

IN THE SUPREME COURT OF THE STATE OF OREGON

MARK STRAWN, on his own
behalf and as representative of a
class of similarly situated persons,

Plaintiff-Respondent,
Petitioner on Review,

v.

FARMERS INSURANCE
COMPANY OF OREGON, an
Oregon stock insurance company;
MID-CENTURY INSURANCE
COMPANY, a foreign corporation;
and TRUCK INSURANCE
EXCHANGE, a foreign corporation,

Defendants-Appellants,
Respondents on Review,
and

FARMERS INSURANCE GROUP
INC., a foreign corporation,

Defendant.

Supreme Court
No. S057520

Court of Appeals
No. A131605

Multnomah County Circuit Court
No. 9908-09080B

***AMICUS BRIEF OF UNITED POLICYHOLDERS IN
SUPPORT OF MARK STRAWN***

On Review of the Decision of the Court of Appeals
Dated May 20, 2009

Author: Sercombe, J.

Joined by Edmonds, P.J., and Wollheim, J.

In an appeal from the Judgment of the
Multnomah County Circuit Court

The Honorable Jerome E. LaBarre, Judge

Counsel Listed Inside Cover

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QUESTION PRESENTED

Question No. 2: Did the Court of Appeals err when it concluded that the jury's punitive damage award violated due process?

PROPOSED RULE OF LAW

In order to assure that a punitive damages award fulfills the purpose of deterrence and retribution, due process considerations for assessing the constitutional validity of a punitive damages award must include consideration of the defendant's wealth.

ARGUMENT

The purpose of punitive damages is to not only punish the defendant for engaging in conduct which a civilized society considers reprehensible, but to deter both that defendant, and others, from engaging in that same misconduct in the future. *Exxon Shipping Co. v. Baker*, 128 S.Ct. 2605, 2621-2622 (2008). The United States Supreme Court has established three primary "guideposts" for assessing the constitutional validity of a punitive damages award: reprehensibility, ratio and comparable civil or criminal penalties. *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 418. But those are not the **exclusive** factors to be considered in making that assessment. Indeed, the high court has specifically stated in other cases that the wealth of a defendant is properly a consideration in that calculus. *BMW of North America, Inc. v. Gore*, 517 U.S.

559, 591 (1996) (Breyer, J., concurring)[the use of wealth as a consideration is not “unlawful or inappropriate.”], cited and quoted with favor in *State Farm*, at 427-428; *Pacific Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1, 22 (1991).

The evidence at the trial in this action included testimony about the wealth of the defendant, and the amount of punitive damages that would be necessary to have any meaningful deterrent effect on the defendants in this case. In reducing the total amount of punitive damages awarded by the jury in this case, the court of appeals failed to consider the impact of the award in light of the defendants’ wealth.

It is essential that this Court, in assessing the validity of the punitive damages awarded by the jury in this case, establish as a rule of law in Oregon that the wealth of the defendant be a consideration. As the California Supreme Court observed in *Adams v. Murakami*, 54 Cal.3d 105, 111 (1991), “the function of deterrence . . . will not be served if the wealth of the defendant allows him to absorb the award with little or no discomfort.” Absent consideration of wealth as a factor, it is impossible to assess whether the state’s interest in deterrence and retribution has been achieved by a specific award.

I. DETERRENCE AND RETRIBUTION

It is universally accepted that punitive damages have an important function in the law. Even the United States Supreme Court has acknowledged that “in our judicial system compensatory and punitive damages, although usually awarded at

the same time by the same decisionmaker, serve different purposes.” *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 416 (2003). While compensatory damages “are intended to redress the concrete loss that the plaintiff has suffered,” punitive damages, by contrast, “serve a broader function; they are aimed at deterrence and retribution.” *Id.* The high court also stated in *BMW v. Gore*, at 568, that punitive damages “may properly be imposed to further a State’s legitimate interests in punishing unlawful conduct and deterring its repetition.”

Thus, the fundamental public policy purpose of punitive damages is to assure that the defendant, and others, are deterred from engaging in conduct which society considers so injurious to the state’s interests that it needs to be punished.

II. WHY WEALTH IS IMPORTANT

“What is ruin to one man’s fortune, may be a matter of indifference to another’s.” (William Blackstone, *Commentaries*, Vol. 4, at 371.)

In *State Farm*, the U.S. Supreme Court established three primary “guideposts” for assessing whether a particular punitive damages award comports with constitutional due process protections. But the *State Farm* court was clear that the “guideposts” are just that – i.e., *non-exclusive* factors to be included as part of the overall assessment.

This Court acknowledged in *Williams v. Philip Morris Inc.*, 340 Or. 35, 62,

127 P.3d 1165 (2006) (“*Williams II SC*”) that while wealth “cannot justify an otherwise unconstitutional punitive damages award . . . [¶] *Campbell* did not otherwise remove wealth from the punitive damage equation.” In fact, this Court noted after *Campbell* that a “jury still may levy a higher punitive damage award against a wealthy defendant, as long as the final punitive damage award does not exceed the constitutional limits established by the three *Gore* guideposts.”

While the United States Supreme Court’s recent punitive damages jurisprudence has not included wealth as a critical factor in assessing the constitutionality of punitive damages, it also has not rejected its prior statements on the issue.¹ As the court noted in *TXO Production Corp. v. Alliance Resources Corp.*, 509 U.S. 443, 462, n. 28 (1993), the defendant’s wealth is a factor “typically considered in assessing punitive damages” and wealth as a consideration in assessing the constitutionality of punitive damages was specifically approved by the high court in *Pacific Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1, 21-22 (1991).

Perhaps the gravest concern in failing to consider the defendant’s wealth in assessing whether a punitive damages award is appropriate is that “capping punitive damages at an arbitrary level would result in under-detering conduct that is condemned by society.” Amelia J. Toy, Comment, Statutory Punitive Damage

¹ Contrary to the arguments of most punitive damages defendants, the *Campbell* court did not reject wealth as a consideration. Rather, it merely noted that wealth alone, “cannot justify an *otherwise* unconstitutional punitive damages award.” *State Farm*, at 428; emphasis added.

Caps and the Profit Motive: An Economic Perspective, 40 Emory L.J. 303, 305 (1991).

Because of this concern, many commentators and courts still stress the consideration of a defendant's wealth as crucial in determining whether a particular punitive damages verdict is in the proper range. See, e.g., Keith N. Hylton, *A Theory of Wealth and Punitive Damages*, 17 Widener L. J. 927 (2008); *Seltzer v. Morton*, 336 Mont. 225, 272-273, 154 P.3d 561, 597 (Mont. 2007); *Wright v. American Home Products Corp.*, 557 F.Supp.2d 1032, 1039 (W.D. Missouri 2008).

In *Hudgins v. Southwest Airlines Co.*, 212 P.3d 810, 830 (Az. App. 2009), for example, the Arizona Court of Appeals used the consideration of the defendant's wealth to double the punitive damages to compensatory damages ratio because "SWA's wealth warrants a more substantial punitive damages award in order to serve the deterrent purposes underlying such awards."

Similarly, in his concurring opinion in *Southern Union Company v. Irvin*, 563 F.3d 788, 793 (2009), Justice Reinhardt stated that wealth is "another consideration" that should be added "to our discussion of the relevant factors in assessing punitive damages." As he explained, "[i]f punitive damages are to achieve the twin purposes of deterrence and punishment . . . we must consider the impact of a damage award upon the particular defendant in determining the constitutional limit." *Id.* Essentially, "although the conduct may be similar, because of lower compensatory damages or the defendant's higher net worth, a higher ratio may be necessary to achieve a deterrent or punitive effect." *Id.*

As an example, Justice Reinhardt posited a case in which there was \$10,000 in compensatory damages. In the case of a defendant with a net worth of \$50,000, a 1:1 ratio would “achieve both the punitive and deterrent purposes.” But, “[t]he same amount of punitives awarded against a company earning \$1 billion a year, with a net worth of \$50 billion, would hardly serve either of these objectives.” *Id.*

As another court explained, “meager amounts do not accomplish the purposes of punitive damage awards.” *Green v. Denny’s Corporation*, 2008 WL 4328221, *2 (S.D. Ill. 2008).

The Supreme Court of Montana echoed this concern in *Seltzer v. Morton*, 336 Mont. 225, 272-273, 154 P.3d 561, 597 (Mont. 2007). Quoting from the California Supreme Court in *Simon v. San Paolo U.S. Holding Co., Inc.*, 35 Cal.4th 1159, 29 Cal.Rptr. 379, 113 P.3d 63, 78-79, the *Seltzer* court concurred that “the function of deterrence will not be served if the wealth of the defendant allows him to absorb the award with little or no discomfort.” The court then added a critical consideration: “Punitive damage awards *should not be a routine cost of doing business that an industry can simply pass on to its customers through price increases, while continuing the conduct the law proscribes.*” *Id.*, at 273.

Fundamentally, when faced with an extremely wealthy defendant, a court considering the appropriateness of a punitive damages award must take wealth into consideration in order to assure that the ameliorative effects of an exemplary damages award can be achieved. An award of anything less than an amount that has a meaningful impact on the defendant will allow the defendant to simply absorb the punitive damages as a cost of doing business rather than as a deterrent

to engaging in the misconduct. Accordingly, wealth is an important factor in assessing a punitive damages award and, especially in this case, is a consideration that must be included in the analysis.

III. THE EVIDENCE IN THIS CASE

The unchallenged evidence in this case proved that the three defendant companies had a net worth in excess of \$1.1 billion. [Tr. 1493:12-25.] Plaintiff's expert compared this net worth with the net worth of an average household - \$84,000. [Tr. 1497:13-1498:7; 1499:2-7.] A one percent fine against an average householder would amount to \$840, and against the three defendants would amount to \$11.5 million [Tr. 1500:15-20] - significantly more than the eight million dollars imposed by the jury.

A fine of a mere one percent of net worth would not have a significant impact on a defendant's ability to continue operations, but would have at least some impact on its desire to engage in wrongful conduct in the future. And that conclusion is consistent with cases upholding punitive damages awards in the range of just under 1% of a defendant's net worth, up to as much as 4% of that amount. *See, e.g., Moore v. American United Life Ins. Co.*, 150 Cal.App.3d 610, 642 (1984) [4%]; *Downey Savings & Loan Assn. v. Ohio Casualty Ins. Co.*, 189 Cal.App.3d 1072 (1987) [just under 1%]; *Roemer v. Retail Credit Co.*, 44 Cal.App.3d 926, 937-938 (1975) [just under 1%]; *Dunn v. HOVIC*, 1 F.3d 1371,

1383 (3rd Cir. 1993); *Cash v. Beltmann North American Co., Inc.*, 900 F.2d 109, 111, n.3 (7th Cir. 1990) [collecting decisions from various courts].

Another important factor in this case is that the amount of each individual insured's pecuniary damage was minimal – over 90% of the reductions were for \$25 or less. [Ex 601-604; SER 44-47.] And those damages related to the medical expenses of individual insureds or their medical providers, not damages owed to corporations or businesses with considerable assets.

Where the situation involves small sums sought by individual people, the court in *Mathias v. Accor Economy Lodging, Inc.*, 347 F.3d 672 (7th Cir. 2003), engaged in a compelling ratio analysis that involved the defendant's wealth as a factor in conjunction with the more limited means of the plaintiffs. In *Mathias*, the defendant motel was infested with bedbugs. Instead of eradicating them, or even warning patrons about them, the motel blithely continued renting infested rooms to travelers. The jury awarded each plaintiff \$5,000 in compensatory damages and \$186,000 in punitive damages, a 37:1 ratio. In upholding that punitive damages award, Justice Posner rejected the defendant's argument that punitive damages should be capped at a 4:1 ratio. To do so, Justice Posner concluded, might cause a plaintiff to have difficulty in financing a lawsuit and would allow wealthy defendants to use their financial resources to make litigation costly—and unattractive—for plaintiffs. As the *Mathias* court noted, “wealth in the sense of resources enters [the calculus] in enabling the defendant to mount an extremely aggressive defense against suits such as this and by doing so to make litigating against it very costly, which in turn may make it difficult for the

plaintiffs to find a lawyer willing to handle their case, involving as it does only modest stakes” *Id.*, at 677.

The same considerations warrant approval of the jury’s punitive damages verdict in this case: The small amounts at issue and the general financial circumstances of the class members would similarly allow wealthy defendants like these to use their financial resources to make litigation costly – and unattractive.

CONCLUSION

Wealth as a factor in the determination of whether a punitive damages award is constitutionally excessive is not only an appropriate consideration, but an essential one. If a punitive damages award is not sufficient to deter the inappropriate conduct, the purpose of imposing punitive damages is undermined. The jury’s determination that an \$ 8 million punitive damages award – representing little more than one-half of one percent of the defendants’ net worth – was not only appropriate on the basis of the defendants’ reprehensible conduct, the ratio of compensatory to punitive damages, and the comparable penalties, but

essential in light of the defendants' wealth. This Court should confirm that wealth – and especially massive wealth – is an appropriate consideration in assessing the constitutional adequacy of a punitive damages award.

Dated this ____ day of November, 2009

Respectfully submitted,

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