle for her reinstatement plus \$30,000, but Sheetz refused to settle the case. See *id.* at n.21.

²⁸⁰ *Id.* at 688. The evidence showed that the regional manager returned to the store to retrieve the tape that was made of Ms. Vandevender the day before. The evidence also showed that pictures taken by various sales clerks of Ms. Vandevender as she shopped at Sheetz' store found their way to the district manager's office at Sheetz' corporate headquarters. *Id.* The trial court observed that no one took responsibility at trial for this surveillance. *Id.*

sufficient to support the assessment of punitive damages. Specifically, the Court held that “[g]iven Sheetz’ admissions of discriminatory acts that constitute violations of both state law and public policy,²⁸¹ we conclude that sufficient evidence was presented of willful, wanton, and/or reckless conduct that warranted a consideration of punitive damages by the jury.”²⁸²

b. Meaningful and Adequate Review

Next, the Court considered the question of whether the trial court properly conducted a meaningful and adequate review within the established guidelines for punitive awards.²⁸³ The Court found that the trial court had considered all of the required factors enumerated in *Garnes*²⁸⁴ and therefore had engaged in an appropriate review of the punitive award.²⁸⁵

The *Vandevender* Court held that the trial court had acted consistent with the procedural dictates from *Garnes*.²⁸⁶ The Court rejected Sheetz’ contention that it was denied a meaningful and adequate review of the punitive damages award.²⁸⁷ To the contrary, the record showed that the trial court had explicitly laid out its reasons for finding conduct deserving of punitive damages, and for finding that the award was not excessive.²⁸⁸

c. Excessiveness of the Punitive Damages Award

Finally, the West Virginia Supreme Court of Appeals examined whether the punitive damage award was excessive.²⁸⁹ Before analyzing the size of the award, the Court criticized Sheetz for stating its assignments of error rather conclusorily, rather than with particularity as mandated in syllabus point five of *Gar-*

²⁸¹ *Vandevender*, 490 S.E.2d at 689 n.22. Sheetz admitted that its personnel erroneously enforced two company policies in violation of West Virginia law: an unwritten policy that required all workers to be 100% before coming back to work and a written policy of firing employees who were absent for more than one year. *Id.*

²⁸² *Id.* at 688-89.

²⁸³ *See id.* at 689.

²⁸⁴ In *Garnes*, the West Virginia Supreme Court of Appeals considered whether its guidelines provided sufficient review of punitive damage awards by trial courts. *See Garnes*, 413 S.E.2d at 908. In light of the United States Supreme Court’s decision in *Haslip*, the *Garnes* Court found that the trial court’s review of the punitive damage award was neither meaningful nor adequate as required by the Due Process Clause. *See id.* Consequently, the Court adopted the Alabama procedures approved by the Supreme Court in *Haslip*. *See id.*

²⁸⁵ *See id.*

²⁸⁶ *See Vandevender*, 490 S.E.2d at 689.

²⁸⁷ *See id.*

²⁸⁸ *See id.*

²⁸⁹ *See id.* at 689-90.

nes.²⁹⁰ After applying the relevant standards dictated by syllabus points three and four of *Garnes* and syllabus point fifteen of *TXO*, the Court held that the punitive damages awarded for the unlawful termination and failure to rehire claims were excessive.²⁹¹ However, the Court did not reduce the amount of punitive damages awarded for the retaliation claim.

The Court viewed separately, as did the jury, the damages awarded for the unlawful termination and failure to rehire from the retaliatory damages.²⁹² The jury awarded \$221,748 in compensatory damages and \$1,575,000 in punitive damages for the unlawful termination and failure to rehire claims.²⁹³ These figures represented a seven-to-one ratio of punitive to compensatory damages.²⁹⁴ For the retaliation claim, the jury awarded, after remittitur, \$72,118 in compensatory damages and \$1,124,000 in punitive damages, a fifteen-to-one ratio.²⁹⁵

The Court recognized the necessity for vigilance against punitive awards that are unreasonable in light of their purpose to punish and deter, and as a result, violate due process.²⁹⁶ The Court then began its application of the *Garnes* factors to determine if the award was reasonable and thus within the due process limitations intended to guard against penalties which are grossly excessive in relation to the state's interest.²⁹⁷

The first of the *Garnes* factors requires that punitive awards bear a reasonable relationship to the potential and actual harm caused by the defendant's actions.²⁹⁸ The Court recognized that "[i]nherent to this inquiry is the notion that the amount of the damages awarded are directly connected to the nature of the defendant's conduct—the more egregious the conduct of the defendant, the greater the award."²⁹⁹ "This principle reflects the accepted view that some wrongs are more blameworthy than others."³⁰⁰

The Court then applied the standard from syllabus point fifteen of *TXO* which distinguishes between conduct that demonstrates extreme negligence and

²⁹⁰ See *id.* at 690. Syllabus point five of *Garnes* requires a petitioner to address the factors set forth in syllabus points three and four with particularity and to summarize the facts given to the jury on the subject or to the trial court at the post-judgment review stage. See *Vandevender*, 490 S.E.2d at 690 (quoting *Garnes*, 413 S.E.2d at 900).

²⁹¹ See *Vandevender*, 490 S.E.2d at 693-94.

²⁹² See *id.* at 690.

²⁹³ See *id.*

²⁹⁴ See *id.*

²⁹⁵ See *id.*

²⁹⁶ See *Vandevender*, 490 S.E.2d at 690 (quoting *Haslip*, 499 U.S. at 21).

²⁹⁷ See *id.* at 690.

²⁹⁸ See *id.* at 691 (quoting *Garnes*, 413 S.E.2d at 658 Syl. Pt.3).

²⁹⁹ *Id.* at 691.

³⁰⁰ *BMW*, 517 U.S. at 575.

conduct that evinces a real intent to cause harm.³⁰¹ The significance of this distinction is that West Virginia punitive damage law places an outer limit of five-to-one regarding the ratio of punitive to compensatory damages in cases where no actual intent to harm is evidenced.³⁰² Only when the defendant can be shown to have intended to cause harm can the ratio be permitted to climb higher without “rais[ing] a suspicious judicial eyebrow.”³⁰³

The Court reasoned that the type of evidence shown in connection with the unlawful termination and failure to rehire claims suggested an employer acting against state law and policies, but not an employer whose conduct showed a malicious intent to prevent Ms. Vandevender from returning to her job.³⁰⁴ This evidence included Sheetz’ admissions that its employment policies were in violation of the Workers’ Compensation Act and the Human Rights Act.³⁰⁵

On the other hand, the Court held that the evidence presented against Sheetz with regard to the retaliation theory suggested a mean-spirited intent to punish Ms. Vandevender for her injury and her subsequent claims against Sheetz.³⁰⁶ As evidence of an intent to cause harm, the Court noted the conduct of the regional manager who willfully pretended to be unaware of Ms. Vandevender’s work restrictions, ordered her to obtain a new medical examination and directed her to perform strenuous physical work that very day.³⁰⁷ The Court also pointed to Sheetz’ surveillance of Ms. Vandevender during both when she returned to work and when she shopped at the store as evidence of malicious intent.³⁰⁸

The Court further stated that the deceptiveness employed by the regional manager when she feigned ignorance of Ms. Vandevender’s medical restrictions and Sheetz’ continued use of surveillance cameras on Ms. Vandevender was comparable to the “fraud, trickery, or deceit” recognized by the United States Supreme Court in *TXO* as deserving of larger punitive awards.³⁰⁹ In *TXO*, the Supreme Court noted the dramatic disparity between the actual damages and the punitive award, but upheld the punitive damage award in light of the potential harm of the defendant’s conduct, the bad faith of the defendant, the fact that the scheme employed was part of a larger pattern of fraud, trickery and deceit, and the defendant’s

³⁰¹ See *Vandevender*, 490 S.E.2d at 691.

³⁰² See *id.*

³⁰³ *Id.* (quoting *TXO*, 509 U.S. at 481 (O’Connor, J., dissenting)).

³⁰⁴ See *id.*

³⁰⁵ See *id.* at n.29. Sheetz claimed to have been unaware of the West Virginia laws that it admitted violating. See *id.*

³⁰⁶ See *Vandevender*, 490 S.E.2d at 691.

³⁰⁷ See *id.*

³⁰⁸ See *id.*

³⁰⁹ *Id.* at 693.

wealth.³¹⁰

The next *Garnes* factor the West Virginia Supreme Court of Appeals considered was the degree of reprehensibility of Sheetz' conduct.³¹¹ The United States Supreme Court in *BMW*, stated that the degree of reprehensibility may be the most important indicator of the reasonableness of a punitive award.³¹² The West Virginia Supreme Court found sufficient evidence in the record of reprehensible conduct by Sheetz.³¹³ The punitive award was supported by evidence of Sheetz' failure to reasonably accommodate Ms. Vandevender, failure to allow her to return to work absent full recovery, termination of her, refusal to rehire her, and failure to admit its knowledge of her work limitations.³¹⁴ The award was also supported by Sheetz' program which rewarded managers with bonuses tied to reduced worker's compensation premiums.³¹⁵ Sheetz' conduct regarding the retaliation claim may have evinced reckless disregard or indifference to Ms. Vandevender's health and safety. Furthermore, Sheetz' conduct in connection with the unlawful termination and failure to rehire claims show that Sheetz' employment policies were in violation of West Virginia law.³¹⁶

The Court agreed with the trial court's conclusion that there were no comparable civil or criminal penalties available for the conduct at issue.³¹⁷ No criminal penalties exist for violation of the Human Rights Act.³¹⁸ The Workers' Compensation Act does provide for a civil cause of action based on violation of its anti-discrimination provisions.³¹⁹ However, that enabling section does not set a penalty limit, and therefore, the Court concluded that it was without any useful civil or criminal penalties for purposes of comparison.³²⁰

These *Garnes* factors were used to determine if Sheetz received adequate notice of the conduct which would subject them to penalty and of the size of the punishment that might be assessed. The Court particularly wished to address Sheetz' argument that the *BMW* decision altered the review factors previously iden-

³¹⁰ *TXO*, 509 U.S. at 462.

³¹¹ *See Vandevender*, 490 S.E.2d at 691.

³¹² *BMW*, 517 U.S. at 575.

³¹³ *See Vandevender*, 490 S.E.2d at 691-92.

³¹⁴ *See Id.*

³¹⁵ *See Id.*

³¹⁶ In *BMW*, the United States Supreme Court did not consider BMW's conduct to be reprehensible. *BMW*, 517 U.S. at 576. The Supreme Court found that BMW was actually in compliance with the strictest state statutes dealing with that issue, and therefore BMW was acting in good faith on a policy that had never been deemed unlawful. *See id.* at 577-80. Moreover, BMW's conduct showed no indifference to or reckless disregard for the health and safety of others. *See id.* at 576.

³¹⁷ *See Vandevender*, 490 S.E.2d at 692.

³¹⁸ *See id.*

³¹⁹ *See id.* (citing W.VA. CODE § 23-5A-2).

³²⁰ *See id.* at 692.

tified in *Garnes*.³²¹ The Court maintained that *BMW*'s "guideposts" are merely reiterations of factors previously used by both this Court and the United States Supreme Court.³²² The Court further remarked that, contrary to Sheetz' contention that *BMW* altered West Virginia law on punitive damages review, each one of the *BMW* "guideposts" was in fact applied by the trial court in its punitive award review.³²³ Moreover, the Court stated that there was nothing in the *BMW* case that excluded previously considered factors that are not among the big three "guideposts."³²⁴ Therefore, the Court concluded that there was no merit to Sheetz' argument that *BMW* demanded that punitive awards be reviewed differently than the system as it existed under *Garnes*.³²⁵

As a result of these findings and the application of syllabus point fifteen of *TXO*, the Court found the seven-to-one ratio of punitive to compensatory damages in connection with the unlawful termination and failure to rehire claims was excessive.³²⁶ Consequently, the Court reduced the punitive damages awarded for those two claims by \$466,260 so that the punitive to compensatory ratio would be roughly five-to-one.³²⁷

However, since the Court found that the evidence supporting the retaliation claim showed elements of fraud, trickery and deceit, and an actual intent to cause Ms. Vandevender physical or emotional harm, the punitive award for that claim was upheld.³²⁸ The Court stated that they were properly satisfied that the trial court engaged in the review required and that the facts of this case regarding the retaliation claim supported upholding the fifteen-to-one ratio of punitive to compensatory damages and did not offend due process.³²⁹

C. The Dissenting Opinion

Justice Maynard dissented, opining that punitive damages are not recoverable for violation of either the Human Rights Act or Workers' Compensation Act.³³⁰ Justice Maynard stated that "it is clear that these acts do not specifically authorize punitive damage awards and our case law indicates that punitive damages

³²¹ See *Vandevender*, 490 S.E.2d at 692.

³²² See *id.*

³²³ See *id.*

³²⁴ See *id.*

³²⁵ See *id.*

³²⁶ See *Vandevender*, 490 S.E.2d at 693.

³²⁷ See *id.*

³²⁸ See *Id.*

³²⁹ See *id.* at 693-94.

³³⁰ See *id.* at 694 (Maynard, J., dissenting). Sheetz did not preserve this issue for appeal because this objection was not raised at the trial court level. See *Vandevender*, 490 S.E.2d at 687.

are not an element of damages under the Human Rights Act³³¹ He reasoned that “[a]lthough the Workers’ Compensation Act does not address the relief available for workers’ compensation discrimination, I believe that it would not differ from the relief available under the Human Rights Act.”³³² Based upon dicta in previous cases,³³³ and the lack of clear legislation stating that punitive damages are recoverable, Justice Maynard argued that punitive damages were not recoverable in the *Vandevender* case.³³⁴

Justice Maynard acknowledged that the West Virginia case of *Dobson v. Eastern Associated Coal Corp.*, held that “other legal and equitable relief” means that a plaintiff may generally recover damages available in tort.³³⁵ If “other legal or equitable relief,” as provided in the Human Rights Act,³³⁶ also means that a plaintiff in a Human Rights Act case may generally recover damages available in tort, then these recoverable damages would likely include punitive damages. However, Justice Maynard recognized dicta from *Harmon* stating that “punitive damages . . . are not an element of damages under the Human Rights Act.”³³⁷ While it is indeed clear that these acts do not specifically authorize punitive damage awards, the statutes do not specifically prohibit punitive damages either. The express language from the Human Rights Act which provides for “any other legal or equitable relief as the court deems appropriate,” hardly appears to be limiting the damages recoverable.

Justice Maynard acknowledged that Ms. Vandevender had clearly been treated badly by Sheetz. However, he argued that while nearly \$300,000 in compensatory and noneconomic damages seemed fair, \$2.2 million was simply too much under the facts of this case.³³⁸ Justice Maynard summarized the struggle to find the correct balance in punitive damage jurisprudence by stating that “[t]he task of determining what constitutes an excessive punitive damages award, in light of due process guarantees, is extremely difficult, and not given to bright line rules.”³³⁹

Justice Maynard concluded his dissent by invoking the memory of Supreme Court Justice Potter Stewart,³⁴⁰ commenting that “I know an excessive puni-

331 *Id.* at 695 (Maynard, J., dissenting).

332 *Id.* (Maynard, J., dissenting).

333 *Guevara v. K-Mart Corp.* 629 F. Supp. 1189, 1190-91 (S.D.W.V. 1986); *Harmon v. Higgins*, 426 S.E.2d 344, 346 (W. Va. 1992).

334 *Vandevender*, 490 S.E.2d at 695.

335 *Id.* (citing 422 S.E.2d 494, 501 (W. Va. 1992)).

336 W.VA. CODE § 5-11-13 (c).

337 *Vandevender*, 490 S.E.2d at 695 (citing 426 S.E.2d 344, 346 (W. Va. 1992)).

338 *See id.* at 695 (Maynard, J., dissenting).

339 *Id.*

340 Struggling for a definition of hard core pornography, Justice Stewart wrote “I know it when I see it.” *Jacobellis v. Ohio*, 378 U.S. 184, 197 (1964)(Stewart, J., concurring).

tive damages award when I see one, and I see one here."³⁴¹

V. CONCLUSION

The *Vandevender v. Sheetz* decision demonstrates the inherent difficulties in attempting to set meaningful standards on the case-specific doctrine of punitive damages. Over the last decade, the West Virginia Supreme Court of Appeals has set and adhered to the constitutionally acceptable standards handed down by a Supreme Court that fully understands the problems of trying to objectively guide the lower courts through a subjective reasoning process.

The Supreme Court has recently accomplished much in their attempts to ensure due process protections to those on the unfriendly end of a punitive award. The four Supreme Court cases of *Haslip*, *TXO*, *Oberg*, and *BMW* have set and modified due process standards to find a framework of analysis that courts can follow when determining whether an award is reasonable or excessive.

The *BMW* case in particular has given meaning to the standard of "reasonableness" by engaging in a delicate balance between the competing interests involved in the awarding of punitive damages. The three factors that *BMW* set out as "guideposts" help ensure that a tortfeasor has adequate notice of the size of a punitive award assessed against him. The wrongdoer can expect that the penalty will correspond to the reprehensibility of their bad conduct. The three factors help provide restraint against arbitrary decisions motivated by passion or prejudice by comparing the punitive award with civil or criminal penalties as well as with the actual harm inflicted by the tortfeasor. As a result, lower courts are able to conduct a more objective review of jury awards. The *BMW* decision has finally managed to provide some limit to punitive awards, but not such constraint as to turn the doctrine into just another tax on businesses. The *BMW* guideposts have also provided a degree of substantive due process analysis rather than only a strict procedural due process framework.

The controversy surrounding the availability of punitive damage recovery under the West Virginia Workers' Compensation Act or the Human Rights Act was no doubt heightened by the *Vandevender* decision. However, *Vandevender* did not break new ground in employment law. No guidance was offered from the decision, as the issue was not properly preserved for appeal.³⁴² Justice Maynard's dissent is irrelevant to the majority per curiam opinion because the issue was not addressed by the *Vandevender* Court. The West Virginia Supreme Court of Appeals has subsequently held that punitive damages are available under the Human Rights Act.³⁴³

The West Virginia Supreme Court of Appeals has kept up with the recent developments from the United States Supreme Court and has attempted to ensure fair procedures through its decisions in *Garnes*, *TXO*, and *Alkire*. These decisions have adopted sound procedural guidelines for the review of punitive damage

³⁴¹ *Id.* at 695.

³⁴² *Id.* at 687.

³⁴³ *See Haynes v. Rhone-Poulenc, Inc.*, 521 S.E.2d 331, Syl. Pt. 5 (W. Va. 1999).

awards. The Court has solidified West Virginia's position regarding syllabus point fifteen of *TXO*, which places a five-to-one punitive to compensatory ratio limit on claims lacking evidence of malice, intent to harm, fraud, trickery or deceit.³⁴⁴

The process of review utilized in *Vandevender* is the same framework used by the Court in *Alkire*. Indeed, if a per curiam opinion is to be followed as mandatory precedent only with regards to the syllabus points,³⁴⁵ then *Vandevender* and *Alkire* are the exact same case. The *Vandevender* decision, right or wrong, shows West Virginia's commitment to a stable process for reviewing punitive awards.

William B. Hicks

³⁴⁴ See *Vandevender*, 490 S.E.2d at 691.

³⁴⁵ See *Lieving*, 423 S.E.2d at 604 n.4.

