

No. 15-

15-327

IN THE

Supreme Court, U.S.

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Supreme Court of the United States

WESTGATE RESORTS, LTD., L.P.
A/K/A WESTGATE RESORTS, LTD.,

Petitioner,

v.

NATHAN B. OVERTON AND PATRICIA A. OVERTON,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF
APPEALS OF TENNESSEE AT KNOXVILLE

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

In this case, the Supreme Court of Tennessee denied Petitioner's Application for Permission to Appeal the final decision of the Court of Appeals of Tennessee which affirmed the Final Judgment of the Chancery Court for Sevier County, Tennessee finding the Petitioner liable for compensatory and punitive damages for violation of the Tennessee Time-Share Act of 1981, Tenn. Code Ann. §§ 66-32-101, *et seq.* (the "Time-Share Act"); violation of the Tennessee Consumer Protection Act, Tenn. Code Ann. §§ 48-18-101, *et seq.* (the "TCPA"); common law fraud and misrepresentation; breach of the parties' July 12, 2011 Purchase and Sale Contract and for rescission.

The questions presented are:

1. Whether a punitive damages award that is nearly fourteen times the compensatory damages, primarily based upon the defendant's nationwide wealth, violates the due process clause of the Constitution?
2. Whether awarding punitive damages that are nearly fourteen times compensatory damages based on conduct meeting only one of the *Campbell* reprehensibility factors violates the due process clause of the Constitution?

CORPORATE DISCLOSURE

Pursuant to Supreme Court Rule 29.6, Petitioner, Westgate Resorts, Ltd., L.P. a/k/a Westgate Resorts, Ltd., identifies its parent corporations as Central Florida Investments, Inc. (99%), the David A. Siegel Irrevocable Trust (.5%), and Westgate Resorts, Inc. (.5%). Petitioner further states that there is no publicly held company owning 10% or more of the stock of any of the foregoing entities.

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PETITION FOR A WRIT OF CERTIORARI

Westgate respectfully petitions for a Writ of Certiorari to review the Judgment of the Court of Appeals of Tennessee in this case.

OPINIONS BELOW

The November 20, 2014 Court of Appeals of Tennessee Order which is the subject of this Petition and is an unreported slip copy available at 2015 WL399218, is reproduced as App. 2a-37a (the “Opinion” or “Decision”). The June 15, 2015 Supreme Court of Tennessee Order denying Westgate’s permission to appeal, which is not officially reported, is reproduced as App. 1a.

STATEMENT OF JURISDICTION

On June 15, 2015, the Supreme Court of Tennessee entered its Judgment. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

PERTINENT STATUTORY AND CONSTITUTIONAL PROVISIONS

The Constitutional Provision at issue in this case is U.S. Const. Amd. XIV, § 1.

The Due Process Clause of the Fourteenth Amendment to the U.S. Constitution provides:

Section 1. All persons born or naturalized in the United States and subject to the jurisdiction thereof are citizens of the United States, and

of the State where they reside. No State shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due processes of law; nor deny to any person within its jurisdiction the equal protection of the law.

STATEMENT OF THE CASE

The Overtons toured the Westgate Gatlinburg Resort (the “Resort”) with two timeshare salespersons. (App. 3a). After what the Overtons described as “high pressure” dealings, they ultimately signed and closed on a Purchase and Sale Agreement (the “Contract”) at 11:00 p.m. on July 12, 2011. The Contract stated the Overtons paid \$39,280 for an “all season – float week/float unit,” (a “floating” timeshare interval). (App. 4a, 5a). The Contract did not guarantee that the Overtons would have the use of a particular unit. (App. 5a).

The Overtons claimed that the salespersons had assured them that the Overtons would: be able to request and obtain a reservation for a certain unit (#458) for the same week in December each year; have the right to book unlimited additional nights (“Owners’ Nights”) at any Westgate resort for \$49 to \$69 per night; receive a commission refund of \$1,000 from one salesperson and \$500 from the other; and be able to use a foosball table that the salespersons would purchase and keep at the Resort. (App. 4a).

The alleged promise regarding the guaranteed use of Unit 458 every December was not in writing, and the Contract expressly provided the opposite: that the timeshare interest was for a “floating” week and unit. The promises regarding the foosball table and the commission refunds were put in writing and signed by the salespersons. At the conclusion of the closing, the Overtons were presented with a briefcase containing copies of all of their closing documents as well as three CD-ROM disks. (App. 5a).

When the Overtons later tried to confirm their reservation for Unit 458, they were told that no guarantee of booking Unit 458 existed and that units were not assigned more than a few days in advance of arrival. They claimed they were further informed that they did not have unlimited Owners’ Nights. (App. 5a, 6a). The Overtons retained counsel who reviewed the documents and CD-ROMs provided to the Overtons at closing and discovered that the Overtons had been provided with CD-ROMs which were difficult to navigate and which were not a current and complete copy of Westgate’s public offering statement (“POS”). Consequently, written notice of the Overtons’ request to rescind the Contract was sent to Westgate’s corporate office. (App. 6a). Counsel for Westgate sent a response denying the Overtons’ request to rescind the contract.

The Overtons subsequently filed suit. Following a trial, the court ruled largely in favor of the Overtons, though the trial court ruled in Westgate’s favor on the Overtons’ claim of fraud regarding the floating use plan and their allegation that Westgate misrepresented that they would be entitled to use the same unit every year. (App. 57a, 58a).

The trial court determined that Westgate intentionally failed to provide the Overtons with an accurate POS and intentionally refused to rescind the Contract (App. 6a); that the Overtons were promised gifts of a foosball table and unlimited Owners' Nights without proper disclosure of their value, in willful violation of the Time-Share Act; that Westgate had engaged in deceptive practices in violation of the TCPA; and that Westgate was guilty of common law fraud and misrepresentation with regard to the promise of unlimited Owners' Nights. (App. 7a).

The trial court granted a rescission of the Contract; ordered Westgate to refund the Overtons' purchase money; and ruled that the Overtons were entitled to punitive damages for common law fraud and misrepresentation, as well as enhanced statutory damages and attorney's fees pursuant to the TCPA. *Id.*

At a subsequent hearing, the trial court awarded \$600,000 in punitive damages, finding the most significant factors to be Westgate's financial position and the reprehensibility of its conduct. (App. 26a). The trial court opined that it would "take[] a lot of money to make them [Westgate] feel it." *Id.* After noting Westgates' income of \$545,568,329 and assets of \$1,389,788,000, the trial court said, "How are you going to deter somebody with that kind of income? It takes more than a slap on the wrist. What is a lot of money to you and me is very little money to Westgate." *Id.*

The Overtons never claimed, nor did the trial court conclude, that the Overtons were physically injured by Westgate's actions; that Westgate's actions evidenced a reckless disregard for the Overtons' health or safety; that

the Overtons were financially vulnerable individuals upon whom Westgate preyed; or that Westgate's conduct was repeated. (App. 2a-36a).

Alternatively to the punitive damage award, the enhanced statutory damages were set at \$113,340, which represented trebling the amount of compensatory damages. The Overtons elected to receive the \$600,000 punitive damage award. They were also awarded \$117,082 in attorney's fees and \$19,198 in litigation expenses. (App. 8a). Westgate's motion to alter or amend the judgment was denied. The Overtons' motion seeking additional attorney's fees was granted in the amount of \$25,429. *Id.*

On appeal, the Court of Appeals of Tennessee ("Court of Appeals") noted that, under *Hodges v. S.C. Toof & Co.*, 835 S.W. 2d 896 (Tenn. 1992), when determining the proper amount of a punitive damage award, the trial court shall consider the nine distinct factors where relevant (the "*Hodges* factors"). The Court of Appeals concluded that the trial court properly applied the *Hodges* factors when it found Westgate's conduct to be particularly reprehensible and focused on Westgate's wealth in determining the amount of punitive damages. (App. 26a).

According to the Court of Appeals, the trial court's discussion regarding federal due process standards consisted of the following:

. . . [t]he trial court discussed the factors elucidated by the U.S. Supreme Court in *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 575 (1996). Those considerations are (1) reprehensibility of the conduct, (2) the ratio

between the punitive damage award and the actual harm suffered by the plaintiff, and (3) a comparison of the punitive damage award to civil penalties imposed in comparable cases. *Id.* The High Court explained that “trickery and deceit” were examples of conduct considered to be reprehensible. *Id.* at 576. As stated above, the trial court herein found Westgate’s conduct to be exceedingly reprehensible, due to the fact that Westgate made intentional misrepresentations to the Overtons, willfully violated the Tennessee Time-Share Act, and refused to rescind the contract despite statutory provisions supporting such rescission. . . .

(App. 27a).

The Court of Appeals affirmed the punitive damages award but remitted it to \$500,000 to comport with Tennessee’s statutory punitive damages cap. (App. 34a). Westgate’s Petition for Rehearing was denied. Westgate’s Petition for Permission to Appeal the Decision in the Supreme Court of Tennessee was denied on June 15, 2015. (App. 1a).

REASONS FOR GRANTING THE PETITION

I. THE OPINION OF THE COURT OF APPEALS VIOLATES DUE PROCESS AND CONFLICTS WITH THIS COURT'S DECISIONS, AND PROVIDES THE COURT WITH THE OPPORTUNITY TO ADDRESS PROPORTIONALITY AND THE LIMITS ON A STATE'S CONSIDERATION OF NATIONWIDE OR WORLDWIDE WEALTH.

Our legal system has an obligation to ensure that awards of punitive damages “be fair, reasonable, predictable, and proportionate.” *Payne v. Jones*, 711 F.3d 85, 93 (2d Cir. 2012) citing to *Exxon Shipping Co. v. Baker*, 554 U.S. 471, 499 (2008) (“Courts of law are concerned with fairness as consistency”); *id.* at 502. (“[A] penalty should be reasonably predictable in its severity [T]he penalty scheme [that similarly situated tortfeasors] face ought to threaten them with a fair probability of suffering in like degree when they wreak like damage”).

In *Payne*, *supra*, the Second Circuit further noted that in addition to impairing the fairness, predictability and proportionality of the legal system, judgments awarding unreasonable amounts as punitive damages imposed harmful, burdensome costs on society. *Payne*, 711 F.3d at 94. Excessive verdicts that are allowed to stand can establish precedent for excessive awards in later cases, in snowballing fashion. Publicity that accompanies huge punitive damages awards can influence future jurors and jurists to impose or approve similarly large amounts. *Id.* Moreover, unchecked awards levied against significant industries could seriously harm the national

economy. Productive companies could go bankrupt or out of business. *Id.* Additionally, the threat of excessive damages can drive up the price of goods and services, and the cost of insurance premiums, inhibit innovation, deter both individuals and enterprises from undertaking socially desirable activities and risks, and encouraged overspending on “socially excessive precautions” that “cost[] more than the reduction of harm produced by [them].” *Id.* citing to A. Mitchell Polinsky & Steven Shavell, Punitive Damages: An Economic Analysis, 111 Harv. L. Rev. 869, 879 (1998).

Consequently, the questions presented address important questions of both law and public interest, as they involve the substantive protections in place to ensure a defendant is not punished arbitrarily and unpredictably. The Court also noted that punitive damages have been characterized as a “windfall to a fully compensated plaintiff,” *City of Newport v. Fact Concerts, Inc.*, 453 U.S. 247, 267 (1981), because punitive damages are awarded over and above full compensatory damages. The Opinion is sufficiently important to merit this Court’s review because punitive damages issues appear frequently in cases throughout the United States and consume substantial judicial resources and because lower court punitive damages awards often involve enormous financial liabilities. The efforts of the Tennessee courts to apply the guidelines given by this Court show a distortion of this Court’s efforts to establish limiting criteria, a distortion that is duplicated in many other decisions, as discussed and documented in *Exxon*, 554 U.S. at 498-501. The persistence of “outlier cases,” *id.* at 500, exemplify the need to clarify how courts should apply the constitutional limitations on punitive damage awards. Recent law review articles provide a thorough empirical evaluation of the

current punitive damages doctrine, focusing on the virtual cap imposed by this Court in *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408 (2003), and demonstrate that even though the cap should have decreased award amounts, it has not had that effect. See Constitutional Limitations on Punitive Damages: Ambiguous Effects and Inconsistent Justifications, 66 Vand. L. Rev. 961 (2013).

In *Philip Morris USA, Inc. v. Williams*, 556 U.S. 178, 129 S.Ct. 1436 (2009) (*Williams III*), the only question under consideration was the Oregon Supreme Court's handling of the remand in *Williams II* (*Philip Morris USA, Inc. v. Williams*, 549 U.S. 346, 349, 127 S.Ct. 1057 (2006)) to correct the constitutionality of a jury instruction regarding the calculation of a punitive damages award. During the *Williams III* oral argument, Chief Justice John Roberts suggested that, if there was something "malodorous" about how Oregon handled the remand in *Williams II*, perhaps articulating a clear standard regarding the proper ratio might help ease this concern and "protect [the Court's] constitutional authority" in excessive punitive damages claims. *Williams III* Transcript, available at 2008 WL6524409 (2008) at *51-52; see also *id.* at *55 (statement of Justice Breyer, acknowledging that Chief Justice Roberts did, in fact, suggest "that maybe [the Court] should reach the issue of due process on the amount?")

Judge W. Michael Gillette of the Oregon Supreme Court expressed frustration with implementing the guideposts established by this Court in a recent dissent:

I add one final note: a plea to the Supreme Court of the United States. For years this court generally, and I personally, have struggled to

apply [*BMW of North Am. v.] Gore* [517 U.S. 559 (1996)] and *Campbell* faithfully to the cases before us. This case represents but one of the many problems that have cropped up in the seven years since the Court decided *Campbell*. The courts around are in need of – indeed, I will assert that we deserve – further guidance that only the Court can provide. Whether the Court agrees with my analysis, or the majority, or something in between, does not matter to me. But it would be a responsible act of comity for the Court to say something clear to help in future cases.

Hamlin v. Hampton Lumber Mills, Inc.,
246 P.3d 1121, 1136 (Or. 2011) Gillette, J., pro
tempore, dissenting).

In awarding punitive damages that bear almost no relationship to the consequences of Westgate’s conduct, the Opinion exceeded the boundaries of constitutionally permissible punishment and casts doubt on the continuing viability in Tennessee¹ of the *Gore* guideposts in constraining punitive damages awards. Accordingly, this Court should grant the Petition so as to guard against the “acute danger of arbitrary deprivation of property.” *Campbell, supra*, at 417.

1. In Tennessee, unless designated “Not For Citation,” “DCRO” or “DNP,” unpublished opinions shall be considered persuasive authority pursuant to Rule 4(G), Rules of the Tennessee Supreme Court. The Opinion does not have any of the foregoing designations and is, therefore, persuasive authority in Tennessee.

Certiorari should also be granted to clarify to what extent, if any, a national corporation's wealth should be a factor in the constitutional inquiry into the excessiveness of a punitive damage award given the Tennessee Court of Appeals' citation to Westgate's "appreciable assets and income" nationwide as a justification for the punitive award.

II. THE OPINION IS CONTRARY TO *GORE* BECAUSE A DEFENDANT'S NATIONWIDE WEALTH CANNOT JUSTIFY AN OTHERWISE UNCONSTITUTIONAL AWARD OF PUNITIVE DAMAGES.

The vast majority of state courts which have considered the issue of whether the trier of fact may consider the wealth of the defendant in fashioning a punitive award have determined that the defendant's wealth is an appropriate consideration because the degree of punishment or deterrence is to some extent proportionate to the means of the wrongdoer. Punitive Damages: Relationship to Defendant's Wealth as Factor in Determining Propriety of Award, 87 A.L.R. 4th 141 (1991). Among those courts which have considered whether evidence of a defendant's wealth may properly be considered by the trier of fact, some courts have taken the position that the finder of fact must consider the wealth of the defendant in determining the appropriate amount of punitive damages. *Id.* Many other jurisdictions, however, have considered evidence of the defendant's wealth to be a relevant factor, although not a mandatory one, in assessing the appropriateness of a punitive damage award. Still other courts have

prohibited the trier of fact from considering such evidence in determining the amount of the award.²

Thus, while “wealth” or “financial position” is often taken into account in a multifactor test as a matter of state law, it has not been considered part of the federal constitutional inquiry under *Gore*. See *Perez v. Z Frank Oldsmobile, Inc.*, 223 F.3d 617, 625 (7th Cir. 2000) (“constitutional limits on punitive damages come into play only after the assessment has been tested against statutory and common law principles”). Instead, the absence of a wealth element under the *Gore* guideposts has properly been interpreted as precluding the use of a wealth factor to justify an excessive punitive damage award. Yet many states, including Tennessee, continue to rely on wealth as a leading factor in assessing punitive damages.

Remands from this Court reflect the proper rejection of a wealth factor. In *Gore*, the respondent specifically argued that the \$2 million punitive award could be justified

2. See, e.g., *Southern Life & Health Ins. Co. v. Whitman*, 538 So.2d 1025 (Ala. 1978); *Hensley v. Paul Miller Ford, Inc.*, 508 S.W.2d 759 (Ky. 1974); *Peisner v. Detroit Free Press*, 242 N.W.2d 775 (Mich. App. 1976); *Mathias v. Accor Economy Lodging, Inc.*, 347 F.3d 672 (7th Cir. 2003); *Smith v. Colorado Interstate Gas Co.*, 794 F.Supp. 1035 (D.C. Colo. 1992); *Hien Nguyen v. Taylor*, 723 S.E.2d 551 (N.C. Ct. App. 2012); *Roth v. Farner-Bocken Co.*, 667 N.W.2d 651 (SD. 2003). The rationale for this refusal is reflected in the court’s holding in *Peisner*, *supra*. (the amount of punitive damages should be determined by the extent of the plaintiff’s injury, which is independent of the defendant’s wealth. Plaintiffs’ injuries are no greater if the defendant earns \$5 million per year and has a net worth of \$50 million than if the defendant only earns \$5,000 per year and has a net worth of \$500,000).

on the basis of BMW's wealth. Brief of Respondent at 39, 517 U.S. 559. This Court observed that "[t]he fact that BMW is a large corporation rather than an impecunious individual does not diminish its entitlement to fair notice of the demands that the several States impose on the conduct of its business." 517 U.S. at 585. For that reason, the Court did not include wealth among its federal constitutional "guideposts." On remand, the Alabama Supreme Court recognized that a defendant's wealth cannot justify an award that is excessive under the *Gore* guideposts. *See, e.g., BMW of N. Am., Inc. v. Gore*, 701 So. 2d 507, 514 (Ala. 1997) (on remand a large punitive award "should not be upheld upon judicial review merely because the defendant has the ability to pay it").

In the Ninth Circuit's original opinion in *Cooper Industries*, the Court held that "the size of an award necessary to create deterrence to an entity of Cooper's size and assets" was one of the main factors foreclosing a federal due process challenge to that award. *Leatherman Tool Group, Inc. v. Cooper Industries, Inc.*, 205 F.3d 1351 (9th Cir. 1999) (unpublished opinion) vacated, 532 U.S. 424 (2001), on remand, 285 F.3d 11246 (9th Cir. 2002). On certiorari, this Court focused exclusively on the three *Gore* guideposts, pointedly omitting any further mention of Cooper's wealth. On remand, the Ninth Circuit stated, "in view of the *Gore* factors, we cannot conclude that this [wealth] consideration renders the amount awarded by the jury constitutional." 285 F.3d at 1152.

As explained in Polinsky & Shavell, Punitive Damages: An Economic Analysis, *supra*, "wealth" of a corporate defendant is improperly taken into account in attempting to achieve optimal levels of deterrence

through punitive damages because wealthy corporations will be led to take excessive precautions, undesirably curtail their activities and set prices above the proper level, chilling consumption of their products. Imposing punitive damages on the basis of corporate wealth also effectively imposes a tax on corporate size and success, thereby discouraging growth and development. *See also, Zazu Designs v. L'Oreal, S.A.*, 979 F.2d 499, 508 (7th Cir. 1992) (sanction of \$1 million for manufacturer's misconduct during trademark infringement action which was calculated as percentage of manufacturer's net worth was excessive; award could not be justified as necessary to either compensation or deterrence as corporate assets financed ongoing operations and were unrelated to either injury done to victim or size of award needed to cause corporate managers to obey law); *Gore, supra* at 594 (Breyer, J., concurring) (noting that a "constraining 'economic' theory" might cause the Court to review an otherwise suspect award "more deferential[ly]").

Each of the *Gore* guideposts and the *Campbell* reprehensibility factors provides a defendant with fair notice of the consequences of its misconduct. Given that this Court has eschewed every opportunity to tie the federal analysis of excessiveness of punitive damages under the Due Process Clause to "wealth," it is a violation of these "fair notice" principles to try to incorporate wealth into the *Gore* analysis – as the Court of Appeals did. Indeed, a billion dollar company does not know if fraudulent misconduct will result in a punitive damages award equal to one-tenth of one percent of its wealth (\$1 million) or ten percent of its wealth (\$100 million). Left undisturbed, in Tennessee, it will be "as if having a large net worth were the wrong to be deterred!" *Zazu, supra* at 508 (exclamation point in original).

Certainly, at the lower end, utilization of a wealth factor serves a useful due process purpose of preventing the financial ruin of the defendant by a punitive damages award far in excess of the defendant's ability to pay. However, the converse is not also true. The use of a wealth factor on financially successful entities becomes the opposite of a limitation, and instead is an open exhortation to unpredictable and excessive awards. This is based on the unproven assumption that a person or entity would not take heed of a sanction that is a smaller percentage of its net worth. To the contrary, within any business structure, some person is accountable for costs and expenditures, and poor performance will come to the attention of that person's supervisors. While a given line item of a certain amount may not reach the attention of the Chairman of the Board, the accountable person must report to his or her superior, and management will presumably react accordingly.

A rough analogy can be drawn to criminal sentencing. While a convicted criminal defendant's advanced age or poor health may be appropriate considerations for mitigating punishment, a sentence should not be enhanced based on the youth or long life expectancy of a defendant.

Moreover, the Court of Appeals failed to recognize that reliance on the wealth of a national corporation like Westgate as a factor in punitive awards must be balanced by concerns for the federal system and the need to avoid imposing undue burdens on interstate commerce. In *Ace v. Aetna Life Ins. Co.*, 40 F.Supp. 2d 1125 (D. Alaska 1999), the district court addressed this issue, stating that, under *Gore*, "due process and comity concerns counsel restraint where a proposed award of punitive damages is based to a

significant degree on an accumulation of wealth generated outside the jurisdiction where the wrong was suffered.” *Id.* at 1135. Accordingly, in the case of a national company, “[h]eavy reliance on a defendant’s aggregate wealth would be inappropriate” and “[s]ome tempering of the weight given that criterion [wealth] is necessary where it cannot be adjusted to reflect that which is necessary to protect the interests of each individual state’s consumers” so as to “leave some room within which the other states can exercise their own interests in defining the precise extent of and in deterring wrongful conduct.” *Id.* at 1132-33; see *Johansen v. Combustion Engineering, Inc.*, 170 F.3d 1320 (11th Cir. 1999) (defendant’s wealth cannot justify an award “so large as to ‘implicate the federal interest in preventing . . . undue burdens on interstate commerce’” (quoting *Gore*, 517 U.S. at 585)).

The Court of Appeals justified the punitive award by reference to Westgate’s entire income and assets, (App. 26a) most of which was earned by business activities outside of Tennessee. Thus, the award impermissibly infringes upon the interests of other states to regulate business within their own borders by defining for themselves wrongful conduct and the appropriate means and levels of deterrence. As this Court stated in *Gore*, the fact that a defendant “is a large corporation does not diminish its entitlement to fair notice of the demands that the several states impose on the conduct of its business. Indeed, [a defendant’s] status as an active participant in the national economy implicates the federal interest in preventing individual states from imposing undue burdens on interstate commerce.” *Gore*, 517 U.S. at 585.

The Court of Appeals' improper emphasis on Westgate's nationwide wealth compounds the constitutional errors that pervaded its punitive damages award. This Court should grant certiorari to clarify the proper role of a defendant's wealth in awarding punitive damages.

III. THE OPINION IS CONTRARY TO *GORE* AND *CAMPBELL* BECAUSE IT APPROVES A PUNITIVE DAMAGES RATIO OF NEARLY 14 TO 1.³

The Opinion conflicts with this Court's rulings in *BMW of North Am., Inc. v. Gore*, 517 U.S. 559 (1996); and *State Farm Mut. Auto Ins. Co. v. Campbell*, 538 U.S. 408 (2003) on the "guideposts" for evaluating the appropriateness of a punitive damages award. The Opinion goes beyond the procedural and substantive limitation this Court has placed on punitive damages awards.

A punitive damages award is unconstitutional if it is "grossly disproportional to the gravity of [the offense]." *Cooper Indus., Inc. v. Leatherman Tool Group, Inc.*, 532 U.S. 424, 434, 121 S.Ct. 1678 (2001). Proportionality is evaluated under three factors: (1) the reprehensibility of the punishable conduct; (2) the disparity between the harm caused by this conduct and the size of the punitive damages award; and (3) the relationship between a judicially sanctioned punitive award and any legislatively established punishments authorized for similar conduct. *Gore*, *supra* at 575. In *Campbell* this Court further articulated a more detailed evaluation of the first

3. All ratios are hereinafter expressed with the punitive damages number followed by the compensatory number.

guidepost, the reprehensibility factor. Consideration for evaluating the degree of reprehensibility includes whether (1) the harm was physical or merely economic; (2) the conduct evidenced a reckless disregard of health or safety; (3) the plaintiff was financially vulnerable; (4) the conduct was repeated or isolated; and (5) the harm resulted from intentional malice, trickery or deceit (collectively, the “Campbell factors”). *Campbell*, *supra* at 419.

A. *Gore* Guidepost Number One: Westgate’s Conduct Was Low on the Reprehensibility Scale.

Westgate’s conduct and the harm it caused do not support the punishment in this case. The Court of Appeal’s confusion regarding this guidepost is exemplified by the fact that *Campbell*, the Court’s most significant clarification of the reprehensibility point, was not cited once. The Overtons have never claimed, nor has the trial court or the Court of Appeals concluded, that the Overtons were physically injured by Westgate’s actions; or that Westgate’s conduct evidenced a reckless disregard for the Overtons’ health or safety; or that the Overtons were financially vulnerable individuals upon whom Westgate preyed. *Campbell*, 538 U.S. at 419 (instructing courts to consider whether “the harm caused was physical as opposed to economic”; whether conduct “evinced an indifference to . . . health or safety” and whether the Overtons were financially vulnerable).

Westgate acknowledges that the Court of Appeals and the trial court concluded that the Overtons’ harm resulted from deceit, the last of the five *Campbell* factors. (App. 22a). That fact, however, does not convert Westgate’s

conduct into “exceedingly reprehensible” conduct to justify a significant sanction in addition to compensatory damages. As this Court said in *Campbell*, “any one of these factors . . . may not be sufficient to sustain a punitive damages award.” *Campbell*, 538 U.S. at 419 (the presence of a single factor involved in the reprehensibility analysis may not warrant punitive damages at all, let alone an award above a 1 to 1 ratio). See also, *Cummings Incorporated v. BP Products North America, Inc.*, 648 F.Supp. 2d 969 (M.D. Tenn. 2009) (where there was only one reprehensibility factor, 4.89 to 1 ratio was close to if not over the line of constitutional impropriety. Thus, the acceptable ratio was lowered to 1 to 1 even though the compensatory damages award did not appear to include a punitive element); *Bridgeport Music, Inc. v. Justin Combs Publ’g*, 507 F.3d 470, 487 (6th Cir. 2007) (“where only one of the reprehensibility factors is present, a ratio in the range of 1 to 1 to 2 to 1 is all that due process will allow”); *CGB Occupational Therapy, Inc. v. RHA Health Svs., Inc.*, 499 F.3d 184, 191-92 (3d Cir. 2007) (punitive damages award reduced in part because harm was economic and only three reprehensibility factors were present); *Bach v. First Union Nat’l Bank*, 486 F.3d 150, 155-57 (6th Cir. 2007) (reducing \$2.2 million punitive damages award to \$400,000, the amount of the compensatory damages award, where only one reprehensibility factor present).

The evidence at trial did not establish that Westgate engaged in egregious or malicious conduct. The Overtons did not prevail on their primary contention of consumer fraud, *i.e.*, that Westgate fraudulently induced them to enter into a contract with the false promise that they would be guaranteed the use of a particular unit every year.

The facts of this case do not justify a departure from the presumptive 1 to 1 ratio, because this was not a case “involving death, grievous physical injury, financial ruin, or actions that endanger a large segment of the public.” *Id.* See, e.g., *Wilson v. Americare Sys.*, 2014 WL 791936 at *6 (Tenn. Ct. App. Feb. 25, 2014). In *Wilson*, the impact of the wrongdoing was the death of the patient, and multiple *Campbell* factors were clearly present. *Id.* at *6. As the trial judge stated, “The impact of the wrongdoing, put in simplest terms, is that the defendants killed the patient.” The defendant was aware of the amount of harm being caused, and budget concerns were the reason for not hiring more staff. Moreover, the staff failed to administer to the patient the prescribed dose of her medication. Employees kept fraudulent records reflecting approximately six times more doses than the patients received. Because of the magnitude of the harm caused, the Court of Appeals ruled that the size of the award did not violate the facility’s due process rights and “had no difficulty” finding that the facility’s conduct was highly reprehensible.

The Court of Appeals of Tennessee actually cited to *Wilson* as support for the punitive damages awarded in this case. (App. 29a). Westgate’s conduct simply cannot be placed in the same category of reprehensibility as cases where the defendant’s conduct results in death of a person entrusted to the defendant’s care, such as in *Wilson*. This is the twisted message that the ratio of punitive damages to compensatory damages conveys in this case, *i.e.*, that failure of full disclosure in a timeshare sale is just as reprehensible as conduct that has a high risk of killing someone.

Given the uncontroverted fact that only one *Campbell* reprehensibility factor was present, the reprehensibility guidepost cannot support a punitive damages award beyond a 1 to 1 ratio. In fact, concluding that the facts of this case warrant nearly a 16 to 1 ratio (reduced to 14 to 1) devalues cases in which such a ratio may seem justified, *i.e.*, cases involving serious injury or death.

B. *Gore* Guidepost Number Two: The Ratio of Punitive Damages to Compensatory Damages is Unduly High.

Despite being the second guidepost, the ratio of punitive damages to compensatory damages provides the “most commonly cited indicium” for assessing punitive damages. *Gore*, 517 U.S. at 581. In *Gore*, the Court made clear that “exemplary damages must bear a ‘reasonable relationship’ to compensatory damages.” *Gore*, 517 U.S. at 580. The presumptive ratio is 1 to 1, but a departure from that ratio may be appropriate where “a particularly egregious act has resulted in only a small amount of economic damages.” This is because conduct warranting punitive damages yet causing nominal economic harm would be virtually unpunished. Multiplying nominal numbers yields products that are still nominal. Departure from the presumptive ratio is also possible where “the injury is hard to detect or the monetary value of noneconomic harm might have been difficult to determine,” *Gore*, 517 U.S. at 582, for similar reasons. The Court in *Gore* also has stated that a punitive damage award of four times the amount of compensatory damages (4 to 1) is “close to the line” in terms of constitutional propriety. *Gore, supra* at 581.

Campbell went one step further and made clear that “the conduct must have a nexus to the specific harm suffered by the plaintiff.” *Campbell*, 538 U.S. at 422. In *Campbell*, this Court significantly reduced the scope of defendant conduct that a state may subject to punitive liability, and pointedly clarified the rigorous three-guidepost analysis the Court established in *Gore*, offering highly structured guidance on the outer limits of punitive damages awards. *Campbell*, 538 U.S. 408. The second *Gore* guidepost, therefore, focuses a court’s analysis on the “relationship between the penalty and the harm to the victim caused by the defendant’s actions.” *Cooper*, *supra* at 535. Even with egregious conduct, however, “few awards exceeding a single-digit ratio . . . will satisfy due process.” *Campbell* at 425.

In *Bennett v. Reynolds*, 315 S.W. 3d 867, 879-80 (Tex. 2010), the Texas Supreme Court addressed both the first and second guideposts in holding that a 4 to 1 ratio represented the constitutional limit, and noted that:

[P]ushing exemplary damages to the absolute constitutional limit in a case like this leaves no room for greater punishment in cases involving death, grievous physical injury, financial ruin, or actions that endanger a large segment of the public.” *Id.* at 879 (internal quotation marks omitted). The court also noted the importance of allowing departures from established punitive damages ratios only in particularly egregious circumstances: “If Courts fail to diligently police the ‘particularly egregious’ exception, they insulate from due process review precisely those cases where judicial review matters most:

those involving unsympathetic defendants where juries are most likely to grant arbitrary and excessive awards. Allowing a freewheeling reprehensibility exception would subvert the constraining power of the ratio guidepost.” *Id.*

Here, the disproportionately large punitive damages award was not necessary to compensate for nominal damages. The compensatory damages already are significant, especially since the award of attorneys’ fees makes those damages a net recovery to the Overtons. There is no concern that the compensatory damages are so nominal that a normal ratio is insufficient. At a ratio of nearly 14 to 1, the award does not reflect the actual harm occasioned by Westgate’s conduct.

To complete the ratio analysis here, the Tennessee Court of Appeals should have analyzed the nexus between the already substantial compensatory damages awarded for the actual harm and the amount of punitive damages. As the Opinion makes clear, the nexus between the “harm” and the punitive damages was judicially supplied, since there is no way to establish as required by *Gore* and *Campbell* that the trial court only looked at the actual harm occasioned by Westgate’s misconduct.

C. *Gore* Guidepost Number Three: Civil Penalties Imposed for Similar Conduct Do Not Support the Punitive Damage Awarded.

The final guidepost for assessing the constitutional excessiveness of a punitive damages award is the size of the award in comparison to relevant civil penalties that could be imposed for the same conduct. In evaluating

alternative sanctions, courts “should accord ‘substantial deference’ to legislative judgments concerning appropriate sanctions for the conduct at issue.” *Gore*, 517 U.S. at 583 (some internal quotation marks and citation omitted). This deference is important because it represents the only place in the analysis to consider a legislatively determined state interest in punishing certain conduct. Where the appropriate ratio is in doubt, comparable civil penalties should govern.

The Tennessee legislature has specifically provided notice of the severity of the potential civil penalty for engaging in the conduct at issue in the present case by providing that a court may award treble damages under the TCPA. *See* Tenn. Code Ann. § 48-18-109. Nothing in the TCPA provided Westgate with notice of the possibility of a \$600,000 penalty, or the even reduced \$500,000 penalty for its conduct here. *Gore*, 517 U.S. at 584. Tennessee’s legislature has determined that treble damages will sufficiently advance the state’s interest. This legislative judgment must be accorded “substantial deference,” and Westgate respectfully submits that the ceiling for statutory or common law punitive damages in the present case was three times the rescission amount (\$113,340). *Id.* In light of the foregoing, the award here was grossly disproportional and, therefore, violated substantive due process standards.

The Court of Appeals posited that a \$500,000 punitive damages award was supported because of the “prospect of criminal sanctions,” under the Time-Share Act. (App.17). On that point, this Court stated:

The existence of a criminal penalty does have bearing on the seriousness with which a

State views the wrongful action. When used to determine the dollar amount of the award, however, the criminal penalty has less utility. Great care must be taken to avoid use of the civil process to assess criminal penalties that can be imposed only after the heightened protections of a criminal trial have been observed, including, of course, its higher standards of proof. Punitive damages are not a substitute for the criminal process, and the remote possibility of a criminal sanction does not automatically sustain a punitive damages award.

Campbell, supra at 428.

Indeed, this case is an example of the misapplication of a potential criminal sanction to avoid or trump other constitutional limitations on potential damage awards. The only criminal sanctions available against Westgate for the conduct found by the trial court would be a Class C misdemeanor under the Time-Share Act. Tenn. Code Ann. § 66-32-118(b). This is the least serious crime in Tennessee, punishable by 30 days in jail, a \$50 fine, or both. Tenn. Code Ann. § 40-35-111. Another example of a Class C misdemeanor in Tennessee is public intoxication. Tenn. Code Ann. § 39-17-10. This demonstrates Tennessee's relatively light legislative approbation of violation of timeshare statutes (though to the extent the conduct may also violate the TCPA treble damages are available, but no criminal sanctions). This Court should take this opportunity to clarify that the mere fact that the most minor criminal penalty may be available does not weigh heavily or at all in a proportionality analysis. The Court of Appeals apparently believed that any potential criminal sanction, no matter how minor, makes any level of punitive

damages permissible. Other courts could be under a similar misapprehension. They should be corrected.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that this Court should grant certiorari and quash the decision of the Court of Appeals of Tennessee.

Respectfully submitted,

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