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IN THE SUPREME COURT
STATE OF ARIZONA

KENNETH JOHN NARDELLI and TAMMY M. NARDELLI, husband and wife, Plaintiffs/Appellants/Cross-Appellees/Petitioners, v. METROPOLITAN GROUP PROPERTY AND CASUALTY INSURANCE COMPANY, a Rhode Island corporation; METROPOLITAN PROPERTY AND CASUALTY INSURANCE COMPANY, a Rhode Island corporation, Defendants/Appellees/ Cross-Appellants/Respondents.	Case No. CV-12-0180-PR Arizona Court of Appeals No. 1 CA–CV 10-0350 Maricopa County Superior Court Case No. CV 2004-019991 **AMICUS CURIAE BRIEF OF UNITED POLICYHOLDERS**

This Court should grant review because the petition for review raises issues of first impression about the responsibilities of Arizona appellate courts reviewing

jury decisions on the amount of punitive damages.

Legal Argument

1. The facts found by the jury—and recognized in the Court of Appeals' Opinion—justified a sizeable punitive and exemplary damages award.

After reviewing the facts, the Court of Appeals held that the Nardellis had presented "substantial evidence" permitting the jury to find all elements of bad faith.[1] The Court also found "clear and convincing evidence entitling" them to an award of punitive damages.[2] As the Court evaluated the evidence, the jury could "reasonably find" that MetLife's decisions in adjusting the merits of the Nardellis' claim were driven by MetLife's "financial self-interest" and *not* by the merits of their claim *or* by the terms of their MetLife insurance policy.[3] Thus, the Court agreed with the jury's evident conclusion that "MetLife acted outrageously and with the requisite evil mind."[4] In fact, it took the Court of Appeals 19 paragraphs and 13 footnotes merely to summarize *part* of MetLife's outrageous misconduct, noting at the end of its exposition that the Nardellis had "presented *additional* evidence that would further support the conclusion MetLife acted in conscious disregard of a substantial risk of harm to the Nardellis' rights."[5]

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[1] *Nardelli v. Metropolitan Group Prop. & Cas. Ins. Group*, 277 P.3d 789, 801 ¶ 58 (Ariz. App. 2012).

[2] *Id*. at 801-02 ¶ 62.

[3] *Id*. at 802 ¶ 62.

[4] *Id*.

[5] *Id*. at 801-08, ¶¶ 62-79 and notes 19-32 (emphasis added).

Given the evidence that the Opinion meticulously described, it is apparent that the jury could have found MetLife's conduct extraordinarily reprehensible. The size of the jury's punitive-damage verdict establishes that the jury did just that. What else explains a moderate compensatory award accompanied by such an enthusiastic punitive-damages verdict?

But the Court then backtracked, engaging in an extended discussion of what it apparently regarded as mitigating facts—as if MetLife had not argued those supposedly mitigating facts to the jury and as if the jury had not obviously rejected them.[6] After "considering all the evidence and looking at all the pertinent factors," the Court found that MetLife's misconduct merely fell "within the low to, at most, the middle range of the reprehensibility scale" of outrageous behavior.[7] That evidentiary finding, of course, subverted the jury's unmistakable conclusion that MetLife's misconduct fell within the high range of "outrageous" behavior.

One could argue about whether the jury—or the Court of Appeals—was right about level of MetLife's reprehensibility. But that is not the point. Where there is supporting evidence of significant reprehensibility, as the jury and the trial judge clearly found, an appellate court must give that finding deference. Hundreds of years of our legal tradition, and the stated intent of our state constitutional framers to preserve the right to jury trial inviolate, require deference to the jury

[6] *Id*. at 807-08, ¶¶ 86-94 and note 33.
[7] *Id*. at 808, ¶ 94.

determinations on reprehensibility and on the proper amount of punitive damages.[8] Indeed, the jury's reprehensibility and punitive-damages-amount findings are also protected from appellate nullification under the Seventh Amendment. As the Ninth Circuit and other federal courts have emphatically declared, "it would be a violation of the Seventh Amendment right to jury trial for the court to disregard a jury's finding of fact."[9]

In a parallel strong tradition of judicial deference to jury determinations, Arizona appellate courts have always held that the amount of an award of punitive damages is "a matter of discretion" with the trier of fact that will not be disturbed unless the amount is so unreasonable under the circumstances of a particular case that the award shows the influence of passion or prejudice.[10] (Notably, "passion" and "prejudice" are two words utterly absent from the *Nardelli* Opinion.) Unlike some jurisdictions, Arizona has never approved a "compensatory-punitive damage ratio limit."[11] Instead, deciding if punitive damages are excessive has always depended "solely" on each case's unique facts.[12]

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[8] *Brown v. Greer*, 16 Ariz. 215, 217, 141 P. 841, 842 (1914) (The state constitutional protection of the right to a jury trial guarantees the preservation of that right as it existed when the Arizona Constitution was accepted.). *See* Ariz. Const. art. 2, § 23 ("The right of trial by jury shall remain inviolate.").

[9] *Acosta v. City of Costa Mesa*, --- F.3d ---, 2012 WL 3834658 at *18 (9th Cir. Sept. 5, 2012).

[10] *Nielson v. Flashberg*, 101 Ariz. 335, 341, 419 P.2d 514, 520 (1966).

[11] *Nienstedt v. Wetzel*, 133 Ariz. 348, 357, 651 P.2d 876, 885 (1982).

[12] *Id*. *See also Tarnoff v. Jones*, 17 Ariz. App. 240, 245, 497 P.2d 60, 65

The Court of Appeals gave no deference to the jury and, even more remarkably, none to the trial judge. Instead, based on a cold factual record, it did a comparative analysis with a few published cases and concluded from that tiny sample that a 1-to-1 ratio was proper.[13] If this is how appellate courts are to determine punitive damages, why bother with the time, trouble, and expense of having a jury decide the amount in the first place? Let's just let the jury decide if punitive damages should be awarded, ignore what the jury did, and then, on appeal, "try" the issue of how much to award based on a tiny sample of appellate decisions in completely unrelated cases.

The protocol the Court of Appeals followed has one other major defect: It entirely ignores the question of how much in punitive damages is proper to punish a huge corporation with assets and market capitalization in the billions. More important, how much is necessary to deter other insurers in similar positions from engaging in similar misconduct in the future? That finding is also inherent in the verdict but totally ignored—and unmentioned in the Opinion. Deterrence is one of the primary goals of punitive damages, but the Court of Appeals set the 1-to-1 ratio without addressing the question of deterrence, although there was ample record evidence on the question and although, the matter having been argued to the jury,

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(1972) ("The exact amount of punitive damages to be awarded in a contested or uncontested action does not depend upon a specific sum prayed for; rather the amount of such an award is a matter of discretion with the trier of fact.").

[13] *Id*. at 808-09 ¶¶ 98-100.

its finding on this issue was inherent in the verdict. This Court should not ignore the obvious: A punitive-damage award of $155,000 will not deter a corporation with assets of *$70 billion* and a market cap of *$37 billion*[14] from committing the type of intentional misconduct that the Court of Appeals described so clearly. MetLife's net income for 2011 exceeded *$6 billion.*[15] For MetLife, a punitive-damages award of $155,000 represents an accountant's hiccup. An award so small cannot deter. It can only embolden and encourage future wrongful actions by MetLife and other insurance plutocrats.

2. The United States Supreme Court has obscured the analysis by failing to accord consistent deference to a jury's determination of the amount of punitive damages.

In the 2001 *Cooper Industries, Inc. v. Leatherman Tool Group, Inc.* case, the Unites States Supreme Court held that a jury's award of punitive damages was not "really" a finding of fact.[16] That would surely surprise jurors who conscientiously strive to base their punitive-damages on an accurate appraisal of the facts and to conform their deliberations to the trial court's instructions. Moreover, even if *Cooper*'s analysis may mean that determining the level of reprehensibility now involves a legal conclusion, a reviewing appellate court *still* "must accept the

[14] *See* the attached "Selected Financial Data, Balance Sheet Data, and Financial Tear Sheet," from the MetLife, Inc. Annual Report for 2011.

[15] *Id.*

[16] *Cooper Industries, Inc. v. Leatherman Tool Group, Inc.*, 532 U.S. 424, 437 (2001).

underlying facts as found by the jury and the [trial] court."[17]

Cooper cautioned that the de novo review of punitive-damages awards does not suggest "that the Seventh Amendment would permit a court, in reviewing a punitive damages award, to disregard . . . jury findings" on factual issues.[18] That principle forcefully applies in this case, because no Arizona jury can award punitive damages unless the plaintiff proves, "by clear and convincing *evidence*, either direct or circumstantial," that the defendant acted with an evil mind.[19] The *Nardelli* jury, as all other Arizona juries that award punitive damages, necessarily found facts sufficient to support an award of punitive damages. The *Nardelli* jury's factual findings on reprehensibility are entitled to the proper regard and deference they failed to receive.

3. There is no presumptive one-to-one compensatory-to-punitive ratio. And Arizona appellate courts should not adopt one.

The Court of Appeals defaulted to a 1:1 ratio. But setting a default 1:1 ratio is unwise because it deprives the jury and the appellate courts of the flexibility they need to ensure that punitive damages perform their important function of punishing particularly evil tortfeasors across the spectrum of reprehensibility and injury.

For general common-law tort cases, not even the United States Supreme

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[17] *Cooper Industries, Inc. v. Leatherman Tool Group, Inc.*, 285 F.3d 1146, 1150 (9th Cir. 2002).

[18] *Cooper*, 532 U.S. at 440 n. 12.

[19] Personal Injury Damages 4, Punitive Damages, *Revised Arizona Jury Instructions (Civil)* (4th ed. 2005) (emphasis added).

Court has held that a 1:1 compensatory-to-punitive damages ration is proper. The closest to that approach is the Supreme Court's 2008 *Exxon Shipping Co. v. Baker* case.[20] In *Exxon*, the Court carved out a distinctive punitive-damages doctrine for federal maritime awards—rather than using the due process framework it had created for common-law cases. As Justice Souter emphasized in the *Exxon* majority opinion, the Court was reviewing the compensatory-to-punitive-damages ratio under admiralty law: "Today's enquiry differs from due process review because the case arises under federal maritime jurisdiction, and we are reviewing a jury award for conformity with maritime law, rather than the outer limit allowed by due process; we are examining the verdict in the exercise of federal maritime common law authority, which precedes and should obviate any application of the constitutional standard."[21] Justice Souter explained that "a 1:1 ratio, which is above the median award, is *a fair upper limit in such maritime cases*."[22]

In *Exxon*, Justice Souter stated that the underlying wrongful acts did not demonstrate "exceptional blameworthiness" because there was no intentional or malicious conduct.[23] Nor was the situation one where there was only modest economic harm or low odds of detection of the underlying bad behavior.[24] Cases--

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[20] *Exxon Shipping Co. v. Baker*, 554 U.S. 471, 501-03 (2008).
[21] *Id*. at 501-02.
[22] *Id*. at 513 (emphasis added).
[23] *Id*.
[24] *Id*.

and the present case is one--involving those sorts of elements do not fit well within a ratio analysis that relies on a comparison of compensatory to punitive damages.

"A strict one-to-one ratio fails in these instances because more egregious conduct might warrant more punishment, the level of appropriate punishment sometimes does not correspond to the plaintiff's other damages, and because a defendant may escape full punishment if the harm it causes often escapes detection."[25]

Some courts—and many financially powerful corporations—have regarded *Exxon* as imposing a 1:1 cap on damages. The effect on public safety has been harmful. For instance, discussing the *Exxon* opinion in light of the British Petroleum oil-spill disaster in the Gulf of Mexico, an exasperated Senator Patrick Leahy of Vermont asked: "Is anyone surprised that, after the Supreme Court effectively capped damages designed to punish corporate misconduct, oil companies cut corners and sacrificed safety?"[26]

The mismatch between a poor or middle-class tort victim and a wealthy corporate defendant requires more than automatically using a 1:1 ratio. In *Poetic Justice: Punitive Damages and Legal Pluralism*, Marc Galanter and David Luban

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[25] Sandra F. Sperino, *Direct Employer Liability for Punitive Damages*, 97 Iowa L. Rev. Bull. 24, 29 (2012).

[26] *The Risky Business of Big Oil: Have Recent Court Decisions and Liability Caps Encouraged Irresponsible Corporate Behavior?: Hearing on H.R. 5503 Before the S. Comm. on the Judiciary, 111th Cong.* 1-3 (2010) (statement of Patrick Leahy, U.S. Senator).

argue that punitive damages are "perhaps the most important instrument in the legal repertoire for pronouncing moral disapproval of economically formidable offenders."[27] Thus, punitive damages that juries award to redress the "heinousness of the offense," are fundamentally undermined when punitive awards are tightly pegged to the amount of compensatory damages, because even heinous acts may not cause large compensatory damages.[28]

For instance, "cold-bloodedly throwing a child out of a skyscraper window may result in very little harm because the child's suspenders miraculously catch on a flagpole."[29] But the act is so heinous that massive punitive damages are essential to show societal condemnation and to punish. Indeed, in *Nardelli* case, MetLife's mistreatment of its insureds was so extreme that imposing a 1:1 ratio is a remedial measure unanchored from the factual finding of extreme reprehensibility and the need for deterrence.

4. The remedy or remedies?

The remedy for excessive punitive damages has traditionally been a new trial focusing exclusively on the proper amount of punitive damages.[30] When an

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[27] Marc Galanter & David Luban, *Poetic Justice: Punitive Damages and Legal Pluralism*, 42 Am. U. L. Rev. 1393, 1428 (1993).

[28] *Id*. at 1432.

[29] *Id*.

[30] *Maxwell v. Aetna Life Ins. Co.*, 143 Ariz. 205, 219, 693 P.2d 348, 362 (1984) ("Remand of this cause for a new trial solely on the issue of punitive damages is the appropriate remedy. Other courts have approved of a new trial

appellate court determines that the amount of punitive damages is excessive, based on its de novo, due-process review, it can and should remand for a new trial on those damages. That could even be done in the nature of a remittitur, with the plaintiff having the option of accepting the ratio that the appellate court believes is proper, or rejecting that in favor of a remand for a new trial.

Simply imposing a ratio that the appellate court finds suitable under its evaluation of the facts violates the due-process and Seventh Amendment rights of the plaintiff to a fair civil trial, and nullifies the jury's conscientious, hard work in evaluating the facts. Arizona law has never tolerated preempting the jury's factfinding concerning the basis and amount of punitive damages—and should not tolerate it even in the new world of the United States Supreme Court's pottering in punitive damages.

DATED this 25th day of September, 2012.

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only on a punitive damages claim.").

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Certificate of Compliance

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