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SUPREME COURT
STATE OF ARIZONA

JAMES DUEPNER, Plaintiff/Appellant/Petitioner, v. GOVERNMENT EMPLOYEES INSURANCE COMPANY and GEICO CAUSALTY COMPANY, Respondents/Defendants/Appellees.	**Case No. CV-17-0216-PR** **Court of Appeals, Division One** **Case No. 1 CA-CV 16-0278** Maricopa County Superior Court Case No. CV 2014-000168 Hon. James T. Blomo

AMICUS CURIAE BRIEF

OF UNITED POLICYHOLDERS

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Reasons to Grant the Petition for Review

1. In punitive-damages cases, "most deplorable" and "most outrageous" are superlative descriptions that are "most bad." They provide no useful guidance for trial courts screening punitive-damages claims.

In any critical analysis, superlatives are dangerous. There can be, after all, only one case that is "most deplorable"—a phrase the Court of Appeals coined in this Decision to describe cases meriting punitive damages. The act of "allowing this case to go to the jury on punitive damages," the Court of Appeals wrote, "would run counter to the command of *Linthicum* to reserve that remedy to the most deplorable cases." *Decision* at ¶ 27 (citing *Linthicum v. Nationwide Life Ins. Co.*, 150 Ariz. 326 (1986)).

Linthicum never used the colorful superlative "most deplorable." It is true that *Linthicum* was the first Arizona punitive-damages opinion to use the term "most egregious" for punitive damages. *Linthicum* held that punitive damages "should be appropriately restricted to only the most egregious of wrongs" and are a remedy "only to be awarded in the most egregious of cases." *Id.* at 331-32. After *Linthicum*, when discussing punitive damages, Arizona appellate courts have often used the "most egregious" phrase. *See, e.g., Sobieski v. American Standard Ins. Co. of Wisconsin*, 240 Ariz. 531, 536 ¶ 18 (App. 2016).

This Decision's "most deplorable" superlative is a clear stepchild of the parent "most egregious" superlative—but shares the same defect as the "most

egregious" superlative. The defect is that there can be only *one* "wrong" or *one* "case" that is "most egregious" or "most deplorable." After all, "most" is a superlative adjective describing a supreme something surpassing all other things. *American Heritage Dictionary of the English Language* 1749 (5th ed. 2011); *Random House Webster's Unabridged Dictionary* 1909 (2nd ed. 2001). Something is superlative when it is "to the highest degree; superior to all others; most eminent; expressing the highest degree (*grammar*)." *Chambers Dictionary* 1562 (13th ed. 2014). Superlative refers to the utmost degree of something. *Webster's Third New International Dictionary of the English Language Unabridged* 2294 (2002).

For that reason, the standard punitive-damages jury instruction never uses the superlative adjective "most" to describe cases or wrongs bad enough for a jury to award punitive damages. "Punitive Damages," *Personal Injury Damages 4*, RAJI (Civil) (5th ed. July 2013). Using that instruction, jurors regularly determine existence of intent to injure, spite, ill will, conscious disregard of a substantial risk that conduct might significantly injure the rights of others, and conscious pursuit of conduct knowing that it created a substantial risk of significant harm to others. *Id*. But jurors cannot—and do not—decide if a case or wrong is one of the "most egregious" or "most deplorable" cases or wrongs.

The use of the superlative adjective "most" both fails to follow the standard jury instruction and must confuse any trial judge trying to apply it as a screening

tool. The trial judge would start on a quixotic quest to find wrongs or cases that are "most deplorable" or "most egregious," and never end the journey, because no one can ever definitely say what are the "most egregious" or "most deplorable" cases or wrongs without considering *all* cases and wrongs. And that is impossible. As a result, if a trial judge were to tilt at the superlative windmill by using "most egregious" or "most deplorable" to screen punitive-damages claims, no punitive-damages claim would ever be bad enough to reach the jury.

Perhaps the "most egregious" words in *Linthicum* are why fewer and fewer punitive damages claims reach juries. Defense lawyers certainly energetically tout the "most egregious" language. Many judges may latch onto the "most egregious" superlative, fail to imagine what a "most egregious" case or wrong might be, and decide that the claim is not one of the imaginary "most egregious" cases or wrongs.

Trial judges *can* determine if specific conduct is egregious or deplorable, although those terms never appear in the standard punitive-damages jury instruction. But asking trial judges to screen punitive-damages claims to decide if a case or wrong is "most egregious" or "most deplorable" is asking the impossible. No trial judge—or appellate judge, for that matter—can ever responsibly determine if a particular situation presents a case or wrong that, above all other possible cases or wrongs, is "most egregious" or "most deplorable." "Very egregious"—maybe. "Very deplorable"—maybe. But "most egregious?" or "most deplorable?"—never.

This case presents an opportunity to clarify for Arizona judges and lawyers that the right way to screen punitive-damages claims is not by using the superlative "most egregious" or the new and more emotionally charged superlative "most deplorable," but by using the tried, tested, and non-superlative principles summarized in the standard Arizona punitive-damages jury instruction (as stated in the opinions on which it rests).

2. If review is not granted, the Decision will confuse judges and lawyers across Arizona on who gets to make favorable *and* adverse inferences for summary-judgment motions concerning punitive damages.

Over a century ago, the Arizona Territorial Supreme Court approved a jury instruction telling an Arizona jury that if it found "'the injury inflicted by the defendant was wanton, malicious, and committed in reckless and willful disregard of the rights of plaintiff,' exemplary damages might be allowed in case the compensatory damages returned might not be sufficient in the judgment of the jury 'to punish the defendant and serve as a warning to others.'" *Iaeger v. Metcalf*, 11 Ariz. 283, 289 (Terr. 1908).

In Arizona, public policy, societal condemnation, punishment, and deterrence can support awarding punitive damages. *Haralson v. Fisher Surveying, Inc.*, 201 Ariz. 1, 3 ¶ 7 (2001). But in 2017—as in 1908—the right to decide whether to award punitive damages remains with the jury. In fact, "whether punitive damages are justified should be left to the jury if there is *any* reasonable

evidence which will support them." *Farr v. Transamerica Occidental Life Ins. Co. of California*, 145 Ariz. 1, 9 (App. 1984) (emphasis added).

Arizona courts must therefore be cautious in making any adverse inference that could prevent a jury from deciding if a case's facts might support imposing punitive damages. That is one reason why, when reviewing a summary-judgment motion seeking to bar punitive damages against an insurer, the court *must* take *all* reasonable inferences from the evidence in the insured's favor. *Felipe v. Theme Tech Corp.*, 235 Ariz. 520, 520 ¶ 31 (App. 2014).

In its Decision, the Court of Appeals acknowledged that circumstantial or direct evidence can be the basis on which a defendant's actual intent can be reasonably inferred. *Decision* at *4 ¶ 20. And it acknowledged that the "evil mind" needed to justify punitive damages may also "'be inferred.'" *Decision* at *5 ¶ 24 (quoting *Rawlings v. Apodaca*, 151 Ariz. 149, 163 (1986)).

That is consistent with the principle that deciding the sufficiency of facts to infer motivation and to infer an insurer's possibly evil mind are jury tasks. An "inference," after all, "'is a conclusion which the law permits *the jury* to draw if it finds a given set of facts.'" *State v. Mohr*, 150 Ariz. 564, 567 (App. 1986) (quoting *United States v. Burns*, 597 F.2d 939, 943 n. 7 (5th Cir.1979)) (emphasis added).

For punitive damages, inferences are decisive. After all, no insurer will ever admit it was deliberately indifferent to or consciously disregarded an insured's

rights. Therefore, "a jury may infer evil mind" even if a defendant's acts are not outrageous, as long as the defendant has deliberately continued its wrongful actions despite the fact that inevitable or highly probable harm would follow. *Gurule v. Illinois Mutual Life & Casualty Co.*, 152 Ariz. 600, 602 (1987).

The Decision, however, veers from accepted norms—and may improperly influence judges and lawyers statewide—by refusing to take reasonable inferences in the insured's favor and by taking adverse inferences against the insured. In fact, the Court of Appeals held that "the facts of this case are insufficient to infer" that the insurer's handling of the insurance claim was motivated by making a profit. *Decision* at *6 ¶ 29. The weight of the evidence and adverse inferences to be made from the evidence are, however, for the jury.

At such an early stage in a case of this nature, an Arizona court may not weigh the evidence and may not make adverse inferences. *See Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133, 150 (2000) (A reviewing court "must draw all reasonable inferences in favor of the nonmoving party, and it may not make credibility determinations or weigh the evidence."). When reasonable inferences will let a jury resolve a material issue one way or the other, summary judgment is improper. *Boomer v. Frank*, 196 Ariz. 55, 58 ¶ 8 (App. 1999).

For punitive damages, where "questions of motive, intent and the subjective state of mind" are "critical," those "questions are particularly best determined by

the jury as a trier of fact." *Huggins v. Deinhard*, 127 Ariz. 358, 361 (App. 1980). Here, the Court of Appeals incorrectly held that too much of the insurer's conduct was "objectively reasonable" to allow for an inference of an improper profit motive. *Decision* at *6 ¶ 29. That is another adverse inference on reasonableness of conduct that only a jury gets to make.

Moreover, the Decision contradicts itself. In particular, the Court of Appeals states that the insurer's handling of part of the insured's claim gave rise "to inferences" that the insurer had lowballed the insurer's claim and had forced the insured to "'go through needless adversarial hoops.'" *Decision* at *3 ¶ 15 (quoting *Zilisch v. State Farm Mut. Auto. Ins. Co.*, 196 Ariz. 234, 238, ¶ 21 (2000). That sort of inference (of deliberate indifference) is one supporting punitive damages.

Despite its intermittent refusal to take all reasonable inferences in the insured's favor, the Court of Appeals agreed with the principle that the "task of resolving the competing inferences that arise from this record is reserved for the jury." *Decision* at *4 ¶ 18. But the Court of Appeals still preempted the jury's right to make the range of inferences, both favorable and adverse, that only the jury has the right to make to determine whether to award punitive damages.

In punitive-damages summary-judgment proceedings, courts cannot make adverse inferences. The only inferences courts can make are inferences favorable to the insured. The Decision went astray by failing to follow that established rule.

This Court should grant review because that mistake may cause courts and lawyers statewide to do the same.

3. Because of the importance of insurance to consumers, and because of the immense disparity of wealth and power between insurance companies and their customers, courts should be particularly careful to protect the right of insurance consumers to seek punitive damages against their insurers in appropriate cases.

A large percentage of Arizona punitive-damages cases involve allegations of serious, systematic wrongdoing by insurance companies in providing coverage and in handling customer claims. That is not surprising. Arizona courts, after all, "almost uniformly" will "protect those in unequal bargaining positions, specifically insureds against their insurers." *Lingel v. Olbin*, 198 Ariz. 249, 260 ¶ 33 n. 16 (App. 2000). In the insurer/insured context, "Arizona's public policy protects insureds." *Equity Income Partners, LP v. Chicago Title Ins. Co.*, 241 Ariz. 334, 339 ¶ 17 (2017).

Consumers do not buy insurance for commercial advantage. They buy it "as protection against calamity" and expect their insurer to help and protect them when an insured loss occurs. *Noble v. National Am. Life Ins. Co.*, 128 Ariz. 188, 189-90 (1981). Because insureds are often "in an especially vulnerable economic position" when a loss occurs, the "whole purpose of insurance is defeated if an insurance company can refuse or fail, without jurisdiction, to pay a valid claim." *Id*. at 190.

Those are the reasons why Arizona recognizes the tort of insurance bad faith.

But a strong additional protection for insureds comes from the possibility of an award of punitive damages when an insurance company commits insurance bad faith under circumstances evidencing that the insurer:

(1) intended to cause injury; or

(2) committed wrongful conduct motivated by spite or ill will; or

(3) acted to serve its own interests, having reason to know and consciously disregarding a substantial risk that its conduct might significantly injure the rights of others; or

(4) consciously pursued a course of conduct knowing that it created a substantial risk of significant harm to others.

"Punitive Damages," *Personal Injury Damages 4*, RAJI (Civil) (5th ed. July 2013).

Punitive damages against insurers discourage perpetuation of objectionable corporate policies "that breach the public's trust and sacrifice the interests of the vulnerable for commercial gain." *Amadeo v. Principal Mut. Life Ins. Co.*, 290 F.3d 1152, 1164-65 (9th Cir. 2002).

The California Court of Appeals has held that "the unequal relationship" between an insured and the insurer requires "special remedies," including "tort remedies for the failure to perform obligations promised in a policy and punitive damages." *20th Century Ins. Co. v. Superior Court*, 109 Cal. Rptr.2d 611, 626 (App. 2001). The California Supreme Court has also held that because "the

relationship of insurer and insured is inherently unbalanced," the "adhesive nature of insurance contracts places the insurer in a superior bargaining position." *Egan v. Mutual of Omaha Ins. Co.*, 620 P.2d 141, 146 (Cal. 1979), *cert. denied*, 445 U.S. 912 (1980). "The availability of punitive damages is thus compatible with recognition of insurers' underlying public obligations and reflects an attempt to restore balance in the contractual relationship." *Id*.

Arizona courts have repeatedly cited and relied on the California Supreme Court's *Egan* opinion. *See, e.g., Rawlings v. Apodaca*, 151 Ariz. 149, 154 (1986) (An insured buying insurance seeks "protection and security from economic catastrophe" and "peace of mind."); *Deese v. State Farm Mut. Auto, Inc. Co.*, 172 Ariz. 504, 507 (1992) (An insurer "must treat its insureds fairly in evaluating claims."); *Noble v. National American Life Ins. Co.*, 128 Ariz. 188, 189-90 (1981) (When a casualty loss occurs, the insured is often "in an especially vulnerable position" and the whole purpose of the insurance can be defeated if the insurer can then refuse or fail to play a valid claim without justification.).

Arizona courts are traditionally so receptive to allowing punitive damages to reach the jury that a punitive-damages claim *must* go to the jury when there is *any* reasonable evidence that will support awarding them. *Mendoza v. McDonald's Corp.*, 222 Ariz. 139, 158 ¶ 63 (App. 2009). And if the issue of punitive damages is actually presented to the jury, the "jury's decision to award punitive damages

should be affirmed if any reasonable evidence exists to support it." *Filasky v. Preferred Risk Mut. Ins. Co.*, 152 Ariz. 591, 599 (1987). The present Decision does not conform to that strong, pro-consumer tradition.

Conclusion

This Court should grant review to clarify three important aspects of Arizona punitive-damages law: *First*, when screening punitive-damages matters for possible presentation to juries, it is unwise to use superlatives, such as "most deplorable" and "most egregious." The standards for letting punitive damages reach a jury are well covered in the standard punitive-damages instruction—which nowhere uses superlatives such as "most deplorable" or "most egregious." If a situation satisfies the factors set out in the standard jury instruction and the cases from which that instruction grew, punitive damages should go to the jury. If not, not. The superlative gloss confuses instead of enlightens.

Second, when considering whether a punitive-damages claim should go to the jury, a court cannot make adverse inferences. That is solely the jury's task.

Third, Arizona courts should remain particularly receptive to letting juries decide whether punitive damages are available if there is *any* reasonable evidence that will support awarding those damages.

Grant of review, followed by clarification, will help foster the proper application and development of Arizona punitive-damages law.

DATED this 30th day of August, 2017.

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