Defendants Facing Punitive Damages Awards Are Entitled to Protection under the Due Process Clause: State Farm Mutual Automobile Insurance Company v. Campbell

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CONSTITUTIONAL LAW – FOURTEENTH AMENDMENT – DUE PROCESS – PUNITIVE DAMAGES AWARDS – The Supreme Court of the United States held that a punitive damages award of $145 million was excessive in violation of the Due Process Clause of the Fourteenth Amendment.


On May 22, 1981, Curtis Campbell (hereinafter “Campbell”) was driving with his wife, Inez Preece Campbell, along a two-lane highway in Utah when a decision by Mr. Campbell to pass several vehicles in his lane led to over twenty years of legal disputes. As Campbell pulled into the oncoming lane, Todd Ospital, who was driving in the opposite direction, had to swerve onto the shoulder where he lost control of his car and crashed into a van driven by Robert Slusher (hereinafter “Slusher”). The Campbells were uninjured, but Mr. Ospital died in the crash and Slusher was severely hurt. There was some dispute early in the investigation as to who was at fault, but witnesses and investigators agreed that Mr. Campbell was to blame for his unsafe attempt to pass.

In September 1981, Slusher sued Campbell as well as Ospital's estate (hereinafter “Ospital”) to recover for the injuries he suffered in the crash. In response, Ospital filed a wrongful death cross-claim against Campbell. Notwithstanding the findings of the preliminary investigation pointing to Campbell’s fault, his insurance provider, State Farm Mutual Automobile Insurance Company (hereinafter “State Farm”), refused to settle the claims and chose

2. *Campbell*, 123 S. Ct. at 1517.
3. *Id.*
4. *Id.*
to take the case to trial.\textsuperscript{7} Prior to the trial, Slusher entered into a settlement agreement with Ospital’s estate, where Slusher accepted $65,000 from Ospital’s liability insurance in exchange for Ospital’s assistance in the case against the Campbells.\textsuperscript{8}

At trial, the jury found Campbell to be entirely at fault and awarded a judgment of $184,849, which significantly exceeded the pretrial offer to settle made by Slusher and Ospital, who only sought the policy limit of $50,000.\textsuperscript{9} Despite prior assurances made by State Farm to Campbell that he would not be financially responsible in the event the jury found him liable for the accident, after the verdict was rendered, State Farm made it clear that it would only cover the policy limit and expected Campbell to pay the remainder of the judgment.\textsuperscript{10} The Campbells hired their own counsel to represent them in the appeal of this verdict, but as the appeal was pending in late 1984, the Campbells entered into discussions with Slusher and Ospital.\textsuperscript{11} In exchange for Slusher and Ospital agreeing to refrain from enforcing the judgment, the Campbells promised to bring a bad faith action against State Farm and to give Slusher and Ospital 90\% of any award.\textsuperscript{12}

The Utah Supreme Court affirmed this jury verdict and, despite its earlier refusal, State Farm paid the entire judgment.\textsuperscript{13} In accordance with the agreement, the Campbells, now represented by Slusher and Ospital’s attorneys, quickly filed a complaint against State Farm alleging bad faith failure to settle, fraud, and intentional infliction of emotional distress.\textsuperscript{14} State Farm moved for summary judgment, arguing that because it had paid the excess verdict, the Campbell’s claim of bad faith was precluded as were the rest of the claims that stemmed from the same bad faith allegation.\textsuperscript{15} The trial court granted the motion, but it was reversed.

\textsuperscript{7} Id.
\textsuperscript{8} Id. at 1142.
\textsuperscript{9} Campbell, 123 S. Ct. at 1518. State Farm had told the Campbells that “their assets were safe, that they had no liability for the accident, that [State Farm] would represent their interests, and that they did not need to procure separate counsel.” Id.
\textsuperscript{10} Id. State Farm’s counsel made this abundantly clear to the Campbells when he told them after the verdict that they “may want to put for sale signs on your property to get things moving.” Id.
\textsuperscript{11} Id.
\textsuperscript{12} Id. The Campbells also agreed that they would be represented by Slusher and Ospital’s attorneys in their action against State Farm. Id.
\textsuperscript{13} Id.
\textsuperscript{14} Campbell, 123 S. Ct. at 1518. The claim for intentional infliction of emotional distress was based on the Campbells’ belief that they were facing financial ruin during the 18 months that State Farm refused to pay the excess verdict. State Farm, 65 P.3d at 1166.
State Farm v. Campbell

on appeal. 16 Upon remand, State Farm next moved to exclude evidence offered by the Campbells concerning unrelated, out of state cases where the insurance company was alleged to have engaged in bad faith efforts to avoid paying claims, but the trial court denied this motion. 17 Finally, State Farm requested a bifurcated trial in front of two different juries. 18 The first jury found that State Farm's unwillingness to settle and decision to pursue a trial was unreasonable. 19 The second phase was to address State Farm's liability for the fraud and emotional distress found in the first phase, and to determine compensatory and punitive damages. 20

When the United States Supreme Court released its decision in BMW of North America, Inc. v. Gore, 21 State Farm reasserted their motion to exclude out of state conduct that was dissimilar to the events in Utah, but the trial court once again denied this motion. 22 The Campbells were able to introduce evidence of a policy called "Performance, Planning & Review" (hereinafter "PP&R Policy") that they claimed was a nationwide scheme by State Farm agents to cap payments on legitimate claims, like the Campbells, in order to meet corporate fiscal goals. 23 Evidence of the existence and implementation of this policy implicated State Farm's business practices in several states over a period of 20 years, but most of the practices entered into evidence did not deal with third-party car insurance claims like the one at issue in the Campbells' case. 24 At the end of the second phase of the trial, the jury awarded the Campbells compensatory damages that totaled $2.6 million, and levied $145 million in punitive damages against State Farm. 25

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16. Campbell v. State Farm, 840 P.2d at 143. The Court of Appeals of Utah held that the Campbell's cause of action arose from State Farm's failure to settle, not its failure to pay, and therefore the eventual payment of the excess verdict by State Farm did not bar the Campbells' suit. Id.
17. Campbell, 123 S. Ct. at 1518.
18. Id.
19. Id.
20. Id.
22. Campbell, 123 S. Ct. at 1518.
23. Id. at 1518-19.
24. Id. at 1519.
25. Id. Compensatory damages are defined as "[d]amages sufficient in amount to indemnify the injured person for the loss suffered." BLACK'S LAW DICTIONARY 394 (7th ed. 2000). Punitive damages are defined as "[d]amages awarded in addition to actual damages
The trial court denied several of State Farm's post-verdict motions, but it did order a remittur that reduced the compensatory damages award to $1 million and the punitive damages award to $25 million. Both State Farm and the Campbells appealed this decision.

Using both the Supreme Court's decision in Gore as well as Utah case law, the Utah Supreme Court affirmed the $1 million remittur in compensatory damages, but reversed and reinstated the jury verdict for $145 million in punitive damages. The court found that State Farm's conduct was reprehensible based primarily on the PP&R Policy, and that State Farm's massive wealth and the large number of people effected by State Farm's action warranted the ratio between compensatory and punitive damages in this case. The Supreme Court of the United States granted certiorari to determine whether the punitive damages award was excessive in violation of the Due Process Clause.

Justice Kennedy, writing for the majority, concluded that the Utah Supreme Court had misapplied the three "guideposts" illustrated in Gore, and that the punitive damage award of $145 million compared with a compensatory damage award of $1 million was "neither reasonable nor proportionate to the wrongs" committed by State Farm. Therefore, the punitive damages portion of the jury verdict violated the Due Process Clause because the award was an "irrational and arbitrary deprivation" of State Farm's property.

Justice Kennedy began his analysis by discussing the purposes that compensatory and punitive damages serve in the judicial sys-
tem.\textsuperscript{33} He stated that while compensatory damages make the victim whole again, punitive damages are aimed at deterring misconduct and providing retribution for the victim.\textsuperscript{34} Justice Kennedy also remarked that states are given wide latitude in determining punitive damages, but the party receiving the punishment is protected by the Due Process Clause of the Fourteenth Amendment from any awards that are excessive or capricious.\textsuperscript{35} The Court noted the similarity between civil punitive damages and criminal penalties, yet expressed concerns that the defendant in a civil proceeding is not afforded the same protections that a defendant in a criminal matter is entitled, making the imprecise manner in which punitive damages are awarded all the more worrisome.\textsuperscript{36} With these issues in mind, the Supreme Court had set up "guideposts" in order to ensure that an award of punitive damages comported with Due Process.\textsuperscript{37}

The three "guideposts" formulated by the Supreme Court in \textit{Gore} for use by lower courts in determining the reasonableness of punitive damage awards are: "(1) the degree of reprehensibility of the defendant's misconduct; (2) the disparity between the actual or potential harm suffered by the plaintiff and the punitive damages award; and (3) the differences between the punitive damages awarded by the jury and the civil penalties authorized or imposed in comparable cases."\textsuperscript{38} The standard of review to be used by appellate courts when reviewing the trial court's application of these guideposts is \textit{de novo}.\textsuperscript{39}

Justice Kennedy addressed each of the guideposts in turn, beginning with the most important consideration, the degree of reprehensibility of the defendant's misconduct.\textsuperscript{40} The Court first recognized that State Farm's conduct with respect to the Campbells was indeed reprehensible and an award for punitive damages was
appropriate. However, the majority noted that there were fundamental mistakes in the lower courts' formulation of reprehensibility. The Court noted the first error was to admit evidence of conduct that took place outside of Utah when formulating the punishment against State Farm. Justice Kennedy explained that the case presented to the jury ceased to be about the harm suffered by the Campbells, but rather became a condemnation of State Farm's nationwide policies and practices. The second error the Court described was that conduct completely unrelated to the case with the Campbells served as the basis for State Farm's punishment. With these considerations in mind, Justice Kennedy concluded that the only conduct relevant to assessing reprehensibility was State Farm's conduct that directly harmed the Campbells.

Justice Kennedy next turned his attention to the second "guidepost," the ratio between the compensatory damages and punitive damages. The majority eschewed a rigid bright-line rule that would set the ratio in all cases, but cautioned that punitive damages awards that were greater than ten times the compensatory damages would most likely violate due process. Justice Kennedy stated that it was the job of the courts to make sure that the punitive damages awarded were both reasonable and proportional to the harm that the defendant caused the plaintiff. The Court prefaced its analysis of the award in the instant case by noting that a ratio of 145 to 1 was presumptively neither reasonable nor proportional. Justice Kennedy examined the Utah Supreme Court's explanation for upholding the disparate award, and concluded that there was nothing to justify such an excessive punitive damages award.

The third "guidepost" analyzed by Justice Kennedy functions to compare and contrast the punitive damages award with the civil penalties imposed in similar cases. The Court noted that if

41. Id. at 1521.
42. Id.
43. Id. Additionally, much of the out-of-state conduct was admittedly lawful in the states where it occurred. Id. at 1522.
44. Id. at 1521.
45. Campbell, 123 S. Ct. at 1523.
46. Id. at 1524.
47. Id.
48. Id.
49. Id.
50. Campbell, 123 S. Ct. at 1524.
51. Id. at 1525.
52. Id. at 1526.
criminal charges could be applicable to a certain case, this might be useful to show how a state regards the misconduct, but it is not helpful in determining an appropriate dollar amount for a punitive award.\textsuperscript{53} Justice Kennedy faulted the Utah Supreme Court again for relying on out-of-state and dissimilar conduct to conclude that State Farm's activities could expose it to a variety of civil penalties.\textsuperscript{54} The Court commented that Utah state law imposed a $10,000 fine for the type of fraudulent conduct that State Farm committed against the Campbells.\textsuperscript{55} The Court concluded that the Utah Supreme Court's analysis was, as in the other guideposts, deficient, and there was nothing to justify the amount of the award.\textsuperscript{56} Therefore, the majority remanded the case to the Utah Supreme Court with instructions to calculate correctly the punitive damages using the opinion as guidance.\textsuperscript{57}

Justice Scalia wrote a short dissenting opinion in which he expressed his view that evaluations of punitive damages awards are outside the scope of due process protections.\textsuperscript{58} Justice Thomas authored a similar dissent in which he stated that it was his belief that the Constitution placed no limits on punitive damages awards.\textsuperscript{59}

Justice Ginsburg also filed a dissenting opinion in which she argued that the Court had made an unwarranted intrusion into the authority of the states to determine the size of punitive damages awards.\textsuperscript{60} She first noted that awards of this size might call for state legislatures to consider passing damage-capping statutes.\textsuperscript{61} Unlike the majority, Justice Ginsburg found ample evidence of reprehensible conduct by State Farm.\textsuperscript{62} She also disagreed with the majority and found that there was clearly a relationship between State Farm's out-of-state conduct and the fraudulent treatment to which the Campbells were subjected.\textsuperscript{63} In her opinion, the

\textsuperscript{53} Id.
\textsuperscript{54} Id.
\textsuperscript{55} Campbell, 123 S. Ct. at 1526.
\textsuperscript{56} Id.
\textsuperscript{57} Id.
\textsuperscript{58} Id. (Scalia, J., dissenting).
\textsuperscript{59} Id. (Thomas, J., dissenting).
\textsuperscript{60} Campbell, 123 S. Ct. at 1527 (Ginsburg, J., dissenting).
\textsuperscript{61} Id. (Ginsburg, J., dissenting).
\textsuperscript{62} Id. at 1527-30 (Ginsburg, J., dissenting). For instance, there was evidence that a State Farm manager had instructed a subordinate to include a note in the file that Ospital was speeding to see a pregnant girlfriend, which was a lie, in order to attack Ospital's character in the event of a trial. \textit{Id.} at 1528.
\textsuperscript{63} Id. at 1530 (Ginsburg, J., dissenting).
majority exceeded its authority by formulating rigid instructions that all states must now follow.44

Although the concept of imposing punitive damages began in England in the 1760s, during the reign of King George III, and was later adopted by the United States, the Supreme Court has only recently begun to examine the constitutionality of this type of award because punitive damages were long thought to be a part of traditional state tort law.65 In the 1980s, there appeared to be a surge in the number of punitive damages awards as well as an increase in their size and, as a result, the Supreme Court began to weigh in on the issue.66 The Court expressed concern that punitive damages awards had “run wild” to the point where they impacted on a defendant’s constitutional rights and needed to be restrained.67

The Supreme Court’s current jurisprudence on the issue of punitive damages began in Browning-Ferris Industries v. Kelco Disposal.68 In Browning-Ferris, the Court addressed the issue of whether the Excessive Fines Clause of the Eighth Amendment applied to punitive damages awards in civil cases, and in particular, whether a $6 million award of punitive damages was an excessive fine when compensatory damages were assessed at $51,146.69 Browning-Ferris Industries (hereinafter “BFI”) was a waste disposal company that tried to put a local competitor out of business by using illegal pricing strategies.70 Kelco, the local business, sued BFI for attempting to monopolize the Burlington, Vermont waste disposal business, as well as for intentional interference with contractual relations.71 The jury found that BFI was liable on both counts and awarded the above-mentioned $51,146

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64. Id. (Ginsburg, J., dissenting).
65. VICTOR E. SCHWARTZ ET AL., PROSSER, WADE AND SCHWARTZ’S TORTS 549-50 (10th ed. 2000). Punitive damages were first awarded in “cases of outrageous abuses of authority by government officers.” Id. at 549. The determination of whether an award was warranted and the appropriate amount was long left to the discretion of the individual states. Id. at 550 (quoting Molzof v. United States, 502 U.S. 301, 306 (1992)).
69. Browning-Ferris, 492 U.S. at 259. “Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.” U.S. CONST. amend. VIII.
71. Id. at 261.
compensatory damages and the $6 million punitive damages.\textsuperscript{72} BFI appealed, and the Second Circuit Court of Appeals affirmed both the verdict and the award, noting that even if the Eighth Amendment applied, the award was not excessive.\textsuperscript{73} The Supreme Court granted \textit{certiorari} to determine whether the Eighth Amendment applied.\textsuperscript{74}

The members of the Court all agreed that the Eighth Amendment could not be applied when determining whether punitive damages were excessive in civil cases.\textsuperscript{75} Justice Blackmun, writing for the majority, described the history of the Eighth Amendment and its exclusive relation to criminal cases.\textsuperscript{76} He traced the history of the amendment back to Section 10 of the English Bill of Rights of 1689, and stated that based on its history, the Excessive Fines Clause was "intended to limit only those fines directly imposed by, and payable to, the government."\textsuperscript{77}

BFI made an argument in their brief that the Due Process Clause forbade excessive punitive damages awards.\textsuperscript{78} The Court recognized that there was some merit to this contention, but refused to address the issue because it was not properly raised in the district court or the court of appeals and therefore was waived.\textsuperscript{79} Several Justices commented, however, that the opinion in the instant case in no way barred the Court from considering the question if it was properly presented in the future.\textsuperscript{80}

The chance to address the due process question arrived in the form of \textit{Pacific Mutual Life Insurance Company v. Haslip}.\textsuperscript{81} In Haslip, a licensed agent of Pacific Mutual defrauded several policyholders by misappropriating their premium payments and not informing them when their policies expired.\textsuperscript{82} Haslip was hospitalized and thought that she had health insurance, but when it was discovered the coverage had lapsed, her bill was given to a collection agency.\textsuperscript{83} In her action against Pacific Mutual, Haslip was

\begin{itemize}
\item 72. \textit{Id.} at 262.
\item 73. \textit{Id.}
\item 74. 488 U.S. 980 (1988).
\item 75. \textit{Browning-Ferris}, 492 U.S. at 260.
\item 76. \textit{Id.} at 262.
\item 77. \textit{Id.} at 266-68.
\item 78. Brief for the Petitioners at 27; \textit{Browning-Ferris}, 492 U.S. 257 (1989).
\item 79. \textit{Browning-Ferris}, 492 U.S. at 277.
\item 80. \textit{Id.} at 280 (Brennan, J., concurring). \textit{See also id.} at 283 (O'Connor, J., concurring in part and dissenting in part).
\item 82. \textit{Haslip}, 499 U.S. at 4-5.
\item 83. \textit{Id.} at 5.
\end{itemize}
awarded $200,000 in compensatory damages and $840,000 in punitive damages. The Alabama Supreme Court affirmed the verdict and the award, but two justices dissented recognizing Due Process concerns.

In the United States Supreme Court, Justice Blackmun began his analysis by first noting that the issue of due process concerns over punitive damages had often appeared before the Court, but for a variety of reasons had never been fully addressed. The first due process concern that the Court addressed was whether it was fair to hold Pacific Mutual responsible for the actions of its licensed agent. Justice Blackmun described that the agent was an employee of Pacific Mutual, and under Alabama common law, the corporation was liable for the actions of its employee under a theory of respondeat superior. The Court stated that holding the corporation responsible for punitive damages that result from the employee's actions does not violate due process. The Court next examined whether the methods used by Alabama juries to determine punitive damages violated due process. Justice Blackmun concluded that the procedure followed by Alabama juries has long been held to be fair, but there was still a possibility that an imposition of punitive damages could be unconstitutional in certain circumstances. With this in mind, the Court examined the constitutionality of the punitive damages award to Haslip.

In analyzing this issue, the Court first looked at the instructions given to the jury and noted that it was made clear to the jury that the purpose of a punitive award was to punish Pacific Mutual and to deter the corporation from acting this way in the future. Justice Blackmun commented that although these instructions gave

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84. Id. at 7 n.2.
85. Id. at 7.
86. Id. at 12.
87. Haslip, 499 U.S. at 12.
88. Id. at 12-15. Respondeat superior is "[t]he doctrine holding an employer or principal liable for the employee's or agents' wrongful acts committed within the scope of employment or agency." Black's Law Dictionary 1313 (7th ed. 2000).
89. Haslip, 499 U.S. at 15.
90. Id. Justice Blackmun explained that:
Under the traditional common-law approach, the amount of the punitive award is initially determined by a jury instructed to consider the gravity of the wrong and the need to deter similar wrongful conduct. The jury's determination is then reviewed by trial and appellate courts to ensure that it is reasonable.

Id.

91. Id. at 17-18.
92. Id. at 18.
93. Id. at 19.
the jury broad discretion, they were constrained by the fact that the award must meet the twin goals of retribution and deterrence. 94

The Court examined the post-trial procedure that Alabama had developed to evaluate the fairness of punitive awards, and stated that the post-verdict review protects defendants from disproportionate awards and ensures that there is some relationship between the award and the actual damages. 95 The majority concluded that Due Process was satisfied by the determination of a punitive award in Haslip, but noted that the four to one ratio between punitive and compensatory awards may be "close to the line" of constitutional impropriety. 96

In TXO Production Corp. v. Alliance Resources Corp., the Court had another opportunity to determine whether a punitive damages award was grossly excessive and in violation of due process. 97 The dispute in TXO concerned dealings between TXO and Alliance in which TXO agreed to develop the oil and gas resources on a tract of land owned by Alliance. 98 TXO learned that another party had an interest in the mineral rights of the property, but this interest did not extend to the oil and gas that was the subject of the deal and this claim to the mineral rights would not cloud the title possessed by Alliance. 99 Nevertheless, TXO purchased the other party's mineral interest without informing Alliance and attempted to renegotiate the development agreement by arguing that it now had title to the oil and gas rights by virtue of the quitclaim deed. 100 When TXO could not renegotiate the deal, it brought suit against Alliance seeking a declaratory judgment on the question of oil and gas rights and Alliance counterclaimed for a slander of title alleging that TXO acted in bad faith because it knew Alliance possessed a clear title. 101 The jury found for Alliance and awarded $19,000 in actual damages and $10 million in punitive damages. 102 TXO sought a judgment notwithstanding the verdict and a remit-

94. Haslip, 499 U.S. at 19. Justice Blackmun stated, "[a]s long as the discretion is exercised with reasonable constraints, due process is satisfied." Id. at 20.
95. Id. at 20-22.
96. Id. at 23-24.
98. TXO, 509 U.S. at 447.
99. Id. at 448.
100. Id. at 449.
101. Id. at 450.
102. Id. at 451.
The West Virginia Supreme Court of Appeals used a reasonable relationship test that focused on factors illustrated in Haslip and affirmed the jury verdict. The Supreme Court granted certiorari and although a majority of the Court affirmed the punitive award, there was no clear majority on the rationale. Justice Stevens authored the main opinion in which the award was analyzed under both substantive and procedural due process protections. Justice Stevens rejected both of the tests for substantive due process that were proposed by TXO and Alliance and instead embraced an analysis that focused on the reasonableness of the award. TXO had placed great emphasis on the disparity between the actual and the punitive damages in this case, but Justice Stevens noted that there existed a reasonable relationship between the punitive award and the harm that could have resulted had TXO succeeded in its scheme. He concluded that TXO's substantive due process right against excessive punitive damages awards was not violated.

Justice Stevens next analyzed TXO's argument that they were denied procedural due process because the jury instructions were inadequate and the West Virginia trial and appellate courts erred in their analysis. After reviewing the jury instructions and the method of review used by the trial and appeals courts, Justice Stevens concluded that the procedure followed in the West Virginia courts was fundamentally fair.

Justice Kennedy agreed with Justice Stevens' analysis as to the procedural due process question, but wrote separately to express concerns over the plurality's use of the reasonableness of the relationship between the award and the harm as the focus when de-

103. TXO, 509 U.S. at 451.
104. Id. at 452-53. The three factors were the potential harm, the maliciousness of TXO's conduct, and the punishment necessary to discourage the company from acting in this manner in the future. Id. at 453.
105. Id. at 445.
106. Id. at 446.
107. Id. at 458. Alliance proposed that a rational-basis test should be used for appellate review of punitive damages awards. Id. at 455. TXO proposed that the Court use a heightened scrutiny test that would look at objective criteria such as the size of awards upheld against other tortfeasors in the same state to determine if an award was fundamentally fair. Id. at 455-56.
108. TXO, 509 U.S. at 459-60.
109. Id. at 462.
110. Id. at 462-63.
111. Id. at 464-66.
termining whether an award is excessive.\textsuperscript{112} He argued that the size of the award was not the proper focus of a substantive due process challenge, but rather that the inquiry should concern whether the jury acted reasonably when it came to its decision.\textsuperscript{113} Justice Kennedy concluded that although this was a close case, it did not appear that the jury made an irrational or arbitrary decision when it awarded punitive damages, and he therefore voted to affirm the jury award.\textsuperscript{114}

Justice Scalia concurred in the judgment, but wrote to make it clear that while he supported the position that there were procedural protections afforded by the Constitution, there was no such guarantee of a substantive due process right that would protect defendants from excessive awards.\textsuperscript{115}

Justice O'Connor authored a dissenting opinion in which she used the principles expressed in \emph{Haslip} to conclude that the award in this case was a violation of due process because the size of the award was too large and the procedure by which the jury reached its decision was flawed.\textsuperscript{116}

The Supreme Court overturned a punitive damages award in \emph{BMW of North America, Inc. v. Gore}, and in doing so, laid out the three "guideposts" to be used when a court reviews a punitive damages award based on due process grounds.\textsuperscript{117} The issue in this case was whether a jury award of $2 million in punitive damages was excessive when actual damages were determined to be $4,000.\textsuperscript{118}

Justice Stevens commented that the Court reviewed this case in order to help clarify for lower courts the standards that should be

\textsuperscript{112} Id. at 466 (Kennedy, J., concurring in part and concurring in the judgment).
\textsuperscript{113} TXO, 509 U.S. at 467 (Kennedy, J., concurring in part and concurring in the judgment). He wrote, "[w]hen a punitive damages award reflects bias, passion, or prejudice on the part of the jury, rather than a rational concern for deterrence and retribution, the Constitution has been violated, no matter what the absolute or relative size of the award." \textit{Id.}
\textsuperscript{114} Id. at 468-70 (Kennedy, J., concurring in part and concurring in the judgment).
\textsuperscript{115} Id. at 470 (Scalia, J., concurring in the judgment). Justice Scalia was joined by Justice Thomas. \textit{Id.}
\textsuperscript{116} Id. at 473 (O'Connor, J., dissenting). Justice O'Connor was joined by Justice White, and by Justice Souter in part. \textit{Id.} at 472.
\textsuperscript{117} 517 U.S. 559 (1996).
\textsuperscript{118} Gore, 517 U.S. at 562-63. Dr. Ira Gore bought a new BMW in Alabama, but several months later detected that it had been repainted. \textit{Id.} at 563. The original paint job had been damaged by acid rain during shipping from Germany and, according to BMW's policy, the car had been repainted without the dealer's knowledge since the cost of repairing the damage was less than 3% of the car's retail price. \textit{Id.} Gore sued alleging fraud in the concealment of this fact. \textit{Id.}
used to identify excessive awards.\textsuperscript{119} After reviewing the legitimate interests that a state has in using punitive damages, the Court commented that Alabama was exceeding its bounds by punishing BMW for conduct that was legal in other states.\textsuperscript{120} Justice Stevens wrote, "[e]lementary notions of fairness enshrined in our constitutional jurisprudence dictate that a person receive fair notice not only of the conduct that will subject him to punishment, but also of the severity of the penalty that a State may impose."\textsuperscript{121} With these considerations in mind, the majority described the three "guideposts" that are to be used to determine whether an award is grossly excessive, and concluded that BMW did not have fair notice that they would be punished so severely for not reporting that a car sold as new had been repainted.\textsuperscript{122}

The degree of reprehensibility of BMW's conduct was the first "guidepost" analyzed by the Court.\textsuperscript{123} In illustrating what constitutes reprehensible behavior, the majority mentioned several generalizations, such as the notion that violent conduct is more blameworthy than nonviolent conduct, and that fraud is more blameworthy than negligence, and comparisons such as these are useful when judging the enormity of the defendant's offense.\textsuperscript{124} Justice Stevens found very little that could be labeled "reprehensible" in BMW's conduct, pointing out that the only harm to Gore was economic, and it was miniscule at that.\textsuperscript{125} Additionally, Gore had argued that BMW's nondisclosure of its repair policy was reprehensible because it was national in scope and therefore the company should be treated as a recidivist and be punished more severely, but Justice Stevens rejected this argument by showing that the conduct was legal in many states and that liability for fraud requires an omission of a material fact, of which repairs for minor damage arguably is not.\textsuperscript{126} The Court concluded that BMW's nondisclosure of minor damage repairs to cars sold as new was not nearly reprehensible enough to justify a $2 million punishment.\textsuperscript{127}

\textsuperscript{119} Id. at 568.  
\textsuperscript{120} Id. at 568-74.  
\textsuperscript{121} Id. at 574.  
\textsuperscript{122} Id. at 574-75.  
\textsuperscript{123} Gore, 517 U.S. at 575.  
\textsuperscript{124} Id. at 575-76.  
\textsuperscript{125} Id. at 576.  
\textsuperscript{126} Id. at 576-79.  
\textsuperscript{127} Id. at 580.
Justice Stevens moved to the second guidepost that had developed in the Supreme Court's jurisprudence, the ratio between the harm suffered and the punitive damages awarded.\textsuperscript{128} The Court reiterated its refusal to develop a mathematical formula for determining the correct ratio in all cases, and further endorsed the reasonable relationship approach developed in \textit{Haslip} and \textit{TXO}.\textsuperscript{129} Justice Stevens called the 500 to 1 ratio in this case "breathtaking," and concluded that this ratio did not appear to be reasonable.\textsuperscript{130}

Relying on \textit{Browning-Ferris} and \textit{Haslip}, the Court illustrated the third guidepost, a comparison of the punitive award and the civil or criminal penalties that a state could impose.\textsuperscript{131} The Court recognized that the treatment by the legislature of certain conduct is an indication that should be afforded substantial deference.\textsuperscript{132} Justice Stevens noted that Alabama's statute for deceptive trade practices set a penalty of $2,000, and that other states had similar provisions.\textsuperscript{133} He also stated that BMW could not have contemplated that it could be facing a multimillion dollar judgment as a result of its policy because there were no decisions in Alabama indicating that conduct such as BMW's would give rise to such harsh punishment.\textsuperscript{134} The Court concluded that the comparison between the award and applicable civil or criminal penalties provided no justification for the award in this case.\textsuperscript{135}

Although the decision in \textit{Gore} was meant to clarify the Supreme Court's position on the proper analysis of punitive awards, there was still confusion in the lower courts about the proper standard of review that should be used in conducting this analysis, and this issue was addressed in \textit{Cooper Industries v. Leatherman Tool Group}.\textsuperscript{136} Leatherman was awarded compensatory damages of $50,000 and punitive damages of $4.5 million for a false advertis-
The trial judge reviewed the award and held that it did not violate due process, and the Court of Appeals for the Ninth Circuit affirmed, holding that there was no abuse of discretion in the decision by the trial judge. The issue on appeal was whether an abuse of discretion was the appropriate standard when the Gore guideposts are used to determine the constitutionality of an award for punitive damages. Justice Stevens, writing for the majority, held that the review of the jury's award should be conducted de novo. He reasoned that the proper constitutional analysis could only be performed by a court using an independent review of the facts of a specific case. Justice Stevens also showed that reviewing the facts in this particular case under both an abuse of discretion and de novo standards could lead to dissimilar results. The Court remanded the case to the court of appeals with instructions to conduct a de novo review.

There can be little debate that punitive damages awards were becoming extremely large by the time the U.S. Supreme Court decided to weigh in on the matter. It certainly appeared as if juries were in some way biased against large, faceless corporations with deep pockets. Eye-popping awards, such as the $145 million given to the Campbells, do inspire a gut reaction in most reasonable people that something must be amiss in the jury room. Specific retribution for the victim turned into general vindictiveness toward the corporation, with little thought to the consequences that the award will mean to the company. The average jury does not seem to realize that the cost of the award will be passed on to them as consumers, or that jobs might be lost in order to cut costs to pay for the award. It was apparent that something needed to be done to address a process that seemed to be out of control, or in the Court's words, "run wild."

One of the main questions surrounding this action is whether the state legislature, rather than the Supreme Court, is the proper forum for such a sweeping change. In an appendix to her dissenting opinion in Gore, Justice Ginsburg collected the state statutes

137. Cooper Industries, 532 U.S. at 426.
138. Id.
139. Id.
140. Id. at 431.
141. Id. at 435-36.
142. Cooper Industries, 532 U.S. at 441.
143. Id. at 443.
that deal with issues such as caps on punitive awards, requirements that all or part of the award be paid to state agencies, and procedural rules that mandate a bifurcated trial with a separate proceeding during which the punitive award is determined. From this list, it is obvious that many state legislatures have taken it upon themselves to enact safeguards that will limit the amount awarded, as well as make an application of the Gore guideposts unnecessary. It will be interesting to see if the analysis employed by the Court in Campbell changes when an action arises in a state where punitive awards are capped, such as in Virginia. Along the same lines, a question remains whether the Gore guidepost analysis will be applied to punitive awards in class action lawsuits where there are multiple plaintiffs. The analysis should not be any different, but there are a number of additional factors that come into play when a jury has to evaluate the conduct of one defendant and the harm inflicted, in varying degrees, to many individuals.

Another concern that was not addressed by the Court in its recent jurisprudence is how this formulation of punitive damages will affect efforts to negotiate settlements. Not only are punitive damages a way to punish a wrongdoer, but the looming threat of an award plays a role in determining whether to settle and on what terms. The uncertainty posed by the possibility of a large punitive award, the size of which is up to the total discretion of the jury and is unquantifiable by both parties, could compel a settlement. If a party can now use these guideposts to predict a figure that the court is more than likely to enforce, the motivation to settle might be diminished as one of the risks of going to trial is mitigated. The degree of chance once associated with punitive awards has been extinguished now that courts have been instructed on the proper procedure for formulating and reviewing awards.

Following the decision in Campbell and with the start of a new Supreme Court term in October 2003, the Court received numerous requests to review jury awards. For instance, Philip Morris appealed an $80 million award given to a deceased smoker’s family claiming it was excessive. The Court agreed, vacated the judgment, and remanded the case back to the Oregon court with

145. VA. CODE ANN. § 8.01-38.1 (1992). Virginia has capped awards at $350,000. Id.
instructions to review the award in light of *Campbell*. In November of 2003, in a dispute over oil royalties between the state of Alabama and Exxon Mobil, a jury returned a verdict for $63.6 million in actual damages and $11.9 billion in punitive damages. It is apparent that this award will not survive a *Campbell* analysis.

It is clear that the Court is responding favorably to the appeals by companies for relief from large jury awards. At the same time, neither the state's interest in the matter nor the harm suffered by the plaintiff can be ignored. It is worth noting that the state procedures by which juries determine the initial punitive damages award remain intact. Nothing in the Supreme Court's recent jurisprudence indicates that the instructions given to juries violate procedural due process, and state's remain free to develop and maintain their own instructions. In spite of criticisms that the Supreme Court has overstepped its bounds and is intruding on an area of law traditionally dealt with by the states, the framework developed in *Gore* has been proven by *Campbell* to be a practical and workable solution to the problem of excessive punitive damages awards.

*Robert Max Junker*

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