PUNITIVE DAMAGES LAW IN WEST VIRGINIA

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INTRODUCTION

Permitting an award of punitive damages in civil litigation has a long history in West Virginia.[1] In spite of the long history of punitive damages in the State, it was not until the 1991 decision in *Garnes v. Fleming Landfill, Inc.*[2], that constitutional due process principles were expressly applied to such damages. The decision in *Garnes* recognized the application of due process principles to punitive damages as a result of the United States Supreme Court's decision in *Pacific Mutual Life Insurance Co. v. Haslip*.[3] In *Haslip,* the United States Supreme Court "decided for the first time that certain punitive damages awards could violate the due process clause of the Fourteenth Amendment."[4] As a result of *Haslip*, the decision in *Garnes* altered punitive damages law in West Virginia so as "to provide both procedural and substantive due process to defendants against whom punitive damages are awarded[.]"[5] *Garnes* summarized the State's new constitutional punitive damages

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[1]*See Mayer v. Frobe*, 40 W. Va. 246, 22 S.E. 58 (1895) (establishing standard for awarding punitive damages).

[2]*Garnes v. Fleming Landfill, Inc.*, 186 W. Va. 656, 413 S.E.2d 897 (1991).

[3]*Pacific Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1, 111 S. Ct. 1032, 113 L. Ed. 2d.2d 1 (1991).

[4]*Garnes v. Fleming Landfill, Inc.*, 186 W. Va. 656, 663, 413 S.E.2d 897, 904 (1991).

[5]*TXO Prod. Corp. v. Alliance Res. Corp.*, 187 W. Va. 457, 474, 419 S.E.2d 870, 887 (1992), *aff'd*, 509 U.S. 443, 113 S. Ct. 2711, 125 L. Ed. 2d 366 (1993). *See also Garnes v. Fleming Landfill, Inc.*, 186 W. Va. 656, 667, 413 S.E.2d 897, 908 (1991) ("Following the dictates of *Haslip,* we here set out a new system for the review of punitive damages awards in West Virginia.").

jurisprudence as follows:

> Under our system for an award and review of punitive damages 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, which may occur when an application is made for an appeal.[6]

For the purpose of this Introduction, two changes brought about by *Garnes* are worth noting. First, prior to the decision in *Garnes,* a punitive damage award was reviewed for excessiveness based upon the following standard: "Courts must not set aside jury verdicts as excessive unless they are monstrous, enormous, at first blush beyond all measure, unreasonable, outrageous and manifestly show jury passion, impartiality, prejudice or corruption."[7] *Garnes* expressly held that "[t]hese guidelines provide insufficient review by the trial court of punitive damages awards."[8]

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[6]Syl. pt. 2, *Garnes v. Fleming Landfill, Inc.,* 186 W. Va. 656, 413 S.E.2d 897 (1991). A year after the decision in *Garnes,* the West Virginia Supreme Court of Appeals issued the decision in *TXO Prod. Corp. v. Alliance Resources Corp*., 187 W. Va. 457, 474, 419 S.E.2d 870, 887 (1992), *aff'd*, 509 U.S. 443, 113 S. Ct. 2711, 125 L. Ed. 2d 366 (1993). As discussed in Section XII of this paper, *TXO* added another due process component to the review of punitive damages.

[7]Syl. pt. 4, *Muzelak v. King Chevrolet, Inc*., 179 W. Va. 340, 368 S.E.2d 710 (1988). *See also* Syl. pt. 4, *Stevens v. Friedman*, 58 W. Va. 78, 51 S.E. 132 (1905) ("In a case where [punitive] damages may properly be awarded, the verdict of a jury will not be set aside on the ground alone that the damages awarded are excessive, unless the amount is so large as to evince passion, prejudice, partiality, or corruption in the jury.").

[8]*Garnes v. Fleming Landfill, Inc*., 186 W. Va. 656, 667, 413 S.E.2d 897, 908 (1991). It should be noted that this standard is still applicable to a review of compensatory damages that are challenged as being excessive. *See Strahin v. Cleavenger*, 216 W. Va. 175, 603 S.E.2d 197 (2004); *Alley v. Charleston Area Med. Ctr., Inc*., 216 W. Va. 63, 602 S.E.2d 506 (2004); *Rodriguez v. Consolidation Coal Co.*, 206 W. Va. 317, 524 S.E.2d 672 (1999);

The second fundamental change brought about by *Garnes* was made implicitly. During the early history of punitive damage jurisprudence in the State, courts adhered to a principle of law set out in *Fisher v. Fisher*.[9] Pursuant to *Fisher,* "[p]unitive or exemplary damages should not be awarded in any case where the amount of compensatory damages is adequate to punish the defendant[.]"[10] Under the *Fisher* formulation, compensatory damages were viewed as punitive, and, as such, courts were required to look at an award of compensatory damages to determine whether they were sufficiently punitive so as to preclude a separate award for punitive damages.[11] As a consequence of the *Garnes* decision, it is no longer required, as a general matter, that compensatory damages be examined to determine whether they contain a sufficient punitive component so as to preclude a separate award of

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Kessel v. Leavitt, 204 W. Va. 95, 511 S.E.2d 720 (1998).

[9]*Fisher v. Fisher*, 89 W. Va. 199, 108 S.E. 872 (1921).

[10]Syl. pt. 1, in part, *Fisher v. Fisher*, 89 W. Va. 199, 108 S.E. 872 (1921). *See also Raines v. Faulkner*, 131 W. Va. 10, 20, 48 S.E.2d 393, 399 (1947) ("Punitive damages may be awarded only if compensatory damages are inadequate to punish the defendant."); Syl. pt. 2, *Claiborne v. Chesapeake & O. Ry. Co.*, 46 W. Va. 363, 33 S.E. 262 (1899) ("If the compensatory damages are sufficiently punitive, it is improper to instruct the jury to allow an additional sum as punitive damages.").

[11]*See* Syl pt. 4, *Blevins v. Bailey*, 102 W. Va. 415, 135 S.E. 395 (1926) ("Where it is proven, in an action of tort, that the trespass is willful, wanton, or malicious, the defendant is subject to exemplary damages. In such case the jury may be so informed, and instructed that, if the damages fixed by them as compensation for the plaintiff do not, in their opinion, adequately punish the defendant for the wrong committed, the amount may be increased until it does so. But the jury should be admonished that the defendant shall not be punished twice for the same wrong, and, if they consider the compensatory damages as sufficiently punitive, no other amount should be added thereto.").

punitive damages.[12]

The intent of this paper is twofold. First, the paper outlines punitive damages law in West Virginia. Second, this paper examines punitive damages principles of law established by the United States Supreme Court and discusses the impact of those principles in West Virginia.

I. PURPOSE OF PUNITIVE DAMAGES

Compensation to a plaintiff for his or her actual losses is achieved through compensatory damages, not through punitive damages.[13] Punitive damages are allowed against a defendant as punishment for proven aggravating circumstances of his or her wrong to the plaintiff, over and above full compensation for all injuries directly or indirectly resulting from such wrong.[14] The West Virginia Supreme Court of Appeals has recognized that punitive damages achieve a number of important objectives. Those objectives include: (1) punishing the defendant; (2) deterring others from pursuing a similar course of conduct; (3) providing additional compensation for the egregious conduct to which the plaintiff has

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[12]The lone exception to this new general rule, as discussed in Section XII of this paper, is a claim involving intentional infliction of emotional distress.

[13]"[C]ompensatory damages include allowance for mental anguish and pain and suffering in addition to . . . pecuniary loss when accompanied by injury from assault, indignity or injury to reputation, etc." *Jones v. Hebdo*, 88 W. Va. 386, 394, 106 S.E. 898, 900 (1921).

[14]*See Marsch v. American Elec. Power Co.*, 207 W. Va. 174, 530 S.E.2d 173 (1999); *State ex rel. State Auto Ins. Co. v. Risovich*, 204 W. Va. 87, 511 S.E.2d 498 (1998).

been subjected; (4) encouraging a plaintiff to bring an action where he or she might be discouraged by the cost of the action; (5) as a substitute for personal revenge by the injured party; and (6) encouraging good faith efforts at settlement.[15]

II. CONDUCT JUSTIFYING PUNITIVE DAMAGES

The law of West Virginia "has long required more than a showing of simple negligence to recover punitive damages."[16] The basis for awarding punitive damages was established by the West Virginia Supreme Court of Appeals in the 1895 decision of *Mayer v. Frobe*.[17] *Mayer* stated "where gross fraud, malice, oppression, or wanton, willful, or reckless conduct or criminal indifference to civil obligations [appear] . . . the jury may assess exemplary, punitive, or vindictive damages; these terms being synonymous."[18] Stated

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[15]*See Hannah v. Heeter*, 213 W. Va. 704, 584 S.E.2d 560 (2003); *Coleman v. Sopher*, 201 W. Va. 588, 499 S.E.2d 592 (1997); *Poling v. Motorists Mut. Ins. Co.*, 192 W. Va. 46, 450 S.E.2d 635 (1994); *Spencer v. Steinbrecher*, 152 W. Va. 490, 164 S.E.2d 710 (1968).

[16]*Bennett v. 3 C Coal Co.*, 180 W. Va. 665, 671, 379 S.E.2d 388, 394 (1989).

[17]*Mayer v. Frobe*, 40 W. Va. 246, 22 S.E. 58 (1895). *See also Haynes v. Rhone-Poulenc, Inc.*, 206 W. Va. 18, 35 n.21, 521 S.E.2d 331, 348 n.21 (1999) ("[W]e are still committed to the traditional rule announced in *Mayer* and cited with approval in a number of subsequent cases.").

[18]Syl. pt. 4, in part, *Mayer v. Frobe*, 40 W. Va. 246, 22 S.E. 58 (1895). *See Goodwin v. Thomas*, 184 W. Va. 611, 403 S.E.2d 13 (1991). It should be noted that the award of punitive damages is a matter of substantive law, not procedural law. Thus, for example, in an action involving interstate pollution by a defendant in another state, the punitive damages law of the defendant's home-state must be applied. *See Arnoldt v. Ashland Oil, Inc.*, 186 W. Va. 394, 412 S.E.2d 795 (1991) (applying Kentucky's punitive damages law).

differently, to sustain a claim for punitive damages, the plaintiff must present evidence to show that a wrongful act was done maliciously,[19] wantonly, mischievously or with criminal indifference to civil obligations.[20] A wrongful act done by a defendant under a *bona fide* claim of right and without malice in any form does not constitute a basis for awarding punitive damages.[21]

III. BURDEN OF PROOF ON PUNITIVE DAMAGES

The Supreme Court has indicated that, to obtain an award of punitive damages, a plaintiff does not have to present "clear and convincing evidence to support jury instructions on punitive damages."[22] Rather, a plaintiff's entitlement to punitive damages must be shown

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[19]"[T]he punitive damages definition of malice has grown to include not only mean-spirited conduct, but also extremely negligent conduct that is likely to cause serious harm." *TXO Prod. Corp. v. Alliance Res. Corp*., 187 W. Va. 457, 474, 419 S.E.2d 870, 887 (1992), *aff'd*, 509 U.S. 443, 113 S. Ct. 2711, 125 L. Ed. 2d 366 (1993).

[20]The "criminal indifference to civil obligations" basis for awarding punitive damages refers to criminal conduct by a defendant that resulted in harm to the plaintiff. *See McClung v. Marion County Comm'n*, 178 W. Va. 444, 452, 360 S.E.2d 221, 229 (1987) ("[O]ne of the infrequently encountered factors supporting an award of punitive damages [is] unprosecuted criminal conduct[.]").

[21]Syl. pt. 3, *Jopling v. Bluefield Water works & Improve. Co.*, 70 W. Va. 670,74 S.E. 943 (1912). *See also General Motors Acceptance Corp. v. D.C. Wrecker Serv.*, 220 W. Va. 425, 647 S.E.2d 861(2007); *Bennett v. 3 C Coal Co.*, 180 W. Va. 665, 379 S.E.2d 388 (1989). It has been said that where a defendant's conduct was "wilfully committed with such reckless, wanton and criminal indifference and disregard of plaintiff's rights[,] the jury could infer malice therefrom, as a basis for allowing punitive damages." *Raines v. Faulkner*, 131 W. Va. 10, 17, 48 S.E.2d 393, 397 (1947).

[22]*Coleman v. Sopher*, 201 W. Va. 588, 602 n.21, 499 S.E.2d 592, 606 n.21 (1997).

by a preponderance of the evidence.[23]

IV. COMPENSATORY DAMAGES REQUIRED FOR PUNITIVE DAMAGES AWARD

A plaintiff cannot maintain an action merely to recover punitive damages. That is, "the right to recover punitive damages in any case is not the cause of action itself, but a mere incident thereto."[24] As a consequence, an award of compensatory damages is a necessary predicate for an award of punitive damages.[25] That is, punitive damages may not be awarded by a jury, if the jury fails to award compensatory damages.[26] If a jury awards punitive damages, but fails to award compensatory relief, the remedy generally is to grant a new trial on damages.[27] However, where there is insufficient evidence of actual liability, the verdict

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[23]*Goodwin v. Thomas*, 184 W. Va. 611, 403 S.E.2d 13 (1991). *See also Mutafis v. Erie Ins. Exch.*, 174 W. Va. 660, 674 n.15, 328 S.E.2d 675, 689 n.15 (1985) ("In order to recover punitive damages, the Plaintiff must prove by a preponderance of the evidence that the Defendant acted in an intentional manner, meaning an intent to harm someone, or with a recklessness demonstrating disregard for another person's rights and the Defendant must also have acted willfully.").

[24]*Lyon v. Grasselli Chem. Co.*, 106 W. Va. 518, 521, 146 S.E. 57, 58 (1928).

[25]*See LaPlaca v. Odeh*, 189 W. Va. 99, 428 S.E.2d 322 (1993); *Toler v. Cassinelli*, 129 W. Va. 591, 41 S.E.2d 672 (1946).

[26]*See* Syl. pt. 1, *Garnes v. Fleming Landfill, Inc.*, 186 W. Va. 656, 413 S.E.2d 897 (1991) ("Syllabus point 3 of *Wells v. Smith*, 171 W. Va. 97, 297 S.E.2d 872 (1982), allowing a jury to return punitive damages without finding compensatory damages is overruled[.]").

[27]*See Rohrbaugh v. Wal-Mart Stores, Inc.*, 212 W. Va. 358, 572 S.E.2d 881 (2002); *Payne v. Gundy*, 196 W. Va. 82, 468 S.E.2d 335 (1996).

for the plaintiff may be vacated and judgment entered in favor of the defendant.[28]

V. ACTIONS IN WHICH PUNITIVE DAMAGES ALLOWED

It was recognized in the decision of *Mayer v. Frobe*[29] that, upon a proper showing, punitive damages may be awarded in tort actions based upon the common law or by statute. This section of the paper examines tort actions in which the West Virginia Supreme Court of Appeals has expressly permitted punitive damages to be awarded, as well as a review of statutes that expressly permit punitive damages to be awarded.

(1) Actions in Which Supreme Court Expressly Recognized Punitive Damages

Although the common law generally permits punitive damages in tort actions, the Supreme Court has been asked on a number of occasions to expressly decide whether or not punitive damages are available for specific torts. The following material highlights tort actions in which the Supreme Court has expressly ruled on this issue.

Wrongful eviction. A tenant in lawful possession of premises, who is wrongfully evicted by his or her landlord, may maintain an action for the resulting damages. Where the wrongful eviction is malicious and wanton, punitive damages may be recovered.[30]

Violation of procedural law. When a defendant intentionally disregards a law

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[28]*LaPlaca v. Odeh*, 189 W. Va. 99, 428 S.E.2d 322 (1993).

[29]*Mayer v. Frobe*, 40 W. Va. 246, 22 S.E. 58 (1895).

[30]*Cato v. Silling*, 137 W. Va. 694, 73 S.E.2d 731 (1952).

designed to protect the public against a particular abuse, and where such intentional disregard of the law causes injury from the exact harm sought to be avoided by the law, punitive damages may be assessed in addition to compensatory damages. Further, where there is a deliberate circumvention of such a law, malice may be inferred even though there may not have been any actual malice toward a particular individual, but only a general intentional disregard of the rights of others.[31]

Liability of employer for injury caused by employee. An employer or principal can be held liable for punitive damages for conduct of its agent or employee if the agent or employee was acting within the scope of his or her employment when harm occurred to the plaintiff.[32]

Violation of Human Rights Act. A jury may award punitive damages in an action under the West Virginia Human Rights Act.[33] However, in an action before the Human

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[31]*Addair v. Huffman*, 156 W. Va. 592, 195 S.E.2d 739 (1973) (involving wrongful suggestee execution).

[32]*Jarvis v. Modern Woodmen of Am.*, 185 W. Va. 305, 406 S.E.2d 736 (1991). *See also* Syl. pt. 4, *Hains v. Parkersburg, M. & I. Ry. Co.*, 75 W. Va. 613, 84 S.E. 923 (1915) ("If a master knowingly employs or retains a careless and incompetent servant, he thereby impliedly authorizes or ratifies his negligent acts, committed in the course of his employment, and, if the servant's negligence is wanton and willful or malicious, the master is liable for exemplary or punitive damages."); Syl. pt. 3, *Davis v. Chesapeake & O. Ry. Co.*, 61 W. Va. 246, 56 S.E. 400 (1907) ("When a railroad company is liable for the act of its train conductor in unlawfully arresting and imprisoning a person on the train, and such act is malicious, wanton, willful, or reckless, the company is liable for exemplary or punitive damages.").

[33]*Haynes v. Rhone-Poulenc, Inc.*, 206 W. Va. 18, 521 S.E.2d 331(1999).

Rights Commission, punitive damages are not allowed.[34]

Assault and battery. In an action to recover for personal injuries alleged to have resulted in an assault and battery, a declaration that alleges that the assault was wilful, intentional, and unlawful will support a recovery of punitive damages if the jury finds sufficient evidence of such conduct.[35]

Negligent infliction of emotional distress. Upon appropriate proof, both compensatory and punitive damages may be awarded to a plaintiff in an action for negligent infliction of emotional distress. If a plaintiff can show wanton, wilful, or reckless conduct by the defendant, the jury may assess punitive damages.[36]

Intentional infliction of emotional distress. The Supreme Court has held that there are instances where both compensatory and punitive damages for intentional infliction of emotional distress are proper.[37] However, there are also circumstances where punitive damages are considered an impermissible double recovery in a claim for intentional infliction of emotional distress.[38]

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[34]*Bishop Coal Co. v. Salyers*, 181 W. Va. 71, 380 S.E.2d 238 (1989).

[35]*See Criss v. Criss*, 177 W. Va. 749, 356 S.E.2d 620 (1987); *Pendleton v. Norfolk & W. Ry. Co.*, 82 W. Va. 270, 95 S.E. 941 (1918).

[36]*Stump v. Ashland, Inc.*, 201 W. Va. 541, 499 S.E.2d 41 (1997).

[37]*See Harless v. First Nat'l Bank in Fairmont*, 169 W. Va. 673, 289 S.E.2d 692 (1982).

[38]*See Dzinglski v. Weirton Steel Corp.*, 191 W. Va. 278, 445 S.E.2d 219 (1994). For further discussion, see *infra* Section XII of this paper.

Wrongful death. Although the issue of punitive damages is not addressed under the wrongful death statute, it has been held that, in an appropriate case, punitive damages may be recovered in a wrongful death action. The Supreme Court has indicated that

> the deterrence principle of punitive damages is perfectly compatible with a wrongful death claim. Indeed, that principle may be even more appropriate in a wrongful death action since, if the death was a result of the malicious, reckless or intentional act of the defendant, the consequence of that act is more severe than when the result is a personal injury.[39]

Retaliatory discharge. Punitive damages may be recovered in a retaliatory discharge suit as well as compensatory damages that include an award for emotional distress. However, because there is a certain open-endedness in the limits of recovery for emotional distress in a retaliatory discharge claim, punitive damages are not automatically allowed. It is only when the employer's conduct is wanton, willful or malicious, that punitive damages may be appropriate.[40]

Workers' compensation fraud by employer. A cause of action exists against an employer who fraudulently misrepresents facts to the Workers' Compensation Fund that are not only in opposition to the employee's claim, but are made with the intention of depriving the employee of benefits rightfully due him or her. In such an action, punitive damages may

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[39]*Bond v. City of Huntington*, 166 W. Va. 581, 592, 276 S.E.2d 539, 545 (1981), *superseded by statute on other grounds as stated in Rice v. Ryder*, 184 W. Va. 255, 400 S.E.2d 263 (1990). *See also* Syl. pt. 6, *Turner v. Norfolk & W. R. Co.*, 40 W. Va. 675, 22 S.E. 83 (1895) ("In all cases of negligence the law governing the assessment of . . . punitive . . . damages is the same whether death result or not.").

[40]*Harless v. First Nat'l. Bank in Fairmont*, 169 W. Va. 673, 289 S.E.2d 692 (1982).

be awarded against an employer.[41]

Intentional interference with an employment relationship. When an intentional interference with an employment relationship is alleged, the jury can properly consider the issue of punitive damages. When an employee is enticed to leave his/her employment by another, malice, for the purpose of punitive damages, is inferred from the wrongful character of the act.[42]

Liability of successor for predecessor harm. When an asbestos manufacturer has actual or constructive knowledge of the severe health hazards caused by a product and continues to manufacture and distribute that product, the manufacturer may be found liable for punitive damages to those injured by the product. When a corporation acquires or merges with a company manufacturing a product that is known to create serious health hazards, and the successor corporation continues to produce the same product in the same manner, it may be found liable for punitive damages for liabilities incurred by the predecessor company in its manufacture of such product.[43]

Employer liability for child support. The Child Advocate Office has the authority to institute civil actions for compensatory and punitive damages against an employer for failing to withhold child support payments. An employer is liable to an obligee for any

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[41]*Persinger v. Peabody Coal Co*., 196 W. Va. 707, 474 S.E.2d 887 (1996).

[42]*See Voorhees v. Guyan Mach. Co.*, 191 W. Va. 450, 446 S.E.2d 672 (1994); *C.W. Dev., Inc. v. Structures, Inc. of West Virginia*, 185 W. Va. 462, 408 S.E.2d 41 (1991).

[43]*Davis v. Celotex Corp*., 187 W. Va. 566, 420 S.E.2d 557 (1992).

amount of child support which the employer fails to withhold from the obligor's wages, when the employer knowingly and willfully enters into an agreement to pay an obligor his wages in cash to assist the obligor in evading child support payments. Punitive damages are recoverable against an obligor and the employer where evidence demonstrates that the obligor and the employer knowingly and willfully engaged in a cash wage agreement so that the obligor could evade paying child support.[44]

Defamation action. In a defamation action, no punitive damages may be recovered without showing either an intentional publication of false defamatory material, or publication of false defamatory material in reckless disregard for its truth or falsity.[45] The Supreme Court has held that, in a defamation action against the media, a trial court "may reduce punitive damages to zero in deference to free speech imperatives when actual damages are substantial and the offending media organization has made a prompt, prominent and abject apology along with an offer of reasonable compensation."[46] It has also been held that, in a defamation action brought against a newspaper by a candidate for public office, "an award of punitive damages will be sustained on appeal only when it is determined that the jury's award of actual damages is inadequate to dissuade newspapers similarly situated from

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[44]*Belcher v. Terry*, 187 W. Va. 638, 420 S.E.2d 909 (1992).

[45]*Havalunch, Inc. v. Mazza*, 170 W. Va. 268, 294 S.E.2d 70 (1981).

[46]Syl. pt. 8, in part, *Hinerman v. Daily Gazette Co., Inc.*, 188 W. Va. 157, 423 S.E.2d 560 (1992) (defamation action against newspaper).

engaging in like conduct in the future."[47]

Injury to trees and plants. The treble damage award available by statute[48] to landowners for wrongfully damaged or removed timber, trees, logs, posts, fruit, nuts, growing plants, or products of any growing plants, does not foreclose a plaintiff from seeking punitive damages. This is because a treble damage award and a punitive damage award serve two distinct purposes. A punitive damage award is given to punish a defendant, to deter others from similar conduct, and to provide additional compensation to the plaintiff. On the other hand, the treble damage award under the statute is to provide compensatory damages to landowners for damaged or removed trees, logs, fruit, etc.[49] To obtain punitive damages, there must be evidence that shows the defendant acted maliciously, willfully, or wantonly when entering upon land of the plaintiff to remove trees, logs, fruit, etc.[50]

Federal Fair Credit Reporting Act. It has been held that, in an action under the federal Fair Credit Reporting Act,[51] in addition to recovery of actual damages, punitive damages may also be recovered. In assessing punitive damages, the jury may consider: (1) the remedial purpose of the Act; (2) the harm to the consumer intended to be avoided or

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[47]*Sprouse v. Clay Communication, Inc*., 158 W. Va. 427, 428, 211 S.E.2d 674, 679 (1975).

[48]*See* W. Va. Code § 61-3-48a.

[49]*Bullman v. D & R Lumber Co*., 195 W. Va. 129, 464 S.E.2d 771(1995).

[50]*Hadley v. Hathaway*, 190 W. Va. 594, 439 S.E.2d 459 (1993).

[51]*See* 15 U.S.C. §§ 1681 to 1681t.

corrected by the Act; (3) the manner in which the consumer reporting agency conducted its business; and (4) the consumer reporting agency's income and net worth.[52]

Criminal restitution previously awarded. A plaintiff who is awarded restitution from a criminal defendant under the Victim Protection Act is not precluded from bringing a civil suit seeking additional compensatory and punitive damages.[53]

Driving under the influence of alcohol. Evidence showing that a defendant was driving while under the influence of alcohol when he or she injured the plaintiff constitutes evidence of reckless negligence. A jury may return punitive damages where it is shown that a defendant was driving under the influence of alcohol when the plaintiff was injured.[54]

Estate of a deceased tortfeasor. In *Perry v. Melton*,[55] the Supreme Court observed that "[c]ourts that have considered the question have been virtually unanimous in holding that punitive damages cannot be awarded against the estate of a deceased tortfeasor."[56] However, *Perry* rejected the majority rule. Under *Perry*, the estate of a deceased tortfeasor can be held liable for punitive damages.

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[52]*Jones v. Credit Bureau of Huntington, Inc.*, 184 W. Va. 112, 399 S.E.2d 694 (1990).

[53]*Moran v. Reed*, 175 W. Va. 698, 338 S.E.2d 175 (1985).

[54]*Wilt v. Buracker*, 191 W. Va. 39, 443 S.E.2d 196 (1993).

[55]*Perry v. Melton*, 171 W. Va. 397, 299 S.E.2d 8 (1982).

[56]*Perry v. Melton*, 171 W. Va. 397, 400, 299 S.E.2d 8, 11 (1982).

Agreement barring punitive damages. In *State ex rel. Dunlap v. Berger*,[57] the Supreme Court held that a provision in a retailer's purchase and finance agreement that prohibited punitive damages from being awarded in any litigation with the retailer was unconscionable and unenforceable. *Dunlap* indicated that any such agreement is unenforceable unless a court determines that exceptional circumstances exist that make the agreement conscionable.

Arbitration. The Supreme Court has held that "[a]rbitrators, like courts, are entitled to award punitive damages in appropriate circumstances as compensation for oppressive conduct."[58]

(2) Punitive Damages Authorized by Statute

The Legislature has enacted a number of statutes that expressly permit punitive damages to be awarded. The following statutes authorize an award of punitive damages:

W. Va. Code § 5-11A-14(c)(1), allowing. punitive damages for unlawful discriminatory housing practice.

W. Va. Code § 16-5C-15(c), permitting punitive damages against any nursing home that deprives a resident of any right or benefit created by contract or law.

W. Va. Code § 16-5D-15(d), allowing punitive damages against any assisted living residence that deprives a resident of any right or benefit created by contract or law.

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[57]*State ex rel. Dunlap v. Berger*, 211 W. Va. 549, 567 S.E.2d 265 (2002).

[58]*Anderson v. Nichols*, 178 W. Va. 284, 288, 359 S.E.2d 117, 121 (1987).

W. Va. Code § 16-5G-6, allowing nominal award of punitive damages against a defendant for violating the Open Hospital Proceedings Act.

W. Va. Code § 16-5N-15(c), allowing punitive damages against any residential care community that deprives a resident of any right or benefit created by contract or law.

W. Va. Code § 29-19-15a(a), permitting punitive damages against a defendant violating the Solicitation of Charitable Funds Act.

W. Va. Code § 30-18-12, allowing punitive damages against a defendant for violating the Private Investigative and Security Services Act.

W. Va. Code § 33-44-8(4), allowing punitive damages against a defendant for violating the Unauthorized Insurers Act.

W. Va. Code § 36B-4-117, allowing punitive damages against a defendant for violating the Uniform Common Interest Ownership Act.

W. Va. Code § 38-16-501(b)(3), allowing punitive damages against a defendant who makes, presents or uses a fraudulent court record or a fraudulent lien.

W. Va. Code § 46A-2-139(b), allowing punitive damages against a defendant for failing to cease initiating unsolicited commercial facsimile transmissions.

W. Va. Code § 46A-6C-9(b), allowing punitive damages against a defendant for violating the Credit Services Organization Act.

W. Va. Code § 46A-6G-5(b), permitting punitive damages against a defendant for failing to cease initiation of unauthorized bulk electronic mail messages.

W. Va. Code § 47-14-12(a), permitting punitive damages against a defendant for violating Preneed Funeral Contracts Act.

W. Va. Code § 47-22-3(b), permitting punitive damages against a defendant for violating the Uniform Trade Secrets Act.

W. Va. Code § 61-3C-16(a)(2), allowing punitive damages against a defendant for violating the West Virginia Computer Crime and Abuse Act.

W. Va. Code § 62-1D-12(a)(2), permitting punitive damages against a defendant for violating the Wiretapping and Electronic Surveillance Act.

VI. PUNITIVE DAMAGES BARRED FOR CERTAIN TYPES OF CLAIMS

Punitive damages are prohibited, *per se*, in a limited number of actions. The *per se* bar is based upon decisions by the Supreme Court and express statutory prohibition.[59]

(1) Supreme Court Decisions Barring Punitive Damages

As set out below, the Supreme Court has prohibited punitive damages from being awarded in a very limited number of causes of actions.

Breach of contract. Generally, punitive damages are not available in an action for

[59]In order to preserve, for appeal purposes, a claim that punitive damages are not recoverable for a specific cause of action, the defendant must timely raise the issue before the trial court. *See Vandevender v. Sheetz, Inc*., 200 W. Va. 591, 490 S.E.2d 678 (1997).

breach of contract.[60] "[C]ompensation for actual loss is the test, the stand[ard] of damages in actions on contract. Damages for breach of contract in excess of actual compensation are unwarranted and a ground of new trial."[61] However, this rule does not apply in exceptional cases where the breach of contract amounts to an independent and willful tort, because the plaintiff has the right to elect whether he or she will proceed in tort or upon contract.[62]

An action seeking equitable relief. In an action seeking equitable relief, punitive damages are not allowed.[63] "To permit a decree for such damages would be at variance with general principles of equity jurisprudence."[64]

Unconscionable consumer credit sale, lease or loan. Pursuant to W. Va. Code § 46A-2-121, a cause of action exists for unconscionable conduct involved in a consumer

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[60]*Berry v. Nationwide Mut. Fire Ins. Co.*, 181 W. Va. 168, 381 S.E.2d 367 (1989). *See also Wilt v. State Auto. Mut. Ins. Co.*, 203 W. Va. 165, 506 S.E.2d 608 (1998); *C.W. Dev., Inc. v. Structures, Inc. of West Virginia*, 185 W. Va. 462, 408 S.E.2d 41 (1991); *Goodwin v. Thomas*, 184 W. Va. 611, 403 S.E.2d 13 (1991); *Horn v. Bowen*, 136 W. Va. 465, 469, 67 S.E.2d 737, 739 (1951).

[61]*Hurxthal v. St. Lawrence Boom & Lumber Co.*, 53 W. Va. 87, 102, 44 S.E. 520, 526 (1903) (citations omitted).

[62]*Warden v. Bank of Mingo*, 176 W. Va. 60, 65, 341 S.E.2d 679, 684 (1985). In *Eagle Gas Co. v. Doran & Assocs., Inc.*, 182 W. Va. 194, 387 S.E.2d 99 (1989), the Supreme Court suggested that punitive damages are not permitted in an action for accounting.

[63]*See Haynes v. Rhone-Poulenc, Inc.*, 206 W. Va. 18, 32, 521 S.E.2d 331, 345 (1999) ("Punitive damages have long been awarded in tort cases and are encompassed in the term 'legal relief.'").

[64]*Given v. United Fuel Gas Co.*, 84 W. Va. 301, 306, 99 S.E. 476, 478 (1919). *See also Benedum v. First Citizens' Bank*, 72 W. Va. 124, 133, 78 S.E. 656, 660 (1913) ("Surely a court of equity will not inflict punitive damages[.]").

credit sale, lease or loan. The Supreme Court has held that punitive damages are not available under the statute because W. Va. Code § 46A-5-101 limits a verdict to actual damages and a penalty of not less than one hundred nor more than one thousand dollars.[65]

Failure to pay wages upon termination of employment. Under W. Va. Code § 21-5-4, if an employer fails to pay a terminated employee any due and owing wages within the time period set by the statute, the employer is liable to the employee for three times the unpaid amount as liquidated damages. The Supreme Court has held that

> [i]n the absence of a showing that the failure to pay . . . wages [as required by the statute] was malicious, willful, wanton, reckless or criminally indifferent to the obligation to pay such wages, and in the absence of any statutory authorization, the [employer is] not liable for any amount of damages in excess of the statutory penalty.[66]

(2) Express Statutory Bar

As shown below, a few statutes expressly prohibit punitive damages in certain causes of action.

Political subdivision or its employee. Pursuant to W. Va. Code § 29-12A-7(a), punitive damages are prohibited in an action against a political subdivision or its employee to recover damages for injury, death, or loss to persons or property for injury, death, or loss to persons or property caused by an act or omission of such political subdivision or employee.

Type II workers' compensation deliberate intent claim. Pursuant to W. Va. Code

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[65] *One Valley Bank of Oak Hill, Inc. v. Bolen*, 188 W. Va. 687, 425 S.E.2d 829 (1992).

[66] *Cook v. Heck's Inc.*, 176 W. Va. 368, 376, 342 S.E.2d 453, 461 (1986).

§ 23-4-2(d)(2), there are two types of deliberate intent causes of action an employee may bring against his/her employer. The causes of action are set out under W. Va. Code § 23-4-2(d)(2)(I) (type I) and W. Va. Code § 23-4-2(d)(2)(ii) (type II). It is provided under W. Va. Code § 23-4-2(d)(2)(iii)(A) that punitive damages for a Type II workers' compensation deliberate intent cause of action are prohibited.

Against the State. Pursuant to W. Va. Code § 55-17-4(3), punitive damages are prohibited from being awarded against the State in any action.

VII. INSURANCE LAW AND PUNITIVE DAMAGES

The Supreme Court has been called upon to address a number of punitive damages issues that are unique to insurance law. The issues addressed are set out below.

(1) Insurance Coverage for Punitive Damages

The public policy of West Virginia does not preclude insurance coverage for punitive damages arising from gross, reckless or wanton negligence.[67] Where the liability policy of an insurance company provides that it will pay on behalf of the insured all sums which the insured becomes legally obligated to pay as damages because of bodily injury, and the policy excludes only damages caused intentionally by or at the direction of the insured, such policy will be deemed to cover punitive damages arising from bodily injury occasioned by gross,

[67]*Hensley v. Erie Ins. Co*., 168 W. Va. 172, 283 S.E.2d 227 (1981).

reckless or wanton negligence on the part of the insured. [68]

An insurer is not required to obtain a waiver from its insured to exclude punitive damages from a policy for underinsured motorist coverage. However, if the insurer fails to expressly exclude punitive damages from its underinsured motorist policy, the policy will be deemed to cover such damages.[69]

(2) Insurance Bad Faith Claims

To avoid the common law bar against allowing punitive damages in contract claims, the Supreme Court has indicated that insurance bad faith claims are tortious in nature.[70] Consequently, punitive damages may be awarded in insurance bad faith cases.[71] There are two general types of insurance bad faith claims: common law and statutory.[72]

Common law bad faith claim. A common law bad faith settlement action against an insurer was first recognized in *Hayseeds, Inc. v. State Farm Fire & Casualty*.[73] In a common law bad faith action, an insurer cannot be held liable for punitive damages by its refusal to pay on an insured's property damage claim, unless such refusal is accompanied by

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[68]*Hensley v. Erie Ins. Co*., 168 W. Va. 172, 283 S.E.2d 227 (1981).

[69]*State ex rel. State Auto Ins. Co. v. Risovich*, 204 W. Va. 87, 511 S.E.2d 498 (1998).

[70]*Wilt v. State Auto. Mut. Ins. Co.*, 203 W. Va. 165, 506 S.E.2d 608 (1998).

[71]*Poling v. Motorists Mut. Ins. Co*., 192 W. Va. 46, 450 S.E.2d 635 (1994).

[72]It will be noted in passing that, in 2005, the legislature abolished third-party bad faith claims. *See* W. Va. Code § 33-11-4a(a).

[73]*Hayseeds, Inc. v. State Farm Fire & Cas*., 177 W. Va. 323, 352 S.E.2d 73 (1986).

actual malice in the settlement process. "Actual malice" means the insurer actually knew that the insured's claim was proper, but willfully, maliciously and intentionally denied the claim.[74] Evidence of negligence, lack of judgment, incompetence or bureaucratic confusion will not support a claim for punitive damages.[75] A necessary predicate to recovering punitive damages in a common law bad faith claim wherein a policyholder alleges that the insurer knew the policyholder's claim was proper, but willfully, maliciously and intentionally denied the claim, is that the policyholder substantially prevail on the underlying contract action.[76]

Statutory bad faith claim. A bad faith cause of action for violating the West Virginia Unfair Trade Practices Act was first recognized in *Jenkins v. J.C. Penney Casualty Insurance Co.*[77] Unlike an action under *Hayseeds*, where it is necessary that a policyholder substantially prevail on the underlying contract action before he or she may recover punitive damages, under *Jenkins* there is no requirement that an insured substantially prevail; all that is required under *Jenkins* is that liability and damages be settled previously or in the course

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[74]*McCormick v. Allstate Ins. Co*., 197 W. Va. 415, 475 S.E.2d 507 (1996). *See Berry v. Nationwide Mut. Fire Ins. Co.*, 181 W. Va. 168, 381 S.E.2d 367 (1989).

[75]*Hayseeds, Inc. v. State Farm Fire & Cas*., 177 W. Va. 323, 352 S.E.2d 73 (1986).

[76]*Jordache Enters., Inc. v. National Union Fire Ins. Co. of Pittsburgh, Pa.*, 204 W. Va. 465, 513 S.E.2d 692 (1998).

[77]*Jenkins v. J.C. Penney Cas. Ins. Co.*, 167 W. Va. 597, 280 S.E.2d 252 (1981) overruled on other grounds *State ex rel. State Farm Fire & Cas. Co. v. Madden*, 192 W. Va. 155, 451 S.E.2d 721 (1994).

of the *Jenkins* litigation.[78]

Where an insured asserts a bad faith claim against his or her insurer for statutory unfair claim settlement practices, punitive damages cannot be awarded against the insurer unless the insured can establish a high threshold of actual malice in the settlement process. "Actual malice" means that the insurer actually knew that the insured's claim was proper, but willfully, maliciously and intentionally utilized an unfair business practice in settling, or failing to settle, the insured's claim. Implicit in this standard is the recognition that, in the statutory setting, it is the unfair settlement *practice* toward which the statute is directed, rather than just the action toward the particular insured. Recovery of punitive damages does not require actual malice toward the individual insured, but instead contemplates only that the insurer denied the claim knowing it to be proper, and that the unfair practice itself can, in aggravated circumstances, indicate such a blatant disregard of civil obligations to insureds in general that the insurer may be liable for punitive damages.[79]

(3) Failure to Settle a Claim Within Policy Limits

Punitive damages may be awarded in favor of an insured against its insurer for failure to settle a claim within policy limits, but the policyholder must establish a high threshold of actual malice in the settlement process. Actual malice means that the insurer actually knew that the claim was proper, but the insurer nonetheless acted willfully, maliciously and

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[78]*McCormick v. Allstate Ins. Co.*, 202 W. Va. 535, 505 S.E.2d 454 (1998).

[79]*McCormick v. Allstate Ins. Co.*, 202 W. Va. 535, 505 S.E.2d 454 (1998).

intentionally in failing to settle the claim on behalf of its insured.[80]

VIII. BIFURCATION OF PUNITIVE DAMAGES ISSUE

Rule 42(c) of the West Virginia Rules of Civil Procedure provides that "[t]he court, in furtherance of convenience or to avoid prejudice . . . *may order* a separate trial of any . . . separate issue[.]" This provision of Rule 42(c) grants trial courts the authority to have a jury determine the issue of punitive damages, after liability has been found and compensatory relief awarded. Bifurcation of the punitive damages issue is not appropriate in every instance. Rather, a showing must be made that bifurcation is warranted under the circumstances of the particular case.[81] For instance, bifurcation may be warranted to prevent a jury from being influenced, on the substantive claim, by evidence of a corporate defendant's enormous wealth, which data would be introduced to enable the jury to gauge the amount of punitive damages to be awarded.[82]

The Supreme Court has indicated that a separate trial on the issue of punitive damages does not promote the goals of judicial economy and convenience of the parties, especially when the bulk of any alleged punitive damages evidence will be introduced to prove liability. Bifurcation would be inappropriate where the only evidence to be introduced exclusively on

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[80]*Shamblin v. Nationwide Mut. Ins. Co.*, 183 W. Va. 585, 396 S.E.2d 766 (1990).

[81]*Berry v. Nationwide Mut. Fire Ins. Co.*, 181 W. Va. 168, 381 S.E.2d 367 (1989) (affirming denial of motion to bifurcate).

[82]*See Rohrbaugh v. Wal-Mart Stores, Inc.*, 212 W. Va. 358, 572 S.E.2d 881 (2002).

punitive damages concerns a defendant's ability to pay and alleged prior bad acts. In this situation, the goal of avoidance of prejudice can be achieved without resorting to a separate trial by using Rule 105 of the West Virginia Rules of Evidence, which provides that "[w]hen evidence which is admissible as to one party or for one purpose but not admissible as to another party or for another purpose is admitted, the court, upon request, shall restrict the evidence to its proper scope and instruct the jury accordingly."[83]

In the context of mass tort litigation, the Supreme Court has held that a trial court may bifurcate "a trial into two phases wherein certain elements of liability and a punitive damages multiplier are determined in the first phase and compensatory damages and punitive damages, based on the punitive damages multiplier, are determined for each individual plaintiff in the second phase."[84]

IX. PUNITIVE DAMAGES EVIDENTIARY ISSUES

There are a few trial evidence issues that are peculiar to a claim seeking punitive damages. Those issues are set out below.

(1) Evidence of Defendant's Wealth

The financial position of the defendant is a factor a jury may consider when

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[83]*See State ex rel. Tinsman v. Hott*, 188 W. Va. 349, 424 S.E.2d 584 (1992) (issuing writ of prohibition to prevent enforcement of bifurcation order).

[84]Syl., in part, *In re Tobacco Litig.*, 218 W. Va. 301, 624 S.E.2d 738 (2005).

determining whether to award punitive damages.[85] That is, evidence of a defendant's wealth may be introduced to enable the jury to gauge the amount of punitive damages to be awarded.[86] Of course, a plaintiff is not mandated to introduce evidence of the wealth of the defendant to recover punitive damages. In some cases, the defendant may wish to demonstrate its meager financial status as a way of holding down a punitive damage award. The failure of the plaintiff to introduce such evidence, however, does not preclude a punitive damage award.[87] A trial court is not required to instruct the jury on the lack of the ability of a defendant to pay punitive damages.[88]

(2) Character Evidence

As a general rule, character evidence is not admissible in a civil case unless it is made

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[85]*See* Syl. pt. 5, *Peck v. Bez*, 129 W. Va. 247, 40 S.E.2d 1 (1946) ("In a law action in which it is proper for the jury to award punitive damages, evidence as to defendant's financial condition is competent."); *Show v. Mount Vernon Farm Dairy Prods.*, 125 W. Va. 116, 124, 23 S.E.2d 68, 72 (1942) ("It is clear that if punitive damages were recoverable, testimony as to the financial standing of the defendant was, for obvious reasons, pertinent and admissible.").

[86]*Rohrbaugh v. Wal-Mart Stores, Inc.*, 212 W. Va. 358, 572 S.E.2d 881 (2002). *See* Syl. pt. 4, *Leach v. Biscayne Oil & Gas Co., Inc.*, 169 W. Va. 624, 289 S.E.2d 197 (1982) ("To achieve the deterrent effect of punitive damages, it may require a greater fine upon one of large means than it would upon one of ordinary means, granting the same malignant spirit was possessed by each.").

[87]*Slack v. Kanawha County Hous. & Redev. Auth.*, 188 W. Va. 144, 423 S.E.2d 547 (1992).

[88]*See Kessel v. Leavitt*, 204 W. Va. 95, 194, 511 S.E.2d 720, 819 (1998) ("[W]e find that the punitive damages assessed by the jury in this case and approved by the trial court are not excessive solely because the jury was not permitted to consider the defendants' financial position in awarding such damages.").

an issue by the pleadings or the proof, as in actions for defamation, malicious prosecution, or cases of seduction.[89] Under these exceptions to the rule, character is generally involved, and the amount of the damages recoverable may be affected thereby. Also, character evidence is admissible whenever punitive damages are sought.[90] Thus,

> [i]n a civil suit, where a recovery of punitive . . . damages is sought, it is proper for the defendant to prove his general good character in the particular [area] in which the offense charged against him attacks it, as a guide to the jury in determining what amount would be adequate to punish him for the offense charged.[91]

(3) Evidence of Insurance Coverage

Proof of a defendant's insured status offered on rebuttal, as a financial asset that should be considered by the jury in awarding punitive damages, does not violate Rule 411 of the West Virginia Rules of Evidence.[92] If a defendant does not offer evidence of his or

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[89]*See* W. Va. R. Evid. 405(b) ("In cases in which character or a trait of character of a person is an essential element of a charge, claim, or defense, proof may also be made of specific instances of that person's conduct.").

[90]*See Spaulding v. Mingo County Bd. of Educ.*, 206 W. Va. 559, 526 S.E.2d 525 (1999); *Raines v. Faulkner*, 131 W. Va. 10, 48 S.E.2d 393 (1947). *See also*, Franklin D. Cleckley, *Handbook on Evidence for West Virginia Lawyers*, § 4-4(E) 4th ed. 2000).

[91]Syl. pt. 3, in part, *Hess v. Marinari*, 81 W. Va. 500, 94 S.E. 968, 969 (1918).

[92]Rule 411 provides as follows:

> Evidence that a person was or was not insured against liability is not admissible upon the issue whether the person acted negligently or otherwise wrongfully. This rule does not require the exclusion of evidence of insurance against liability when offered for another purpose, such as proof of agency, ownership, or control, if controverted, or bias or prejudice of a witness.

her financial status or imply poverty, then neither may the plaintiff offer evidence of the defendant's insurance coverage either in the plaintiff's case in chief or on rebuttal. However, once the defendant offers evidence of his or her financial status to influence the jury on punitive damages, then the plaintiff may rebut such evidence by introducing proof of the defendant's liability insurance.[93]

(4) Evidence of Defendant's Out-of-State Conduct

In *Boyd v. Goffoli*,[94] the Supreme Court recognized that, in *State Farm Mutual Automobile Insurance Co. v. Campbell,*[95] the United States Supreme Court held that, under federal due process principles, a plaintiff cannot introduce evidence of lawful or unlawful out-of-state conduct by a defendant for the sole purpose of punishing the defendant through a punitive damage award. However, *Boyd* noted that *Campbell* permitted evidence of lawful out-of-state conduct to be introduced when it demonstrated the deliberateness and culpability of the defendant's action in the State where the tortious act occurred, but such conduct must have a connection with the specific harm suffered by the plaintiff. Further, when such evidence is introduced, a jury should be instructed that it cannot use the evidence of out-of-state conduct to punish a defendant. The decision in *Boyd* further held that a plaintiff may introduce evidence of unlawful out-of-state conduct to punish a defendant when the unlawful

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[93] *Wheeler v. Murphy*, 192 W. Va. 325, 452 S.E.2d 416 (1994).

[94] *Boyd v. Goffoli*, 216 W. Va. 552, 608 S.E.2d 169 (2004).

[95] *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 425, 123 S. Ct. 1513, 1524, 155 L. Ed. 2d 585(2003) (discussed *infra* in Section XIV of this paper).

out-of-state conduct is limited to conduct directed at the plaintiff and actually injures the plaintiff.

(5) Evidence of Provocation

In an action for assault and battery, the defendant may offer evidence of provocation to mitigate punitive damages.[96]

(6) Evidence of Advice of Counsel

Although a defendant may introduce evidence that his or her conduct was based upon the advice of counsel, such evidence does not prohibit a jury from awarding punitive damages in an employment law action.[97]

X. VERDICT FORM AND PUNITIVE DAMAGES

In an action where the plaintiff is seeking punitive damages, a verdict form should separate compensatory damages from any punitive damages award. It is incumbent upon the defendant to ask for such a separation.[98] It has been held that "[w]here, in a law action, in which punitive damages are sought, defendant does not request submission of interrogatories asking for a separation of compensatory from punitive damages, punitive damages may be

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[96]*Royer v. Belcher*, 100 W. Va. 694, 131 S.E. 556 (1926).

[97]*Sheetz, Inc. v. Bowles Rice McDavid Graff & Love, PLLC* 209 W. Va. 318, 547 S.E.2d 256 (2001).

[98]*Show v. Mount Vernon Farm Dairy Prods.*, 125 W. Va. 116, 23 S.E.2d 68 (1942).

obtained under a general verdict."[99]

XI. INSTRUCTING THE JURY ON PUNITIVE DAMAGES

It has been held that "punitive damages in an action for tort are not [a] matter of right[.]"[100] Therefore, it is reversible error for a trial court to instruct a jury that they *shall* or *should* find punitive damages, because such damages are wholly within the discretion of the jury.[101] That is, "[a]n instruction binding the jury to give [punitive] damages is erroneous."[102] The jury is at perfect liberty, no matter how egregious the defendant's conduct

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[99]Syl. pt. 6, *Peck v. Bez*, 129 W. Va. 247, 40 S.E.2d 1 (1946). It is not reversible error for the trial court to refuse to instruct the jury that separate findings should be made as to the amount of punitive and compensatory damages when the parties have agreed that such damages may be consolidated in one finding: the agreement constitutes a waiver of any right to have the jury so instructed. *Thomas v. Beckley Music & Elec. Co*., 146 W. Va. 764, 123 S.E.2d 73 (1961).

[100]Syl. pt. 3, in part, *Fink v. Thomas*, 66 W. Va. 487, 66 S.E. 650 (1909).

[101]*Kocher v. Oxford Life Ins. Co*., 216 W. Va. 56, 602 S.E.2d 499 (2004) (reversing punitive damages award because trial court instructed jury that it had to award punitive damages). *See also Strawn v. Ingram*, 118 W. Va. 603, 607, 191 S.E. 401, 403 (1937) ("It was error, however, to direct the jury, either orally or in writing, to assess punitive damages. Though the existence of elements may be established which warrant the assessment of [punitive] damages, it is with a jury to say whether or not they shall be given. (quotation and citation omitted."); Syl. pt. 4, *Wilhelm v. Parkersburg, M. & I. Ry. Co.*, 74 W. Va. 678, 82 S.E. 1089 (1914) ("An instruction, saying that if the jury believe from the evidence the servant's act was 'malicious, wanton, willful, or reckless, then, in addition to the actual damages' plaintiff 'suffered for which she may be entitled to recover, the defendant is liable for exemplary or punitive damages,' is prejudicial, and therefore erroneous, as an infringement upon the discretionary right vested in juries to award or refuse exemplary damages or 'smart money.'").

[102]Syl. pt. 2, *Fink v. Thomas*, 66 W. Va. 487, 66 S.E. 650 (1909).

may have been, to refuse punitive damages.[103] Conversely, to the extent that a cause of action permits the recovery of punitive damages, if the evidence supports the giving of an instruction on punitive damages, it is reversible error for a trial court to refuse to give such an instruction when requested to do so.[104]

Pursuant to *Mayer v. Frobe,*[105] a trial court should instruct the jury that it may return an award for punitive damages if the jury finds by a preponderance of the evidence that the defendant acted with gross fraud, malice, oppression, or with wanton, willful, or reckless conduct, or with criminal indifference to civil obligations affecting the rights of the plaintiff.[106]

In addition to the *Mayer* general punitive damages instruction, Syllabus point 3 of *Garnes v. Fleming Landfill, Inc.*,[107] set out factors that a trial court should instruct the jury to consider in awarding punitive damages. The factors listed in Syllabus point 3 of *Garnes*

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[103]*Kocher v. Oxford Life Ins. Co.*, 216 W. Va. 56, 602 S.E.2d 499 (2004). *See also Fisher v. Fisher*, 89 W. Va. 199, 204, 108 S.E. 872, 874 (1921) ("The giving of punitive damages, as we have repeatedly held, is a matter purely discretionary with the jury. Even though the case may be one loudly calling for punishment, the jury may deny punitive or exemplary damages.").

[104]*Painter v. Raines Lincoln Mercury, Inc.*, 174 W. Va. 115, 323 S.E.2d 596 (1984) (new trial ordered on issue of punitive damages).

[105]*Mayer v. Frobe*, 40 W. Va. 246, 22 S.E. 58 (1895).

[106]*See Marsch v. American Elec. Power Co.*, 207 W. Va. 174, 530 S.E.2d 173 (1999); *Estate of Michael v. Sabado*, 192 W. Va. 585, 453 S.E.2d 419 (1994).

[107]*Garnes v. Fleming Landfill, Inc.*, 186 W. Va. 656, 413 S.E.2d 897 (1991).

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.
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> (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,[108] 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.
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> (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.[109]

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[108]"Under *Garnes* . . . prior similar conduct is relevant on the issue of punitive damages. However, to be considered on the issue of punitive damages, the evidence of similar conduct must be sufficient to support a finding by the jury that the defendant committed the similar act." *State ex rel. Tinsman v. Hott*, 188 W. Va. 349, 355, 424 S.E.2d 584, 590 (1992) (internal quotations and citation omitted).

[109]Syl. pt. 3, in part, *Garnes v. Fleming Landfill, Inc.*, 186 W. Va. 656, 413 S.E.2d 897 (1991). *See also* Syl. pt. 2, *Wells v. Smith*, 171 W. Va. 97, 297 S.E.2d 872 (1982) ("In assessing punitive damages, the trier of fact should take into consideration all of the circumstances surrounding the particular occurrence including the nature of the wrongdoing, the extent of harm inflicted, the intent of the party committing the act, the wealth of the perpetrator, as well as any mitigating circumstances."), *overruled on other grounds by*

For appeal purposes, if a trial court erroneously fails to set forth any of the *Garnes* factors in its instructions, a party must timely object at the trial court level.[110] Further, if a trial court instructs a jury generally on the issue of punitive damages and a defendant objects to further instructions that track the language of Syllabus point 3 of *Garnes*, the defendant may not raise on appeal the issue of the failure to give a *Garnes* instruction.[111]

XII. TRIAL COURT REVIEW OF PUNITIVE DAMAGES AWARD

In Syllabus point 7 of *Alkire v. First National Bank of Parsons,*[112] the Supreme Court held that a trial court's post-trial review of a punitive damages award must include "a determination of whether the conduct of an actor toward another person entitles that person

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Garnes v. Fleming Landfill, Inc., 186 W. Va. 656, 413 S.E.2d 897 (1991).

[110]Rule 51 of the West Virginia Rules of Civil Procedure provides that "[n]o party may assign as error the giving or the refusal to give an instruction unless the party objects thereto before the arguments to the jury are begun, stating distinctly, as to any given instruction, the matter to which the party objects and the grounds of the party's objection[.]" *See Kessel v. Leavitt*, 204 W. Va. 95, 193, 511 S.E.2d 720, 818 (1998) ("While the defendants objected generally to John's instruction enumerating the various criteria the jury could consider in deciding whether to assess and award punitive damages, we are unable to locate in the record any indication that the defendants objected specifically to the circuit court's omission of the defendants' financial position portion of this instruction."); *Horan v. Turnpike Ford, Inc*., 189 W. Va. 621, 626, 433 S.E.2d 559, 564 (1993) ("[S]ince the *Garnes* issue was not timely raised at the trial court level, it is not controlling on appeal.").

[111]*See Radec, Inc. v. Mountaineer Coal Dev. Co.*, 210 W. Va. 1, 552 S.E.2d 377 (2000).

[112]*Alkire v. First Nat'l Bank of Parsons*, 197 W. Va. 122, 475 S.E.2d 122 (1996).

to a punitive damages award under *Mayer v. Frobe*."[113] In addition, the Supreme Court has held that every post-trial review of a punitive damages award must be conducted by the trial court within the boundaries of Syllabus points 3 and 4 of *Garnes v. Fleming Landfill, Inc.,*[114] and Syllabus point 15 of *TXO Production Corp. v. Alliance Resources Corp*.[115] After conducting a post-trial review of a punitive damage award, a trial court's order should specifically set out the findings made under *Mayer*, *Garnes*, and *TXO* in reaching its decision.[116] If a trial court fails to perform a post-trial review of a punitive damage award,

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[113]*Mayer v. Frobe,* 40 W. Va. 246, 22 S.E. 58 (1895).

[114]*Garnes v. Fleming Landfill, Inc.,* 186 W. Va. 656, 413 S.E.2d 897 (1991). *See* William B. Hicks, *Vandevender v. Sheetz, Inc.: A Closer Look at the Framework for Review of Punitive Damages Awards*, 101 W. Va. L. Rev. 523 (1999).

[115]*TXO Prod. Corp. v. Alliance Res. Corp.,* 187 W. Va. 457, 419 S.E.2d 870 (1992), *aff'd*, 509 U.S. 443, 113 S. Ct. 2711, 125 L. Ed. 2d 366 (1993). *See also Alkire v. First Nat'l Bank of Parsons,* 197 W. Va. 122, 475 S.E.2d 122 (1996). It should be noted that a review under *Garnes* and *TXO* is concerned with whether a punitive damages award against a defendant was appropriate and not excessive. A *Garnes* and *TXO* analysis is not concerned with whether the jury should have awarded a larger amount of punitive damages to a plaintiff. Even so, a plaintiff is permitted to attack a punitive damages award as being inadequate. *See Marsch v. American Elec. Power Co.*, 207 W. Va. 174, 530 S.E.2d 173 (1999) (finding punitive damage award was adequate). *See also* Syl. pt. 2, *Fullmer v. Swift Energy Co., Inc*., 185 W. Va. 45, 404 S.E.2d 534 (1991) ("We will not find a jury verdict to be inadequate unless it is a sum so low that under the facts of the case reasonable men cannot differ about its inadequacy."); *Freshwater v. Booth,* 160 W. Va. 156, 233 S.E.2d 312 (1977), *overruled in part* by *Linville v. Moss*, 189 W. Va. 570, 433 S.E.2d 281(1993).

[116]*Garnes v. Fleming Landfill, Inc*., 186 W. Va. 656, 669, 413 S.E.2d 897, 910 (1991) ("When reviewing the punitive damages award, a West Virginia trial court should thoroughly set out the reasons for changing (or not changing) the award."). *See also Bowyer v. Hi-Lad, Inc*., 216 W. Va. 634, 609 S.E.2d 895 (2004) (trial court's order was deficient, but Supreme Court found deficiency harmless).

the Supreme Court will remand the case for the trial court to conduct such an analysis.[117]

An analysis under *Mayer*, Syllabus points 3 and 4 of *Garnes,* and Syllabus point 15 of *TXO* requires three distinct types of post-trial review of a punitive damages award. First, a trial court must revisit the issue of whether the evidence supports an award of punitive damages. Second, a trial court must determine whether mitigating factors exist that cause punitive damages to be excessive. Third, a trial court must determine whether punitive damages are constitutionally excessive.[118]

(1) Sufficient Basis for Awarding Punitive Damages

Under the decision in *Alkire v. First National Bank of Parsons,*[119] a post-trial review of a punitive damage award must include a determination of whether an adequate basis existed for finding the defendant's conduct satisfied *Mayer v. Frobe*.[120] That is, a

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[117]*See Alkire v. First Nat'l Bank of Parsons*, 197 W. Va. 122, 130, 475 S.E.2d 122, 130 (1996) ("[U]nder our punitive damage jurisprudence, it is imperative that the amount of the punitive damage award be reviewed in the first instance by the trial court[.]").

[118]In a case where a plaintiff has multiple independent claims, and obtains a separate verdict for punitive damages on each claim, a trial court should perform a separate analysis for each punitive damage verdict. *See Vandevender v. Sheetz, Inc*., 200 W. Va. 591, 490 S.E.2d 678 (1997) (holding that amount of punitive damages for unlawful termination/failure to rehire claim was not appropriate, but that amount of punitive damages for retaliation claim was appropriate). Further, in a case involving multiple plaintiffs, each of whom is awarded punitive damages, a trial court should perform a separate analysis for each punitive damages verdict. *See generally Boyd v. Goffoli*, 216 W. Va. 552, 608 S.E.2d 169 (2004) (four plaintiffs awarded separate compensatory damages and separate punitive damages).

[119]*Alkire v. First Nat'l Bank of Parsons*, 197 W. Va. 122, 475 S.E.2d 122 (1996).

[120]*Mayer v. Frobe,* 40 W. Va. 246, 22 S.E. 58 (1895).

determination must be made as to whether the plaintiff established by a preponderance of the evidence that the defendant's conduct was done with gross fraud, malice, oppression, or wanton, willful, or reckless conduct or criminal indifference to civil obligations.[121] If a trial court finds that punitive damages are not appropriate because none of the criteria under *Mayer* are satisfied, it may set aside the award on that basis alone.[122]

(2) Determining Whether Punitive Damages Are Excessive

Under state and federal constitutional due process protections, punitive damages cannot be excessive.[123] The general outline for determining whether punitive damages are excessive was set out under Syllabus points 3 and 4 of *Garnes* and Syllabus point 15 of *TXO*.

Excessiveness considerations under *Garnes*. In making an excessiveness determination under *Garnes*, a trial court must review the factors set out under Syllabus

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[121]In order to support punitive damages against a defendant in a case in which the conduct of more than one individual is the proximate cause of an injury, proof of actual malice by the defendant toward the plaintiff is not necessary. However, there must be sufficient evidence from which to infer a plan or an arrangement which deliberately or recklessly disregards the rights of others and is entered into by the defendant. *Addair v. Huffman*, 156 W. Va. 592, 195 S.E.2d 739 (1973).

[122]*See* Syl. pt. 5, *Cato v. Silling*, 137 W. Va. 694, 73 S.E.2d 731 (1952) ("When it appears, from the facts in evidence, that a jury could not legally award [punitive] damages, and it also appears that a verdict included such damages, it is the duty of the trial court, upon proper motion, to set aside the verdict[.]"). *See also Alkire v. First Nat'l Bank of Parsons,* 197 W. Va. 122, 475 S.E.2d 122 (1996) (reversing trial court's decision to set aside punitive damage award as not being warranted by the evidence).

[123]*See Pacific Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1, 111 S. Ct. 1032, 113 L. Ed. 2d. 1 (1991); *Garnes v. Fleming Landfill, Inc.,* 186 W. Va. 656, 413 S.E.2d 897 (1991).

points 3 and 4 of *Garnes*.[124] Pursuant to Syllabus point 3 of *Garnes*, the trial court should consider the following factors.[125]

> (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.
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> (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.
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> (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.

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[124]*Garnes v. Fleming Landfill, Inc.*, 186 W. Va. 656, 413 S.E.2d 897 (1991). "The *Garnes* factors are interactive and must be considered as a whole when reviewing punitive damages awards." *TXO Prod. Corp. v. Alliance Res. Corp*., 187 W. Va. 457, 474, 419 S.E.2d 870, 887 (1992), *aff'd*, 509 U.S. 443, 113 S. Ct. 2711, 125 L. Ed. 2d 366 (1993). It should be understood that the *Garnes* factors set out the "minimum" considerations that a trial court must consider in determining whether punitive damages are excessive. In other words, a trial court may consider any additional factor that is relevant to a specific case. For example, in *Boyd v. Goffoli*, 216 W. Va. 552, 608 S.E.2d 169 (2004), consideration was also given to the difference between punitive damages awarded in the case, and the civil penalty that was authorized by statute. *See also*, *Peters v. Rivers Edge Mining, Inc*., ___ W. Va. ___, ___ S.E.2d ___ (No. 34272 Mar. 27, 2009) (addressing punitive damages in relation to civil penalties); *Vandevender v. Sheetz, Inc*. 200 W. Va. 591, 490 S.E.2d 678 (1997) (same).

[125]Syllabus point 3 of *Garnes* has been set out again for the convenience of the reader.

(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.

Pursuant to Syllabus point 4 of *Garnes*, the trial court should consider the following 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;[126] 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.

(Footnote added).

It should be clearly understood that the factors under Syllabus points 3 and 4 of

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[126]The mere fact that a defendant has been required to pay punitive damages in prior litigation does not preclude further punitive damages for the same conduct against another plaintiff. That is, multiple punitive damage awards for a single course of wrongful conduct is not prohibited. There is no principle of law holding that the first punitive damages award against a defendant exhausts all claims for punitive damages and thereby precludes such future judgments. It is neither fair nor practicable to limit punitive damages to a plaintiff who happens to file suit first. Thus, a defendant is not immune to multiple punitive damage awards in mass tort litigation. *See Davis v. Celotex Corp*., 187 W. Va. 566, 420 S.E.2d 557 (1992).

Garnes impose two types of review: (1) an examination of the aggravating evidence that supports the amount of a punitive damage award, and (2) an examination of any mitigating evidence that would permit a reduction in the amount of a punitive damage award. In the final analysis, what this means is that, even though the amount of a punitive damages award may ultimately satisfy the requirements of Syllabus point 15 of *TXO*, a trial court may nevertheless require a remittitur[127] in the amount of punitive damages or grant a new trial on such damages because of mitigating circumstances.[128] However, requiring a reduction in punitive damages because of mitigating circumstances is a purely discretionary decision of the trial court. That is, the West Virginia Supreme Court of Appeals has never held that the mere fact that mitigating factors are present necessitates a reduction in the amount of punitive damages.[129]

Excessiveness considerations under *TXO*. Pursuant to Syllabus point 15 of *TXO*,

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[127]It should be clearly understood that a "trial court should not simply order remittitur but must get plaintiff's consent[.]" Linda L. Schlueter, *Punitive Damages*, at vol. 1 § 6.2(A) (5th ed. 2005). "If the plaintiff declines to accept the remittitur, then a new trial will be ordered solely on the issue of damages." *Wilt v. Buracker*, 191 W. Va. 39, 52, 443 S.E.2d 196, 209 (1993). *See Coleman v. Sopher*, 201 W. Va. 588, 605 n.27, 499 S.E.2d 592, 609 n.27 (1997) ("[T]he plaintiff is given an election to remit a portion of the amount of the verdict or submit to a new trial.").

[128]*See Spencer v. Steinbrecher*, 152 W. Va. 490, 164 S.E.2d 710 (1968) (finding amount of remittitur insufficient and awarding new trial).

[129]*See Bowyer v. Hi-Lad, Inc*., 216 W. Va. 634, 650, 609 S.E.2d 895, 911 (2004) ("[T]he appellant has not been exposed to punitive damages, criminal sanctions, or excessive litigation expenses as a result of its misconduct, all factors which might merit a reduction by the circuit court of a punitive damage award as specified in Syllabus point 4 of *Garnes.*").

when the trial court reviews an award of punitive damages for excessiveness, the court must apply the following standard:[130]

> 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.

Under *TXO*, the amount of punitive damages and compensatory damages must generally have a ratio of 5 to 1.[131] However, "in those cases where the defendant can be shown to have actually intended to cause harm . . . the ratio of punitives to compensatories [is] permitted to climb higher[.]"[132] Further, in cases where "the potential for harm from the defendant's conduct was tremendous, but the actual compensatory damages were negligible, punitive damages in a ratio much greater than five to one [is] appropriate."[133]

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[130] *TXO Prod. Corp. v. Alliance Res. Corp.*, 187 W. Va. 457, 419 S.E.2d 870 (1992); *aff'd*, 509 U.S. 443, 113 S.Ct. 2711, 125 L. Ed. 2d 366 (1993). The facts of TXO are discussed in Section XIV of this paper.

[131] *See Vandevender v. Sheetz, Inc.*, 200 W. Va. 591, 490 S.E.2d 678 (1997) (finding punitive to compensatory damages ratio of 7 to 1 with regard to unlawful termination/failure to rehire claim was excessive).

[132] *Vandevender v. Sheetz, Inc.*, 200 W. Va. 591, 604, 490 S.E.2d 678, 691 (1997). *See Radec, Inc. v. Mountaineer Coal Dev. Co.*, 210 W. Va. 1, 552 S.E.2d 377 (2000) (finding punitive to compensatory damages ratio of 17:1 was not excessive); *TXO Prod. Corp. v. Alliance Res. Corp.,* 187 W. Va. 457, 419 S.E.2d 870 (1992), *aff'd*, 509 U.S. 443, 113 S. Ct. 2711, 125 L. Ed. 2d 366 (1993) (finding punitive to compensatory damages ratio of 526:1 was not excessive).

[133] *TXO Prod. Corp. v. Alliance Res. Corp.*, 187 W. Va. 457, 476, 419 S.E.2d 870, 889 (1992), *aff'd*, 509 U.S. 443, 113 S. Ct. 2711, 125 L. Ed. 2d 366 (1993).

Under state constitutional due process principles, if a trial court finds that a punitive damage award ratio is greater than 5 to 1, and if the court further determines that (1) the evidence failed to establish intentional conduct by the defendant or (2) compensatory damages were very large, then the award should be reduced to meet the 5 to 1 ratio.[134] This is to say that an award of punitive damages greater than a 5 to 1 ratio, which is not justified by intentional conduct or negligible compensatory damages, is a *per se* violation of state constitutional due process. Consequently, a trial court does not need the plaintiff's consent to reduce such an award to the constitutionally permitted 5 to 1 ratio (any reduction to a lesser ratio would require plaintiff's consent).[135]

(3) Punitive Damages in Intentional Infliction of Emotional Distress Claim

The Supreme Court has established a procedure for special review of an award of punitive damages in a claim for intentional infliction of emotional distress.[136] The guidelines for reviewing a punitive damages award in a claim for intentional infliction of emotional distress were set out in Syllabus points 14 and 15 of Tudor v. Charleston Area Medical

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[134]It should be observed that "if the compensatory damages are very high then punitive damages even in the ratio of 5:1 might be excessive." *TXO Prod. Corp. v. Alliance Res. Corp*., 187 W. Va. 457, 476 n.12, 419 S.E.2d 870, 889 n.12 (1992), *aff'd*, 509 U.S. 443, 113 S. Ct. 2711, 125 L. Ed. 2d 366 (1993).

[135]*See Vandevender v. Sheetz, Inc*., 200 W. Va. 591, 606, 490 S.E.2d 678, 693 (1997) ("Under this Court's holding in syllabus point fifteen of *TXO*, we determine that the punitive damages award should be reduced by the amount of $466,260 so that a comparison of the punitive to the compensatory damages would result in a five to one ratio.").

[136]*Sheetz, Inc. v. Bowles Rice McDavid Graff & Love*, *PLLC* 209 W. Va. 318, 547 S.E.2d 256 (2001).

Center, Inc.,[137] as follows:

> In cases where the jury is presented with an intentional infliction of emotional distress claim, without physical trauma or without concomitant medical or psychiatric proof of emotional or mental trauma, i.e. the plaintiff fails to exhibit either a serious physical or mental condition requiring medical treatment, psychiatric treatment, counseling or the like, any damages awarded by the jury for intentional infliction of emotional distress under these circumstances necessarily encompass punitive damages and, therefore, an additional award for punitive damages would constitute an impermissible double recovery. Where, however, the jury is presented with substantial and concrete evidence of a plaintiff's serious physical, emotional or psychiatric injury arising out of the intentional infliction of emotional distress, i.e. treatment for physical problems, depression, anxiety, or other emotional or mental problems, then any compensatory or special damages awarded would be in the nature of compensation to the injured plaintiff(s) for actual injury, rather than serving the function of punishing the defendant(s) and deterring such future conduct, a punitive damage award in such cases would not constitute an impermissible double recovery.
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> Where a jury verdict encompasses damages for intentional infliction of emotional distress, absent physical trauma, as well as for punitive damages, it is incumbent upon the circuit court to review such jury verdicts closely and to determine whether all or a portion of the damages awarded by the jury for intentional infliction of emotional distress are duplicative of punitive damages such that some or all of an additional award for punitive damages would constitute an impermissible double recovery. If the circuit court determines that an impermissible double recovery has been awarded, it shall be the court's responsibility to correct the verdict.

Under *Tudor,* if the trial court determines that an impermissible double recovery has been awarded, it should require a remittitur of some or all of the punitive damages.[138] If a

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[137]*Tudor v. Charleston Area Med. Ctr., Inc.,* 203 W. Va. 111, 506 S.E.2d 554 (1997).

[138]*See Mace v. Charleston Area Med. Ctr. Found., Inc*., 188 W. Va. 57, 422 S.E.2d 624 (1992) (vacating punitive damages award in intentional infliction of emotional distress case).

trial court determines that such an award is not a double recovery, it should then review the award under *Garnes* and *TXO*.

(4) Settlement by Joint Tortfeasor

A defendant in a civil action against whom awards of compensatory and punitive damages are rendered is entitled to a reduction of the compensatory damage award, but not the punitive damage award, by the amount of any good faith settlement previously made with the plaintiff by other jointly liable parties.[139]

(5) Prejudgment and Postjudgment Interest

The Supreme Court has held that prejudgment interest may not be imposed for punitive damages.[140] However, the Supreme Court has approved awards of postjudgment

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[139]*Burgess v. Porterfield*, 196 W. Va. 178, 469 S.E.2d 114 (1996). The justification for this rationale is based upon the "one satisfaction" rule. The purpose of this rule is to ensure that a plaintiff receives no more than full compensation for his or her loss. A plaintiff awarded punitive damages has been given the right to receive more than "one satisfaction." The award of punitive damages is unconcerned with compensation; it is intended to punish the wrongdoer and to deter the commission of similar offenses in the future. Furthermore, the focus is upon particular defendants rather than upon compensating a victim as is the case with compensatory damages. The focus is undistorted when set-offs are applied to compensatory damage awards because the victim still receives complete compensation. However, the focus of punitive damage awards can be completely bypassed if reduced by the amount of settlement monies received from other defendants. The target of the punitive damage award, the defendant who the jury intended to punish, would escape with absolutely no punishment if the settlement was as large as the compensatory damage award and punitive damage award combined. If not as large, there would still be a lesser punishment than the jury deemed appropriate.

[140]*See Bond v. City of Huntington*, 166 W. Va. 581, 600, 276 S.E.2d 539, 549 (1981) ("Interest will not be allowed on future pecuniary losses, nor will interest be available on any punitive damages that might be awarded."), *superseded by statute on other grounds as stated in Rice v. Ryder*, 184 W. Va. 255, 400 S.E.2d 263 (1990)..

interest on punitive damages.[141]

XIII. SUPREME COURT REVIEW OF PUNITIVE DAMAGES AWARD

The Supreme Court "takes seriously its responsibility to substantively review jury verdicts awarding punitive damages to assure that they are in accord with applicable law."[142] A review of punitive damages by the Supreme Court is *de novo*.[143] The Supreme Court has indicated that, in its review of a punitive damages award, it "will consider the same factors that we require the jury and trial judge to consider[.]"[144] This standard has been summarized as follows:

> Upon the appeal to this Court of a punitive damages assessment, we

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[141]*See Pauley v. Gilbert*, 206 W. Va. 114, 122, 522 S.E.2d 208, 216 (1999). It will be noted in passing that the fact that a jury awarded punitive damages does not automatically mean that attorney's fees should be awarded without further examination. Although there are similarities between the criteria for punitive damages and the criteria for an award of attorney's fees, they are two separate and distinct issues that must be addressed separately. *Midkiff v. Huntington Nat'l Bank W. Va.*, 204 W. Va. 18, 511 S.E.2d 129 (1998). Further, the mere fact that a jury fails to award punitive damages does not preclude attorney's fees from being awarded. *Bowling v. Ansted Chrysler-Plymouth-Dodge, Inc.*, 188 W. Va. 468, 425 S.E.2d 144 (1992).

[142]*Sheetz, Inc. v. Bowles Rice McDavid Graff & Love, PLLC*, 209 W. Va. 318, 337 n.21, 547 S.E.2d 256, 275 n.21 (2001).

[143]Syl. pt. 16, *Peters v. Rivers Edge Mining, Inc.*, ___ W. Va. ___, ___ S.E.2d ___ (No. 34272; Mar. 27, 2009). *See Cooper Indus., Inc. v. Leatherman Tool Group, Inc.*, 532 U.S. 424, 436, 121 S. Ct. 1678, 1685, 149 L. Ed. 2d 674 (2001) ("[C]ourts of appeals should apply a *de novo* standard of review when passing on district courts' determinations of the constitutionality of punitive damages awards.").

[144]*Garnes v. Fleming Landfill, Inc.*, 186 W. Va. 656, 669, 413 S.E.2d 897, 910 (1991).

> review awards of punitive damages in the first instance to determine whether the facts and circumstances of the case at issue are sufficient to permit an award of such damages. In conducting a review of the propriety of punitive damages, we employ the criteria set forth [in *Mayer*] describing the situations in which punitive damages are proper. We next review such awards to ascertain whether the amount of punitive damages actually awarded by the jury is proper or whether such an award is excessive.[145]

The Supreme Court has held that

> [A]ll petitions [for appeal] must address each and every factor set forth in Syllabus points 3 and 4 of [Garnes] 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.[146]

It has also been held that

> even where a punitive damage issue is adequately preserved, [the Supreme Court] may conclude in [its] review of the petition that [any] error was harmless and refuse the petition. [That is,] merely because error relating to a punitive damage award is asserted in the petition, that appeal will not automatically be granted on the punitive damage point alone.[147]

When an error occurs with respect to punitive damages, the case may be remanded for

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[145]*Kessel v. Leavitt*, 204 W. Va. 95, 191-92, 511 S.E.2d 720, 816-17 (1998).

[146]Syl. pt. 5, in part, *Garnes v. Fleming Landfill, Inc.*, 186 W. Va. 656, 413 S.E.2d 897 (1991). *See also Bullman v. D & R Lumber Co.*, 195 W. Va. 129, 131 n.2, 464 S.E.2d 771, 773 n.2 (1995) ("The defendant's petition for appeal and brief fail to set forth the necessary factors outlined in *Garnes*.").

[147]*Pote v. Jarrell*, 186 W. Va. 369, 376, 412 S.E.2d 770, 777 (1991).

a new trial solely on the issue of punitive damages.[148]

An example of the thoroughness of discretionary review of punitive damages by the Supreme Court is the case of *Central West Virginia Energy Co. v. Wheeling Pittsburgh Steel Corp*.[149] In that case, a jury in the Circuit Court of Brooke County awarded the plaintiffs $119,850,000 in compensatory damages and $100 million in punitive damages. The defendant filed a petition for appeal assigning error on the issue of punitive damages, as well as other issues. The Supreme Court conducted a thorough review of the case, with particular attention to the punitive damages issue. After the review, the Supreme Court entered an order on May 22, 2008, denying the petition for appeal. Subsequently, the defendant filed a petition for a writ of certiorari with the United States Supreme Court. In its petition, the defendant argued that the United States Supreme Court should hear the case because "[t]oo frequently, lower courts rubber-stamp such awards without regard to whether the gravity of the conduct warrants such massive punishment or whether an exaction of that magnitude is justified for deterrence purposes."[150] The United States Supreme Court rejected the argument that the West Virginia Supreme Court had "rubber-stamped" the award, and affirmed the

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[148]*See Kocher v. Oxford Life Ins. Co.*, 216 W. Va. 56, 602 S.E.2d 499 (2004). A judgment may be vacated on a portion of compensatory damages while sustaining an award for punitive damages. *Wilt v. Buracker*, 191 W. Va. 39, 443 S.E.2d 196 (1993).

[149]*Central W. Va. Energy Co. v. Wheeling Pittsburgh Steel Corp*., ___ S. Ct. ___, 129 S. Ct. 626, 172 L. Ed. 2d 609 (2008) (memorandum order denying certiorari).

[150]*Massey Energy Co. v. Wheeling Pittsburgh Steel Corp*., 2008 WL 3884290 (Appellate Petition, Motion and Filing).

award by denying the defendant's petition for a writ of certiorari.

XIV. FEDERAL DUE PROCESS AND PUNITIVE DAMAGES AWARD

The United States Supreme Court has issued several opinions which impact the ability of states to impose punitive damages on defendants. This section of the paper will highlight those cases and their impact on punitive damages law in West Virginia.

(1) *Pacific Mutual Life Insurance Co. v. Haslip*

The decision in *Pacific Mutual Life Insurance Co. v. Haslip*[151] was the first case in which the United States Supreme Court held that the Due Process Clause of the Fourteenth Amendment to the United States Constitution placed limitations on a state's ability to impose punitive damages on a defendant.[152] In doing so, the opinion made clear "that the common-law method for assessing punitive damages is [not] so inherently unfair as to deny due process and be *per se* unconstitutional."[153]

The underlying facts of *Haslip* involved an action by several plaintiffs against their health care insurer and agent. The plaintiffs alleged that the defendants engaged in fraud in

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[151]*Pacific Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1, 111 S. Ct. 1032, 113 L. Ed. 2d 1 (1991).

[152]*See Garnes v. Fleming Landfill, Inc.*, 186 W. Va. 656, 663, 413 S.E.2d 897, 904 (1991) ("In *Haslip* the U.S. Supreme Court decided for the first time that certain punitive damages awards could violate the due process clause of the Fourteenth Amendment.").

[153]*Pacific Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1, 17, 111 S. Ct. 1032, 1043, 113 L. Ed. 2d 1 (1991).

accepting premium payments from them, even though their policies had been cancelled without notice. The jury returned a verdict awarding the plaintiffs approximately $237,978 in compensatory damages and $840,000 in punitive damages.[154] The Alabama Supreme Court affirmed. The United States Supreme Court granted certiorari.

The narrow issue presented in *Haslip* was whether the State of Alabama's procedures for imposing punitive damages satisfied federal due process. To decide the issue, *Haslip* determined that a state's imposition of punitive damages would pass constitutional muster procedurally if those procedures provide for (1) a reasonable constraint on the jury's discretion;[155] (2) a meaningful and adequate review of the award by the trial court;[156] and (3) a meaningful and adequate review by the appellate court.[157] After reviewing Alabama's detailed punitive damages procedures under the aforementioned factors, the United States Supreme Court held in *Haslip* that "the punitive damages assessed by the jury . . . were not

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[154]The jury returned a general verdict. The decision in *Haslip* assumed that the verdict "contained a punitive damages component of not less than $840,000." *Pacific Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1, 6 n.2, 111 S. Ct. 1032, 1037 n.2, 113 L. Ed. 2d 1 (1991).

[155]*See Pacific Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1, 20, 111 S. Ct. 1032, 1044, 113 L. Ed. 2d 1 (1991) ("As long as the discretion is exercised within reasonable constraints, due process is satisfied.").

[156]*See Pacific Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1, 20, 111 S. Ct. 1032, 1044, 113 L. Ed. 2d 1 (1991) ("[A] meaningful and adequate review by the trial court whenever a jury has fixed the punitive damages.").

[157]*See Pacific Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1, 21, 111 S. Ct. 1032, 1045, 113 L. Ed. 2d 1 (1991) (Due process requires "[a]ppellate review [that] makes certain that the punitive damages are reasonable in their amount and rational in light of their purpose to punish what has occurred and to deter its repetition.").

violative of the Due Process Clause of the Fourteenth Amendment."[158]

Haslip stands for two propositions. First, the Due Process Clause of the Fourteenth Amendment can be invoked to challenge the amount of an award of punitive damages. Second, to impose punitive damages on a defendant, a state must have procedures that place reasonable constraints on a jury, and provide for meaningful and adequate review of the award by the trial court and appellate court.

In *Garnes v. Fleming Landfill, Inc.*,[159] the West Virginia Supreme Court responded to the procedural concerns expressed in *Haslip* and modified punitive damages law in West Virginia accordingly.[160] *Garnes* stated

> [u]nder our system for an award and review of punitive damages 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, which may occur when an application is made for an appeal."[161] The United States Supreme Court has had an opportunity to review the punitive damages procedures established in *Garnes* and found that those procedures comport with *Haslip*.

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[158]*Pacific Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1, 19, 111 S. Ct. 1032, 1044, 113 L. Ed. 2d. 1 (1991).

[159]*Garnes v. Fleming Landfill, Inc.*, 186 W. Va. 656, 413 S.E.2d 897 (1991).

[160]"The *Garnes* factors were derived in part from the factors used by the Alabama state court in *Haslip*." *Vandevender v. Sheetz, Inc.*, 200 W. Va. 591, 603, 490 S.E.2d 678, 690 (1997).

[161]Syl. pt. 2, *Garnes v. Fleming Landfill, Inc.*, 186 W. Va. 656, 413 S.E.2d 897 (1991).

(2) *TXO Production Corp. v. Alliance Resources Corp.*

The case of *TXO Production Corp. v. Alliance Resources Corp.*[162] involved a declaratory judgment action brought in the circuit court of McDowell County, West Virginia. The action was filed by TXO against Alliance to clear a purported cloud on title to property.[163] Alliance filed a counterclaim against TXO alleging slander of title. The trial court ultimately determined that TXO's declaratory judgment action was frivolous and that Alliance's rights to minerals on the property were valid. A jury heard the counterclaim and returned a verdict awarding Alliance $19,000 in compensatory damages and 10 million in punitive damages. The West Virginia Supreme Court affirmed the judgment. The United States Supreme Court granted certiorari to decide whether the verdict was excessive and whether the punitive damages review procedure by the lower courts was constitutionally valid.

The opinion in *TXO* rejected the argument that the punitive damages verdict was excessive. The opinion held the following:

> In sum, we do not consider the dramatic disparity between the actual damages and the punitive award controlling in a case of this character. On this record, the jury may reasonably have determined that petitioner set out on a malicious and fraudulent course to win back, either in whole or in part, the lucrative stream of royalties that it had ceded to Alliance. The punitive damages award in this case is certainly large, but in light of the amount of

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[162] *TXO Prod. Corp. v. Alliance Res. Corp.*, 509 U.S. 443, 113 S. Ct. 2711, 125 L. Ed. 2d 366 (1993).

[163] Alliance had the rights to minerals on the property. TXO entered into an agreement to pay Alliance a royalty for extracting those minerals.

> 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, we are not persuaded that the award was so "grossly excessive" as to be beyond the power of the State to allow.[164]

Regarding the attack on the punitive damages review procedure by the trial court and the West Virginia Supreme Court, *TXO* held the following:

> The only basis for criticizing the trial judge's review of the punitive damages award is that he did not articulate his reasons for upholding it. He did, however, give counsel an adequate hearing on TXO's postverdict motions, and during one colloquy indicated his agreement with the jury's appraisal of the egregious character of the conduct of TXO's executives. While it is always helpful for trial judges to explain the basis for their rulings as thoroughly as is consistent with the efficient dispatch of their duties, we certainly are not prepared to characterize the trial judge's failure to articulate the basis for his denial of the motions for judgment notwithstanding the verdict and for remittitur as a constitutional violation.
>
> Petitioner's criticism of the West Virginia Supreme Court of Appeals' opinion is based largely on the court's colorful reference to classes of "really mean" and "really stupid" defendants. That those terms played little, if any, part in its actual evaluation of the propriety of the damages award is evident from the reasoning in its thorough opinion, succinctly summarized in passages we have already quoted. Moreover, two members of the court who wrote separately to disassociate themselves from the "really mean" and "really stupid" terminology shared the views of the rest of the members of the court on the merits. The opinion was unanimous and gave careful attention to the relevant precedents, including our decision in *Haslip* and their own prior decision in *Garnes*.[165]

It is important to understand that the opinion in *TXO* did not establish any new

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[164] *TXO Prod. Corp. v. Alliance Res. Corp.*, 509 U.S. 443, 462, 113 S. Ct. 2711, 2722-23, 125 L. Ed. 2d 366 (1993).

[165] *TXO Prod. Corp. v. Alliance Res. Corp.*, 509 U.S. 443, 464-65, 113 S. Ct. 2711, 24, 125 L. Ed. 2d 366 (1993).

constitutional principle. However, the opinion is important because it gave federal constitutional approval to the punitive damages review procedure outlined in *Garnes v. Fleming Landfill, Inc*.[166]

(3) *BMW of North America, Inc. v. Gore*

In *BMW of North America, Inc. v. Gore,*[167] the plaintiff brought suit against an automobile manufacturer for failing to disclose that the vehicle he purchased had been repainted following damage to the car's body. A Georgia jury awarded the plaintiff $4,000 in compensatory damages and $4 million in punitive damages. The Georgia Supreme Court reduced the punitive damages award to $2 million. Even so, the defendant appealed the case to the United States Supreme Court. The defendant argued that the punitive damages award was grossly excessive and in violation of the Due Process Clause of the Fourteenth Amendment.

In addressing the issue of the excessiveness of punitive damages, the Court in *BMW* relied upon three guideposts described as follows: "Perhaps the most important indicium of the reasonableness of a punitive damages award is the degree of reprehensibility of the defendant's conduct."[168] "The second . . . indicium of an unreasonable or excessive punitive

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[166]*Garnes v. Fleming Landfill, Inc*., 186 W. Va. 656, 413 S.E.2d 897 (1991).

[167]*BMW of N. Am., Inc. v. Gore,* 517 U.S. 559, 116 S. Ct. 1589, 134 L. Ed. 2d. 809 (1996).

[168]*BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 575, 116 S. Ct. 1589, 1599, 134 L. Ed. 2d 809 (1996).

damages award is its ratio to the actual harm inflicted on the plaintiff."[169] "Comparing the punitive damages award and the civil or criminal penalties that could be imposed for comparable misconduct provides a third indicium of excessiveness."[170] After applying the

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[169]*BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 580, 116 S. Ct. 1589, 1601, 134 L. Ed. 2d 809 (1996).

[170]*BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 583, 116 S. Ct. 1589, 1603, 134 L. Ed. 2d 809 (1996). It should be noted that *BMW's* third guidepost has been interpreted differently by courts. A majority of courts hold that the third guidepost involves an examination only of statutory civil or criminal penalties. *See Saunders v. Equifax Info. Servs., L.L.C.*, No. 3:05CV731, 2007 WL 98596, at *6 (E.D. Va. Jan. 5, 2007) ("Because the Supreme Court directs the lower courts to compare the award with civil and criminal penalties authorized and imposed rather than with civil and criminal damage awards imposed in comparable cases, the amount of punitive damages awarded in past cases is irrelevant to this last factor in the punitive damages analysis."); *Willow Inn, Inc. v. Public Serv. Mut. Ins. Co.*, 399 F.3d 224, 237 (3rd Cir. 2005) (same); *Shiv-Ram, Inc. v. McCaleb*, 892 So. 2d 299, 317 (Ala. 2003) (same); *State v. Carpenter*, 171 P.3d 41, 66 (Alaska 2007) (same); *Grassilli v. Barr*, 142 Cal. App. 4th 1260, 1290 (2006) (same); *Bowen & Bowen Constr. Co. v. Fowler*, 593 S.E.2d 668, 672 (Ga. Ct. App. 2004) (same); *Hall v. Farmers Alliance Mut. Ins. Co.*, 179 P.3d 276, 286 (Idaho 2008) (same); *Hayes Sight & Sound, Inc. v. ONEOK, Inc.*, 136 P.3d 428, 449 (Kan. 2006) (same); *Craig & Bishop, Inc. v. Piles*, 247 S.W.3d 897, 906 (Ky. 2008) (same); *Leary v. State Farm Mut. Auto. Ins. Co.*, 978 So.2d 1094, 1102 (La. App. 2008) (same); *Seltzer v. Morton*, 154 P.3d 561, 613 (Mont. 2007) (same); *Jolley v. Energen Resources Corp.*, 198 P.3d 376, 386 (N.M. Ct. App. 2008) (same); *Barnes v. Univ. Hosps. of Cleveland*, 893 N.E.2d 142, 151 (Ohio 2008) (same); *Hamlin v. Hampton Lumber Mills, Inc.*, 193 P.3d 46, 56 (Or.App. 2008) (same); *Hollock v. Erie Ins. Exchange*, 842 A.2d 409, 422 (Pa. Super. Ct. 2004) (same); *James v. Horace Mann Ins. Co.*, 638 S.E.2d 667, 672 (S.C. 2006) (same). A few courts have construed the third guidepost as including a review of prior punitive damages awards in similar cases. *See Morris v. Flaig*, 511 F. Supp. 2d 282, 312 (E.D.N.Y. 2007) ("This final factor requires a comparison to awards authorized in similar cases. The punitive damages awarded here far exceed those approved in cases involving similar and, in some instances, more egregious examples of misconduct than that demonstrated by defendants."); *Jim Ray, Inc. v. Williams*, 260 S.W.3d 307, 312 (Ark. Ct. App. 2007) (same); *Daka, Inc. v. McCrae*, 839 A.2d 682, 700 (D.C. 2003) (same); *Turner v. Firstar Bank*, 845 N.E.2d 816, 82 (Ill. App. Ct. 2006) (same); *Bunton v. Bentley*, 176 S.W.3d 21, 24 (Tex. App. 2005) (same); *Shahi v. Madden*, 949 A.2d 1022, 1035 (Vt. 2008) (same). Courts that interpret the third guideposts as requiring an examination of

above guideposts to the facts of the case, it was held in *BMW* that the amount of the punitive damages rendered in the case violated due process.

As a result of *BMW*, the West Virginia Supreme Court of Appeals re-examined the standards for reviewing punitive damages awards in *Vandevender v. Sheetz, Inc.*,[171] as follows:

> While the *BMW* decision clearly delineates three guideposts for use in connection with the review of punitive damage awards, these so-called guideposts are merely reiterations of factors previously-adopted by . . . this Court. . . . Other than utilizing the guidepost terminology, *BMW* does not depart from existing law regarding punitive damages. Although *BMW* confines its analysis of the issue of notice to these three guideposts--a term that certainly suggests the possible use of additional factors--there is nothing in *BMW* that eliminates reference to previously-delineated factors that are not among the big three guideposts. Proof of this point is gleaned from the section of the *BMW* opinion that discusses the second guidepost. Although that particular guidepost is phrased in terms of the ratio between the plaintiff's compensatory damages and the amount of the punitive damages, the *BMW* opinion approvingly quotes [a] prior decision . . . as stating the proper inquiry to be 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 has occurred. Thus, the Supreme Court's own analysis in

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punitive damages awarded in comparable cases do so because they have misapplied a passage in *BMW*. The decision in *BMW* initially summarized the three guideposts and, in doing so, described the third guidepost as follows: "the difference between this remedy and the civil penalties authorized or imposed in comparable cases." *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 575, 116 S. Ct. 1589, 1598-99, 134 L. Ed. 2d. 809 (1996). It is this summary formulation of the third guidepost that has caused a few courts to incorrectly interpret *BMW* as requiring an examination of punitive damages awarded in comparable cases. The unfortunately worded summary of the third guidepost was not the formulation that was flushed out and applied in *BMW*. *See State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 428, 123 S. Ct. 1513, 1526, 155 L. Ed. 2d. 585 (2003) (applying *BMW's* third factor only to statutory civil and criminal penalties).

[171] *Vandevender v. Sheetz, Inc.*, 200 W. Va. 591, 490 S.E.2d 678 (1997).

> *BMW* demonstrates . . . that the guideposts were not crafted for the purpose of replacing existing law on punitive damages. . . . Upon analysis, there is simply no basis for [suggesting] that *BMW* demands that punitive damages awards be reviewed differently from the fashion in which they are currently being reviewed under *Garnes* and its progeny.[172]

The decision in *Vandevender* makes clear that the three guideposts relied upon in *BMW*, for assessing whether punitive damages were constitutionally excessive, did not add any new legal principle to punitive damages law in West Virginia. *Vandevender* is correct, but with a qualification. The third guidepost considered in *BMW*, the difference between punitive damages awarded and the civil or criminal penalties that could be imposed for comparable misconduct,[173] is not one of the factors expressly set out under *Garnes v. Fleming Landfill, Inc*.[174] However, *Garnes* expressly indicated that its factors were not intended to be exhaustive. Insofar as *Garnes* permits trial courts to consider any additional relevant factor, *Vandevender* is correct in stating that *BMW* did not add any new legal principle to

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[172]*Vandevender v. Sheetz, Inc*., 200 W. Va. 591, 605-06, 490 S.E.2d 678, 692-93 (1997) (quotations and citations omitted).

[173]The third guidepost has been criticized as ineffective and difficult to employ. *See Aken v. Plains Elec. Generation & Transmission Coop., Inc*., 49 P.3d 662, 71-672 (N.M. 2002) ("This guidepost has also been criticized because the [Supreme] Court did not give any guidance as to what to do if there are *not* any substantial legislative judgments concerning appropriate sanctions for the conduct at issue. Not only is this guidepost vague, it is not even guaranteed to be applicable in future cases. . . . [W]hen statutory penalties for the conduct in question are low or do not exist, a consideration of the statutory penalty does little to aid in a meaningful review of the excessiveness of the punitive damages award.") (quotations and citations omitted)).

[174]*Garnes v. Fleming Landfill, Inc*., 186 W. Va. 656, 413 S.E.2d 897 (1991). *Garnes* does, however, expressly require a consideration of any criminal sanctions that were actually imposed on a defendant.

punitive damages law in West Virginia.[175] Of course, *BMW's* third guidepost is irrelevant if there are no civil or criminal penalties available for comparison purposes.[176]

(4) *State Farm Mutual Automobile Insurance Company v. Campbell*

In *State Farm Mut. Automobile Insurance Company v. Campbell,*[177] the plaintiff filed a bad faith settlement action against an insurer in the State of Utah. During the course of the trial, the plaintiff introduced evidence of "lawful" out-of-state bad faith settlement conduct that was committed by the insurer against others. The jury eventually returned a verdict awarding the plaintiff $1 million in compensatory damages and $145 million in punitive damages. The Utah Supreme Court affirmed the judgment. Subsequently, the United States Supreme Court granted certiorari. Two of the issues addressed by the Supreme Court involved the use of evidence of the insurer's "lawful" out-of-state conduct for the purpose of assessing punitive damages, and determining whether the punitive damages were excessive.

Campbell made two dispositive rulings on the issue of out-of-state conduct

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[175]In *Boyd v. Goffoli*, 216 W. Va. 552, 608 S.E.2d 169 (2004), the West Virginia Supreme Court considered *BMW's* third guidepost and found that the difference between punitive damages awarded in that case and the civil penalty that was authorized by statute did not show that the punitive damage award was excessive.

[176]*See Vandevender v. Sheetz, Inc*., 200 W. Va. 591, 605, 490 S.E.2d 678, 692 (1997) ("[T]he trial court correctly concluded that it was without civil or criminal penalties for comparison purposes.").

[177]*State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 123 S. Ct. 1513, 155 L. Ed. 2d 585 (2003).

perpetrated against nonlitigants as it relates to punitive damages. First, *Campbell* held that,

> [a] State cannot punish a defendant for conduct that may have been lawful where it occurred. Nor, as a general rule, does a State have a legitimate concern in imposing punitive damages to punish a defendant for unlawful acts committed outside of the State's jurisdiction.[178]

Second, the decision in *Campbell* carved out an exception to the general rule regarding the use of evidence of a defendant's "lawful" out-of-state conduct against nonlitigants:

> Lawful out-of-state conduct may be probative when it demonstrates the deliberateness and culpability of the defendant's action in the State where it is tortious, but that conduct must have a nexus to the specific harm suffered by the plaintiff. A jury must be instructed, furthermore, that it may not use evidence of out-of-state conduct to punish a defendant for action that was lawful in the jurisdiction where it occurred.[179]

The decision in *Campbell* concluded that there was no basis for admitting evidence of the insured's lawful out-of-state conduct. In addressing the issue of excessiveness of the punitive damages award, the decision in *Campbell* held the following:

> We decline again to impose a bright-line ratio which a punitive damages award cannot exceed. Our jurisprudence and the principles it has now established demonstrate, however, that, in practice, few awards exceeding a single-digit ratio between punitive and compensatory damages, to a significant degree, will satisfy due process. In *Haslip,* in upholding a punitive damages award, we concluded that an award of more than four times the amount of compensatory damages might be close to the line of constitutional impropriety. We cited that 4-to-1 ratio again in *Gore*. . . . While these ratios are not binding, they are instructive. They demonstrate what should be

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[178]*State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 421, 123 S. Ct. 1513, 1522, 155 L. Ed. 2d 585 (2003).

[179]*State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 422, 123 S. Ct. 1513, 1522-23, 155 L. Ed. 2d 585 (2003).

> obvious: Single-digit multipliers are more likely to comport with due process, while still achieving the State's goals of deterrence and retribution, than awards with ratios in range of 500 to 1, or, in this case, of 145 to 1.
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> Nonetheless, because there are no rigid benchmarks that a punitive damages award may not surpass, ratios greater than those we have previously upheld may comport with due process where a particularly egregious act has resulted in only a small amount of economic damages. The converse is also true, however. When compensatory damages are substantial, then a lesser ratio, perhaps only equal to compensatory damages, can reach the outermost limit of the due process guarantee. The precise award in any case, of course, must be based upon the facts and circumstances of the defendant's conduct and the harm to the plaintiff.[180]

Campbell reversed the punitive damage award and remanded the case to the Utah Supreme Court for reconsideration of the award.[181] Based upon the two pronouncements made in *Campbell*, two separate analyses must be discussed as each relate to West Virginia punitive damages law.

1. ***Out-of-state evidence***. Under *Campbell,* evidence of lawful or unlawful conduct by a defendant, against out-of-state nonparties, cannot be introduced for the purpose of imposing punitive damages upon a defendant. However, under *Campbell*, evidence of lawful out-of-state conduct against nonparties may be introduced for the sole purpose of showing the deliberateness and culpability of the defendant's conduct, but such out-of-state conduct

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[180]*State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 425, 123 S. Ct. 1513, 1524, 155 L. Ed. 2d 585 (2003) (quotations and citations omitted).

[181]On remand, the Utah Supreme Court reduced the punitive damages award and held "that State Farm's behavior toward the Campbells was so egregious as to warrant a punitive damages award of $9,018,780.75, an amount nine times greater than the amount of compensatory and special damages." *Campbell v. State Farm Mut. Auto. Ins. Co.*, 98 P.3d 409, 420 (Utah 2004), *cert. denied*, 543 U.S. 874, 125 S. Ct. 114, 160 L. Ed. 2d.123 (2004).

must be similar to the conduct that harmed the plaintiff. When such evidence is introduced, a jury must be instructed that it may not use the evidence to punish a defendant.

In *Boyd v. Goffoli,*[182] the West Virginia Supreme Court recognized the holding of *Campbell* on the issue of lawful out-of-state conduct by a defendant. However, the facts of *Boyd* were concerned with the admissibility of unlawful out-of-state conduct that actually injured West Virginia plaintiffs. In this context, *Boyd* held that West Virginia "has a legitimate interest in imposing damages to punish a defendant for unlawful acts committed outside of the State's jurisdiction where the State has a significant contact or significant aggregation of contacts to the plaintiffs' claims which arise from the unlawful out-of-state conduct."[183] Consequently, under *Boyd,* a plaintiff may introduce evidence of unlawful out-of-state conduct to punish a defendant when the unlawful out-of-state conduct is limited to conduct directed at the plaintiff and actually injures the plaintiff.

2. ***Punitive damages ratio.*** Under *Campbell,* a single digit ratio of punitive damages to compensatory damages is presumptively constitutional. That is, under federal due process law, a maximum ratio of 9 to 1 is presumptively constitutional.[184] The federal presumptive

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[182]*Boyd v. Goffoli*, 216 W. Va. 552, 608 S.E.2d 169 (2004).

[183]*Boyd v. Goffoli*, 216 W. Va. 552, 562, 608 S.E.2d 169, 179 (2004).

[184]*Campbell initially* suggested that a ratio of more than 4 to 1 approached the outer limits of constitutionality. However, *Campbell* went on to state that, generally, a single digit multiplier would more likely comport with due process. *See Simon v. San Paolo U.S. Holding Co., Inc*., 113 P.3d 63, 77 (Cal. 2005) ("We understand the court's statement in [*Campbell*] that 'few awards' significantly exceeding a single-digit ratio will satisfy due process to establish a type of presumption: ratios between the punitive damages award and

outer limit is larger than that permitted under West Virginia state due process principles. The decision by the West Virginia Supreme Court in *TXO Production Corp. v. Alliance Resources Corp.*[185] held that, under State due process principles, a ratio of 5 to 1 is presumptively constitutional.[186] Both *Campbell* and *TXO* permit their respective presumptively valid ratios to be reduced under appropriate circumstances.[187] In addition, both *Campbell* and *TXO* permit their respective presumptively valid ratios to be exceeded in appropriate circumstances.[188] *Campbell* has been interpreted as permitting a higher than 9

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the plaintiff's actual or potential compensatory damages significantly greater than 9 or 10 to 1 are suspect and, absent special justification, cannot survive appellate scrutiny under the due process clause.").

[185]*TXO Prod. Corp. v. Alliance Res. Corp.,* 187 W. Va. 457, 419 S.E.2d 870 (1992), *aff'd*, 509 U.S. 443, 113 S. Ct. 2711, 125 L. Ed. 2d 366 (1993).

[186]It has been recognized that, "in certain instances, the Constitution of West Virginia may require higher standards of protection than afforded by the Constitution of the United States." *State ex rel. K.M. v. West Virginia Dep't of Health & Human Res.*, 212 W. Va. 783, 794 n.15, 575 S.E.2d 393, 404 n.15 (2002). *See also* Syl. pt. 2, *Pauley v. Kelly*, 162 W. Va. 672, 255 S.E.2d 859 (1979) ("The provisions of the Constitution of the State of West Virginia may, in certain instances, require higher standards of protection than afforded by the Federal Constitution.").

[187]*See Security Title Agency, Inc. v. Pope*, 200 P.3d 977 (Ariz. Ct. App. 2008) (finding *Campbell* violated by punitive damage and compensatory damage ratio of 5:1, because of large compensatory award of $6.3 million).

[188]*See Mathias v. Accor Econ. Lodging, Inc*., 347 F.3d 672 (7th Cir. 2003) (*Campbell* not violated by punitive damage and compensatory damage ratio of 37:1); *Jones v. Rent-A-Ctr., Inc*., 281 F. Supp. 2d 1277 (D. Kan. 2003) (*Campbell* not violated by punitive damage and compensatory damage ratio of 29:1); *Craig v. Holsey*, 590 S.E.2d 742 (Ga. Ct. App. 2003) (*Campbell* not violated by a punitive damage and compensatory damage ratio of 22:1); *Hollock v. Erie Ins. Exch.*, 842 A.2d 409 (Pa. Super. Ct. 2004) (*Campbell* not violated by punitive damage and compensatory damage ratio of 10:1); *Bennett v. Reynolds*, 242 S.W.3d

to1 ratio where there is "extreme reprehensibility or unusually small . . . compensatory damages."[189]

(5) *Philip Morris USA v. Williams*

In *Philip Morris USA v. Williams,* 549 U.S. 346, 127 S. Ct. 1057, 166 L. Ed. 2d. 940 (2007) the plaintiff filed a wrongful death action in an Oregon trial court against a cigarette manufacturer. The plaintiff alleged that her husband's death was caused by smoking. During the course of the trial, the plaintiff argued that the defendant's conduct harmed thousands of Oregonians. As a result of this argument, the defendant asked the trial court to instruct the jury that it could not punish the defendant for conduct committed against others.[190] The trial court refused the instruction. The jury returned a verdict awarding the plaintiff $79.5 million in punitive damages and $821,000 in compensatory damages, constituting a 97 to 1 ratio. Thereafter, the case went through several appeals before reaching the United States Supreme Court. The only issue addressed in *Philip Morris* was "whether the Constitution's Due Process Clause permits a jury to base [a punitive damages]

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866 (Tex. App. 2007) (*Campbell* not violated by punitive damage and compensatory damage ratio of 187:1 against one defendant and 46:1 against second defendant).

[189]*Simon v. San Paolo U.S. Holding Co., Inc*., 113 P.3d 63, 77 (Cal. 2005).

[190]It is not clear from the opinion in *Philip Morris* that the plaintiff actually put on evidence of injury to nonparty Oregonians. The opinion merely indicates that the plaintiff made such an argument to the jury. Further, a review of the decision issued by the Oregon Supreme Court appears to suggest that no actual evidence was introduced on the issue. *See Williams v. Philip Morris Inc*., 127 P.3d 1165 (Or. 2006), *rev'd*, 549 U.S. 346, 349, 127 S. Ct. 1057, 1060, 166 L. Ed. 2d 940 (2007).

award in part upon its desire to *punish* the defendant for harming persons who are not before the court (*e.g.,* victims whom the parties do not represent)."[191] The decision resolved the issue as follows:

> In our view, the Constitution's Due Process Clause forbids a State to use a punitive damages award to punish a defendant for injury that it inflicts upon nonparties or those whom they directly represent, *i.e.,* injury that it inflicts upon those who are, essentially, strangers to the litigation. For one thing, the Due Process Clause prohibits a State from punishing an individual without first providing that individual with an opportunity to present every available defense. Yet a defendant threatened with punishment for injuring a nonparty victim has no opportunity to defend against the charge, by showing, for example in a case such as this, that the other victim was not entitled to damages because he or she knew that smoking was dangerous or did not rely upon the defendant's statements to the contrary.
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> . . . .
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> Respondent argues that she is free to show harm to other victims because it is relevant to a different part of the punitive damages constitutional equation, namely, reprehensibility. That is to say, harm to others shows more reprehensible conduct. Philip Morris, in turn, does not deny that a plaintiff may show harm to others in order to demonstrate reprehensibility. Nor do we. Evidence of actual harm to nonparties can help to show that the conduct that harmed the plaintiff also posed a substantial risk of harm to the general public, and so was particularly reprehensible-although counsel may argue in a particular case that conduct resulting in no harm to others nonetheless posed a grave risk to the public, or the converse. Yet for the reasons given above, a jury may not go further than this and use a punitive damages verdict to punish a defendant directly on account of harms it is alleged to have visited on nonparties.
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> Given the risks of unfairness that we have mentioned, it is

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[191] *Philip Morris USA v. Williams*, 549 U.S. 346, 349, 127 S. Ct. 1057, 1060, 166 L. Ed. 2d 940 (2007). The defendant also presented the issue of the excessiveness of punitive damages, but that issue was not addressed in the opinion.

> constitutionally important for a court to provide assurance that the jury will ask the right question, not the wrong one. And given the risks of arbitrariness, the concern for adequate notice, and the risk that punitive damages awards can, in practice, impose one State's (or one jury's) policies (*e.g.,* banning cigarettes) upon other States-. . . . it is particularly important that States avoid procedure that unnecessarily deprives juries of proper legal guidance. We therefore conclude that the Due Process Clause requires States to provide assurance that juries are not asking the wrong question, *i.e.,* seeking, not simply to determine reprehensibility, but also to punish for harm caused strangers.[192]

The case was remanded back to the Oregon Supreme Court for a determination of whether the jury improperly punished the defendant for conduct committed against nonparties.[193]

The first point that should be understood regarding *Philip Morris* is that, while the argument made by the plaintiff during the trial involved conduct by the defendant towards in-state nonparties, *Philip Morris* addressed the issue in a broader context. That is, the issue as framed by *Philip Morris* was whether the Constitution prohibited a state from using a punitive damages award to punish a defendant for injury that it inflicts upon nonparties. This formulation does not make a distinction between evidence of harm to out-of-state or in-state nonparties.

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[192]*Philip Morris USA v. Williams*, 549 U.S. 346, 353-35, 127 S. Ct. 1057, 1063-64, 166 L. Ed. 2d 940 (2007).

[193]On remand the Oregon Supreme Court affirmed its prior decision upholding the jury verdict. *See Williams v. Philip Morris Inc*., 176 P.3d 1255 (Or. 2008). Subsequent to the Oregon Supreme Court's decision on remand, the United States Supreme Court once again granted certiorari in the case. *See Philip Morris USA Inc. v. Williams*, ___ U.S. ___, 128 S. Ct. 2904, 171 L. Ed. 2d. 840 (2008). However, on March 31, 2009, the United States Supreme Court issued a one sentence per curiam order dismissing the appeal as improvidently granted. *See Philip Morris USA, Inc. v. Williams,* No. 07-1216, 2009 WL 814803 (U.S. Mar. 31, 2009). Consequently, the 97 to 1 ratio of punitive to compensatory damages was allowed to stand.

Philip Morris should be interpreted as permitting evidence to be introduced regarding conduct by a defendant that harmed nonparties for the purpose of showing the degree of reprehensibility of the defendant's conduct. However, a jury should be instructed, when requested, that such evidence cannot be used for the purpose of calculating and awarding punitive damages.

Finally, *Philip Morris* must be harmonized with the decision in *Campbell*. The decision in *Campbell* addressed the issue of conduct by a defendant toward nonparties in the context of "lawful" out-of-state conduct. *Campbell* indicated that such evidence could be introduced to show deliberateness and culpability (*i.e.*, reprehensibility), when such conduct has a nexus to the harm caused to the plaintiff. *Campbell* also made clear that a jury should be instructed that it could not use such evidence to punish the defendant. The decision in *Philip Morris* is consistent with, and an extension of, *Campbell*. Under *Philip Morris*, in-state or out-of-state conduct by a defendant, whether lawful or unlawful,[194] that has a nexus to the harm caused to the plaintiff may be introduced; however, a jury should be instructed that such evidence cannot be used for the purpose of calculating and awarding punitive damages.[195]

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[194]There is nothing in the opinion of *Philip Morris* that would suggest its holding was dependent upon whether nonparty conduct was lawful or unlawful.

[195]*See White v. Ford Motor Co.*, 500 F.3d 963 (9th Cir. 2007) (holding that even though trial court instructed jury that evidence of defendant's out-of-state conduct toward nonparties could not be used to punish defendant, *Philip Morris* was still violated because no such instruction was given regarding evidence of defendant's in-state conduct toward nonparties).

(6) *Exxon Shipping Co. v. Baker*

In *Exxon Shipping Co. v. Baker,*[196] the plaintiffs filed a federal maritime law action against the defendants in the United States District Court for the District of Alaska. The plaintiffs sought compensation for economic losses that occurred after a ship owned by the defendants spilled millions of gallons of crude oil into the Prince William Sound in 1989. A jury awarded the plaintiffs $287 million in compensatory damages (total compensatory damages for all individual claims was $507.5 million) and $5 billion in punitive damages. The Ninth Circuit Court of Appeals ordered that the punitive damages be reduced to $2.5 billion. The United States Supreme Court granted certiorari to consider three issues: (1) whether maritime law allows corporate liability for punitive damages on the basis of the acts of managerial agents, (2) whether the Clean Water Act forecloses the award of punitive damages in maritime spill cases, and (3) whether the punitive damages awarded were excessive as a matter of maritime common law.

As to the first issue, the Supreme Court was equally divided.[197] Therefore, the ruling by the lower courts permitting corporate liability for punitive damages on the basis of the acts of managerial agents was upheld. As for the second issue, the opinion found that the Clean

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[196]*Exxon Shipping Co. v. Baker*, ___ U.S. ___, 128 S. Ct. 2605, 171 L. Ed. 2d. 570 (2008).

[197]Justice Alito did not participate in the case.

Water Act did not foreclose an award of punitive damages in maritime spill cases.[198] The opinion addressed the last issue, whether the punitive damages awarded were excessive as a matter of maritime common law, as follows:

> 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.
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> Our review of punitive damages today, then, considers not their intersection with the Constitution, but the desirability of regulating them as a common law remedy for which responsibility lies with this Court as a source of judge-made law in the absence of statute. Whatever may be the constitutional significance of the unpredictability of high punitive awards, this feature of happenstance is in tension with the function of the awards as punitive, just because of the implication of unfairness that an eccentrically high punitive verdict carries in a system whose commonly held notion of law rests on a sense of fairness in dealing with one another.
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> There is better evidence of an accepted limit of reasonable civil penalty, however, in several studies mentioned before, showing the median ratio of punitive to compensatory verdicts, reflecting what juries and judges have considered reasonable across many hundreds of punitive awards. We think it is fair to assume that the greater share of the verdicts studied in these comprehensive collections reflect reasonable judgments about the economic

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[198] *See Exxon Shipping Co. v. Baker*, ___ U.S. ___, 128 S. Ct. 2605, 2619, 171 L. Ed. 2d 570 (2008) ("All in all, we see no clear indication of congressional intent to occupy the entire field of pollution remedies; nor for that matter do we perceive that punitive damages for private harms will have any frustrating effect on the CWA remedial scheme, which would point to preemption.").

penalties appropriate in their particular cases.

These studies cover cases of the most as well as the least blameworthy conduct triggering punitive liability, from malice and avarice, down to recklessness, and even gross negligence in some jurisdictions. The data put the median ratio for the entire gamut of circumstances at less than 1:1, meaning that the compensatory award exceeds the punitive award in most cases. In a well-functioning system, we would expect that awards at the median or lower would roughly express jurors' sense of reasonable penalties in cases with no earmarks of exceptional blameworthiness within the punishable spectrum (cases like this one, without intentional or malicious conduct, and without behavior driven primarily by desire for gain, for example) and cases (again like this one) without the modest economic harm or odds of detection that have opened the door to higher awards. It also seems fair to suppose that most of the unpredictable outlier cases that call the fairness of the system into question are above the median; in theory a factfinder's deliberation could go awry to produce a very low ratio, but we have no basis to assume that such a case would be more than a sport, and the cases with serious constitutional issues coming to us have naturally been on the high side. On these assumptions, a median ratio of punitive to compensatory damages of about 0.65:1 probably marks the line near which cases like this one largely should be grouped. Accordingly, given the need to protect against the possibility (and the disruptive cost to the legal system) of awards that are unpredictable and unnecessary, either for deterrence or for measured retribution, we consider that a 1:1 ratio, which is above the median award, is a fair upper limit in such maritime cases.

. . . .

Applying this standard to the present case, we take for granted the District Court's calculation of the total relevant compensatory damages at $507.5 million. A punitive-to-compensatory ratio of 1:1 thus yields maximum punitive damages in that amount.

We therefore vacate the judgment and remand the case for the Court of Appeals to remit the punitive damages award accordingly.[199]

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[199] *Exxon Shipping Co. v. Baker*, ___ U.S. ___, ___, 128 S. Ct. 2605, 2626-34, 171 L. Ed. 2d 570 (2008) (quotations and citations omitted).

It is important to understand that the punitive damages ratio applied in *Exxon is limited to federal maritime law* and has no direct application to state punitive damages law.[200] However, the West Virginia Supreme Court has recognized that federal law "allows state courts to entertain *in personam* maritime causes of action[.]"[201] It has been further recognized that "[f]ederal admiralty law governs a tort action if the wrong occurred on navigable waters, and if the incident involved had the potential to disrupt maritime activity and the general character of the activity giving rise to the incident had a substantial relationship to traditional maritime activity."[202] Thus, to the extent that a maritime case is

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[200]*See Peters v. Rivers Edge Mining, Inc.*, ___ W. Va. ___, ___ S.E.2d ___ (No. 34272, Mar. 27, 2009) (noting limitations of *Exxon*); *American Family Mut. Ins. Co. v. Miell*, 569 F. Supp. 2d 841, 859 (N.D. Iowa 2008) ("In determining federal maritime common law, the Court [in *Exxon*] concluded that punitive damages should not exceed the compensatory damages awarded. The Court made it clear, however, that its inquiry involved reviewing a jury award for conformity with maritime law, rather than the outer limit allowed by due process."); *Diversified Water Diversion, Inc. v. Standard Water Control Sys., Inc.*, No. A07-1828, 2008 WL 4300258, at *5 n.4 (Minn. Ct. App. Sept. 23, 2008) ("[T]he Court's decision in *Exxon* to limit a punitive-damages award to the amount of the compensatory-damages award was based on its interpretation of the limit imposed on punitive damages by maritime law, not the limit that due process places on such an award."). *But see Hayduk v. City of Johnstown*, 580 F. Supp. 2d 429, 484 n.46 (W.D. Pa. 2008) ("Although *Exxon* is a maritime law case, it is clear that the Supreme Court intends that its holding have a much broader application."); *Bridgeport Harbor Place I, LLC v. Ganim*, No. X06CV0401845235, 2008 WL 4926925 at *12 (Conn. Super. Ct., Oct. 31, 2008) ("Although the plaintiff is unquestionably correct that *Exxon Shipping* is not controlling, the reasoning of the Supreme Court's decision is very persuasive in identifying certain factors relevant to determining the amount of a punitive damages award[.]").

[201]*River Riders, Inc. v. Steptoe*, ___ W. Va. ___, __ n. 15, 672 S.E.2d 376, 386 n.15 (2008) (holding that whitewater rafting does not constitute traditional maritime activity and is therefore not governed by federal admiralty law).

[202]Syl. pt. 6, *River Riders, Inc. v. Steptoe*, ___ W. Va. ___, 672 S.E.2d 376 (2008).

prosecuted in a State court, *Exxon's* punitive damages principles would be applicable.

It should also be clearly understood that *Exxon* does not impose a 1:1 ratio of punitive to compensatory damages in all maritime cases. Under *Exxon*, the 1:1 ratio is the upper limit only in cases where (1) there is no evidence of intentional or malicious conduct, (2) there is no evidence of behavior driven primarily by the desire for gain, or (3) when high compensatory damages have been awarded.[203]

XV. CONCLUSION

Prior to 1991, trial courts were not required to instruct juries on factors that should be considered in determining the amount of a punitive damages award. All that was required of trial courts was that they give a *Mayer v. Frobe*[204] instruction. That is, trial courts simply had to inform the jury that, to impose punitive damages on a defendant, the plaintiff had to establish that his or her injury was accompanied by gross fraud, malice, oppression, or wanton, willful, or reckless conduct or criminal indifference to civil obligations. Moreover, prior to 1991, if a jury properly found that a defendant's conduct warranted punitive damages under *Mayer*, trial courts and the West Virginia Supreme Court would not set aside such an

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[203]The decision in *Exxon* also indicated that the 1:1 ratio is the upper limit in cases without the "odds of detection that have opened the door to higher awards." This exception is not explained in the opinion. However, it may be in reference to injuries that are hard to detect. *See BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 582, 116 S. Ct. 1589, 1602, 134 L. Ed. 2d 809 (1996) ("A higher ratio may also be justified in cases in which the injury is hard to detect[.]").

[204]*Mayer v. Frobe*, 40 W. Va. 246, 22 S.E. 58 (1895).

award as excessive unless it was "monstrous, enormous, at first blush beyond all measure, unreasonable, outrageous and manifestly show[ed] jury passion, impartiality, prejudice or corruption."[205]

In the 1991 decision of *Garnes v. Fleming Landfill, Inc.*,[206] the West Virginia Supreme Court revolutionized punitive damages law in West Virginia. Although *Garnes* left the *Mayer* standard intact, it dramatically altered other aspects of punitive damages jurisprudence through the imposition of state and federal constitutional due process protections.[207] As a result of *Garnes*, if a jury finds punitive damages are warranted under the *Mayer* standard, the jury must consider specific factors in deciding the amount of punitive damages to award. The *Garnes* factors are designed to focus jury discretion in a rational and meaningful way when deciding what amount of punitive damages to award. Additionally, under *Garnes* and its progeny, a punitive damages award is rigorously reviewed under exacting constitutional standards. The *Garnes* review process affords no deference to a jury's determination of the amount of a punitive damages award. The review process embodies a critical *de novo* review to "ascertain[] whether a jury stripped a party of its

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[205]Syl. pt. 4, in part, *Muzelak v. King Chevrolet, Inc.*, 179 W. Va. 340, 368 S.E.2d 710 (1988).

[206]*Garnes v. Fleming Landfill, Inc.*, 186 W. Va. 656, 413 S.E.2d 897 (1991).

[207]*See Vandevender v. Sheetz, Inc.*, 200 W. Va. 591, 598, 490 S.E.2d 678, 685 (1997) ("Through [the *Garnes*] decision we imposed the necessary, but previously lacking, requirement of 'a meaningful and adequate review' by both the trial and appellate court systems[.]").

property in an arbitrary way and not in accordance with the standards of rationality and fairness the Constitution requires."[208]

The requirements of *Garnes* and its progeny have been approved by the United States Supreme Court as providing adequate safeguards to a defendant's federal constitutional due process right to have punitive damages imposed fairly.[209] Moreover, in some areas, *Garnes* and its progeny have imposed punitive damages standards that are more strict than that required under federal constitutional due process principles. In the final analysis, the current procedures used in West Virginia for imposing punitive damages provide sufficient assurances that a defendant will never be subjected to an unfair punitive damages award.

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[208] *TXO Prod. Corp. v. Alliance Res. Corp*., 509 U.S. 443, 467, 113 S. Ct. 2711, 2725, 125 L. Ed. 2d 366 (1993) (Kennedy, J., concurring).

[209] *See TXO Prod. Corp. v. Alliance Res. Corp*., 509 U.S. 443, 457, 113 S. Ct. 2711, 2720, 125 L. Ed. 2d 366 (1993) ("Assuming that fair procedures were followed, a [punitive damages] judgment that is a product of [West Virginia's] process is entitled to a strong presumption of validity. Indeed, there are persuasive reasons for suggesting that the presumption should be irrebuttable.").