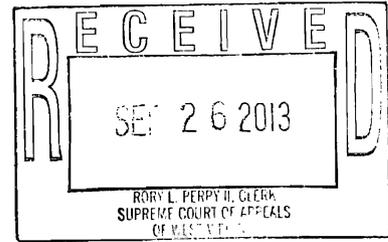


IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA
NO. 13-0470

Manor Care, Inc.; HCR Manor Care Services, Inc.;
Health Care and Retirement Corporation of
America, LLC; Heartland Employment Services,
LLC; John Does 1 through 10; and Unidentified
Entities 1 through 10 (as to Heartland of Charleston)



PETITIONERS / DEFENDANTS

v.

Case No. 13-0470
On Appeal from Kanawha County
Circuit Court Cause No. 10-C-952

Tom Douglas, Individually and on behalf of the
Estate of Dorothy Douglas

RESPONDENT / PLAINTIFF

WEST VIRGINIA ASSOCIATION FOR JUSTICE'S
BRIEF OF *AMICI CURIAE*
IN SUPPORT OF RESPONDENT

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STATEMENT OF AMICUS CURIAE¹

The West Virginia Association of Justice (“WVAJ”) has filed a motion pursuant to Revised Rule of Appellate Procedure 30(c) for leave to file this brief. The WVAJ is a private non-profit organization consisting of attorneys licensed in the State of West Virginia who represent those persons and entities harmed by the wrongful conduct of others. The WVAJ and its members are particularly interested in securing the rights of ordinary individuals to redress in the Courts of this State as provided by the West Virginia Constitution, the West Virginia Code, and the decisions of this Court. WVAJ is committed to help this Court assure that its decisions permit the civil justice system to remain available to persons and entities harmed by wrongful conduct. As part of its mission, WVAJ routinely files amicus briefs which this Court has previously acknowledged on a number of occasions were helpful.

In this case, WVAJ seeks to address the discrete issue of the relevance of a defendant’s insurance coverage in the review of a jury’s award of punitive damages.

STATEMENT OF RELEVANT FACTS

The punitive damage verdict was for \$80,000,000.00.² In their brief in this Court, defendants continue the arguments they began below and seek review of the punitive verdict based on verdict’s size in relationship to the financial resources of

¹No party to this appeal or counsel to a party to this appeal has authored or paid for any part of this brief.

²JA008502-8504.

the defendants.³ Indeed, in Circuit Court the defendants argued that the punitive damage verdict would have disastrous financial impacts on the companies.⁴ While placing these arguments on the record, the defendants refused to even acknowledge whether or not they were arguing that they could not pay the punitive award.⁵ The defendants also argued below as a mitigating factor that they had expended over \$1,100,000.00 in attorney fees and costs defending this case.⁶

It is undisputed that defendants purchased liability insurance coverage with limits of \$125,000,000.00.⁷ The insurance expressly covers liability for punitive damages and is being provided in this case without any dispute over coverage or reservation of rights.⁸ As with the punitive damages award, the attorney fees and costs were apparently covered under the insurance policy.⁹

³Petitioner's Brief at 33-34 (comparing punitive verdict to profits and net equity of the facility that the jury found killed Ms. Douglas and comparing verdict to profits and net equity of defendants' West Virginia facilities); *see also id.* at 34 (arguing that plaintiffs' counsel presented misleading financial information regarding at trial).

⁴*See* JA-006618 (suggestion that punitive award "may bankrupt and destroy the Defendants"); JA-002984 (argument that punitive award "effectively wipes out" profits of 500 of defendants' nursing homes).

⁵JA-000045; JA-006568-6569.

⁶JA-000049.

⁷JA-000045.

⁸*Id.*

⁹JA-008631.

ARGUMENT

In this Court, defendants argue that it was improper for the Circuit Court to consider the existence of insurance.¹⁰ Defendants' arguments ignore the applicable tests, the purposes for awarding punitive damages, and this Court's precedents explicitly allowing the introduction of the existence of punitive damage insurance into evidence at trial. The Circuit Court was correct in considering the defendants' punitive damage insurance coverage in affirming the punitive damage award. Likewise, consideration of this insurance coverage is appropriate in this Court in its review of the award under syllabus point 5 of *Garnes v. Fleming Landfill, Inc.*¹¹

This Court has long recognized several different public policy justifications supporting awards of punitive damages. These public policy justifications support the consideration of the existence of punitive damage insurance when reviewing a punitive damage award.

The traditional policy justifications for a punitive damage award are the twin aims of punishment and deterrence. Almost a century ago, this Court recognized that the twin aims of punishment and deterrence support punitive damage awards.¹² These concepts have been repeatedly reaffirmed by this Court.¹³ This

¹⁰Petitioner's Brief at 35.

¹¹186 W.Va. 656, 413 S.E.2d 897 (1991).

¹²*Pendleton v. Norfolk & W. Ry. Co.*, 82 W.Va. 270, 277-278, 95 S.E. 941, 944 (1918).

¹³Syl. pt. 1, *O'Brien v. Snodgrass*, 123 W.Va. 483, 16 S.E.2d 621 (1941); *Hensley v. Erie Ins. Co.*, 168 W.Va. 172, 183, 283 S.E.2d 227, 233 (1981); Syl. pt. 4,

Court has also recognized that punishment and deterrence support the refusal to allow the settlement with other defendants to constitute an offset to a punitive damage award.¹⁴

Of course, the effectiveness of a particular punitive award in fostering punishment and deterrence is dependant in part on the resources of the particular defendant. This conclusion is not new; as this Court noted in 1918 in *Pendleton*:

The object of such punishment is to deter the defendants from committing like offenses in the future, and this it may be said is one of the objects of all punishment, and we recognize that it would require, perhaps, a larger fine to have this deterrent effect upon one of large means than it would upon one of ordinary means, granting that the same malignant spirit was possessed by each.¹⁵

Consequently, the “financial position of the defendant” has been a traditional factor in considering the size of a punitive damage award.¹⁶ And, this Court has specifically *rejected* the argument that *State Farm Mut. Auto. Ins. Co. v.*

Harless v. First Nat'l Bank, 169 W.Va. 673, 289 S.E.2d 692 (1982)); *Burgess v. Porterfield*, 196 W.Va. 178, 182, 469 S.E.2d 114, 118 (1996); *State ex rel. State Auto Ins. Co. v. Risovich*, 204 W.Va. 87, 92-93, 511 S.E.2d 498, 503-04 (1998); *State ex rel. Dunlap v. Berger*, 211 W.Va. 549, 562, 567 S.E.2d 265, 278 (2002).

¹⁴*Burgess v. Porterfield*, 196 W.Va. 178, 184-85, 469 S.E.2d 114, 120-21 (1996).

¹⁵82 W.Va. at 277-78, 95 S.E. at 944.

¹⁶Syl. pt. 3, *Garnes v. Fleming Landfill, Inc.*, 186 W.Va. at 658, 413 S.E.2d at 899 (“The financial position of the defendant is relevant.”); *see also Quicken Loans, Inc. v. Brown*, 737 S.E.2d 640, 663(2012) (quoting *Garnes*); *Peters v. Rivers Edge Min., Inc.*, 224 W.Va. 160, 185, 680 S.E.2d 791, 816 (2009) (same); *Bowyer v. Hi-Lad, Inc.*, 216 W.Va. 634, 649, 609 S.E.2d 895, 910 (2004).

*Campbell*¹⁷ requires the judicial conclusion that “wealth has no bearing on the question of whether [a] punitive damages award [is] excessive.”¹⁸

Because punishment and deterrence remain a primary policy underlying punitive damage awards, it cannot be seriously argued that the Court should ignore insurance coverage when considering the “financial condition of the defendant” under *Garnes*. Indeed, in *Wheeler v. Murphy*, this Court explicitly recognized that a defendant’s “insured status” was “a *financial asset* that should be considered by the jury in awarding punitive damages.”¹⁹ This is particularly true where, as here, counsel attempts to downplay the defendant’s assets:

In *TXO, supra*, where we held that the court should, at a minimum, carefully explain the factors to be considered in awarding punitive damages, we held that the *final* financial position of the defendant is relevant. The jury was told by Mr. Murphy he had no income other than what he earned from his job at Kroger. Proof of insurance was being offered to rebut any inference that Mr. Murphy's wages alone represented the total assets to be considered by the jury when deliberating on the issue of punitive damages.²⁰

Notably, *Wheeler* reversed the trial court’s refusal to allow the plaintiff to introduce *as rebuttal evidence in a jury trial* the fact that the defendant had in effect

¹⁷538 U.S. 408, 123 S.Ct. 1513, 155 L.Ed.2d 585 (2003).

¹⁸*Perrine v. E.I. du Pont de Nemours and Co.*, 225 W.Va. 482, 555, 694 S.E.2d 815, 888 (2010) (“We reject this argument on the simple ground that the United States Supreme Court approved of the *Garnes* factors. . .”).

¹⁹192 W.Va. 325, 333, 452 S.E.2d 416, 424 (1994).

²⁰*Id.* (emphasis in original) (citing *TXO Production Corp. v. Alliance Resources 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)).

insurance covering punitive damages. Other courts have also allowed the introduction of insurance coverage to rebut allegations of poverty in a punitive case,²¹ and some even permit the plaintiff to do so in the case-in-chief.²²

In addition to punishment and deterrence, the existence of insurance is relevant to other *Garnes* factors. For example, in *Perrine*, this Court noted that the cost of the litigation to the defendant was a potential mitigating factor that might justify a reduction in the punitive damage award.²³ As noted above, in Circuit Court, the defendants argued that the fact that they had spent over \$1,100,000.00 was a mitigating factor. While the Circuit Court rejected this argument on other grounds,²⁴ if these costs were covered under the defendants' insurance policy, such a fact would have been an additional ground to reject the mitigating factor.

²¹*See, e.g., Humana Health Ins. Co. of Florida, Inc. v. Chipps*, 802 So.2d 492, 497-98 (Fla.App.2001) (holding that trial court correctly admitted evidence of indemnity agreement to rebut defendant's assertions that a large punitive damages award would force the company into financial straits); *Wilder v. Cody Country Chamber of Commerce*, 933 P.2d 1098, 1108 (Wyo.1997) (holding that trial court did not err in admitting evidence of defendant's inability to pay punitive damages where plaintiff failed to elicit on re-direct information concerning whether defendant had insurance, which would have been proper rebuttal evidence).

²²*See, e.g., Fleegel v. Estate of Boyles*, 61 P.3d 1267, 1271-72 (Alaska 2002); *Ayers v. Christiansen*, 222 Kan. 225, 564 P.2d 458, 461 (1977) ("Evidence of the defendant's financial condition of which insurance was a part was relevant to punitive damages."); *see also* W. GRAHAM, FEDERAL PRACTICE & PROCEDURE § 5364 (1980) (federal rule barring evidence of insurance "does not prohibit the use of evidence of insurance where it is relevant to the question of punitive damages").

²³225 W.Va. at 554; 694 S.E.2d at 887.

²⁴JA-000049.

As this Court made clear in *Perrine*, the list of factors contained in *Garnes* “is not intended to be exhaustive,” and “it is within the trial court's discretion²⁵ to consider other relevant aggravating and mitigating evidence.” Given the defendants’ position below regarding its assets, it certainly was not an abuse of discretion for the Circuit Court to consider the existence of insurance coverage. Likewise, in its review of the verdict, this Court should also consider the fact that, other than conclusory statements regarding possible increased premiums, the defendants presented no evidence of any potential economic harm from the verdict in this case.²⁶

The authority cited by the defendants does not bar the consideration of insurance coverage by a court reviewing a punitive damage award.²⁷ The cases cited by the defendants all address the insurability of punitive damages and other coverage issues. The fact that such insurance coverage is either available or does not violate public policy says nothing about whether its existence in this or any other case is relevant to determine whether a particular punitive damage award should be upheld.

²⁵225 W.Va. at 553, 694 S.E.2d at 886.

²⁶JA-000045.

²⁷Petitioner’s Brief at 35 (citing *Hensley v. Erie Ins. Co.*, 168 W.Va. 172, 283 S.E.2d 227 (1981); *State ex rel. State Auto Ins. Co. v. Risovich*, 204 W.Va. 87, 511 S.E.2d 498, (1998); *Camden-Clark Memorial Hosp. Ass’n v. St. Paul Fire and Marine Ins. Co.*, 224 W.Va. 228, 682 S.E.2d 566, 2009); and *Bowyer v. Hi-Lad, supra*).

Finally, consideration of insurance coverage is consistent with the precedents of the Supreme Court of the United States. The Court's due process jurisprudence focuses in part on fair notice to the defendant. In *BMW v. Gore*, the Court stated:

Elementary notions of fairness enshrined in our constitutional jurisprudence dictate that a person receive fair notice not only of the conduct that will subject him to punishment, but also of the severity of the penalty that a State may impose.²⁸

In *Gore*, the Court held that no law provided any out-of-state car distributor with fair notice that if it repainted vehicles and sold them as new vehicles, they would be subjected to a multi-million dollar penalty.²⁹ In this case, the defendants were clearly on notice of the potential for large punitive awards if they killed someone due to their willful, wanton, or reckless conduct; indeed, they specifically purchased \$125,000,000.00 in punitive damage insurance to cover them for such losses.

CONCLUSION

This Court should affirm the judgment of the Circuit Court below and, in doing so, conclude that the existence of defendants' punitive damage insurance is one factor supporting the punitive damage judgment against the defendants.

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²⁸517 U.S. 559, 576 (1996).

²⁹*Id.* at 584.

CERTIFICATE OF SERVICE

The undersigned does hereby certify that on this 26th day of September, 2013, the foregoing WEST VIRGINIA ASSOCIATION FOR JUSTICE'S AMICI CURIAE BRIEF IN SUPPORT OF RESPONDENT'S BRIEF was deposited in the U.S. Mail contained in a postage paid envelope addressed to Counsel for all other parties to this appeal as follows:

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