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OF WISCONSIN**

**STATE OF WISCONSIN
SUPREME COURT**

ROBERT L. KIMBLE and JUDITH W. KIMBLE,
PLAINTIFFS,

v. Appeal No. 2011AP1514

LAND CONCEPTS, INC., JOHN E. STEVENSON, AND
JANE E. STEVENSON, TRUSTEES OF THE JOHN E.
AND JANE E. STEVENSON REVOCABLE TRUST,
DORENE E. DEMPSTER and MARK F. HERRELL,
DEFENDANTS,

JOHN E. STEVENSON and JANE E. STEVENSON,
DEFENDANTS-RESPONDENTS, and
FIRST AMERICAN TITLE INSURANCE COMPANY,
DEFENDANT-APPELLANT-PETITIONER.

APPEAL FROM A DECISION OF THE
WISCONSIN COURT OF APPEALS, DISTRICT IV,
AFFIRMING THE JUDGMENT OF THE DOOR
COUNTY CIRCUIT COURT,
THE HON. D. TODD EHLERS,
CASE NO. 09-CV-188

**NON-PARTY BRIEF OF THE
WISCONSIN INSURANCE ALLIANCE, THE
WISCONSIN CIVIL JUSTICE COUNCIL, INC., AND
WISCONSIN MANUFACTURERS & COMMERCE
Wis. Stat. § (Rule) 809.19(7)**

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STATEMENT OF THE ISSUE

Did the Door County Circuit Court and the Wisconsin Court of Appeals appropriately review the jury's award of punitive damages in this case to ensure that it comports with the due process protections enshrined in the Fourteenth Amendment and the Wisconsin Constitution?

INTRODUCTION

While First American Title Insurance Company (“First American”) presents sufficient reasons in its briefs to reverse the decision of the Wisconsin Court of Appeals, the Wisconsin Insurance Alliance (“WIA”), the Wisconsin Civil Justice Council, Inc. (the “WCJC”), and Wisconsin Manufacturers & Commerce (“WMC”) (collectively, the “amici”) submit this brief to provide the Court with a broader perspective. In particular, the amici ask the Court to:

- (1) address the ambiguity in the way Wisconsin courts currently analyze punitive damages awards when constitutional issues of due process are raised;
- (2) harmonize

Wisconsin's treatment of punitive damages awards with U.S. Supreme Court jurisprudence; and, (3) require that the lower court's review of the punitive damages award in this case comport with constitutional due process guarantees under the Fourteenth Amendment and the Wisconsin Constitution. A punitive damages award of thirty-three times the actual compensatory damages simply is "grossly excessive" and unconstitutional for an insurance company's mistaken denial of insurance coverage with no egregious circumstances. Therefore, the amici respectfully request that this Court reverse the decision of the Court of Appeals.

ARGUMENT

I. THE WISCONSIN SUPREME COURT SHOULD FORMALLY ADOPT THE U.S. SUPREME COURT'S PROCEDURE FOR ANALYZING THE CONSTITUTIONALITY OF AN AWARD OF PUNITIVE DAMAGES.

This Court previously has noted that

[w]hile the language [of the due process clauses] used in the two constitutions [Wisconsin's and the United States'] is not identical ... the two provide identical procedural due process protections.

Cnty. of Kenosha v. C & S Mgmt., Inc., 223 Wis. 2d 373, 393, 588 N.W.2d 236 (1999). Because punitive damages awards “serve the same purposes as criminal penalties,” but a defendant “subjected to punitive damages in [a] civil case[] [has] not been accorded the protections applicable in criminal proceedings,” heightened concerns exist “over the imprecise manner in which punitive damages systems are administered.” *State Farm Mut. Auto Ins. Co. v. Campbell*, 538 U.S. 408, 417 (2003). The U.S. Supreme Court, accordingly, has “admonished that “[p]unitive damages pose an acute danger of arbitrary deprivation of property.” *Id.* Therefore, it is paramount that Wisconsin courts provide at least the same level of due process protection guaranteed by the Fourteenth Amendment to the U.S. Constitution.

A. This Court should clearly and unequivocally adopt *de novo* review as the proper standard to analyze the constitutionality of a punitive damages award.

The U.S. Supreme Court has held that *de novo* review is the proper standard for reviewing the constitutionality of a

punitive damages award to ensure that the award comports with Fourteenth Amendment Due Process protections. *Cooper Indus., Inc. v. Leatherman Tool Grp., Inc.*, 532 U.S. 424 (2001). In *Cooper*, the Court noted that the Fourteenth Amendment “of its own force ... prohibits the States from imposing ‘grossly excessive’ punishments on tortfeasors,” and it makes the Eighth Amendment’s prohibition against excessive fines and cruel and unusual punishments applicable to the states. *Id.* at 433-34.

This Court’s prior application of the standard of review to constitutionally suspect punitive damages awards, however, has led to ambiguity. See *Trinity Evangelical Lutheran Church v. Tower Ins. Co.*, 2003 WI 46, 261 Wis. 2d 333, 661 N.W.2d 789. In *Trinity* and other punitive damages cases, this Court has acknowledged that *de novo* review is the proper standard to review a jury award of punitive damages when the defendant contends that a punitive damage award is so excessive that it violates the defendant’s due process

rights. *Id.* at ¶ 49. The Court also has noted, however, that because punitive damages determinations are within the purview of the jury’s discretion, the Court is “reluctant” to set aside a large jury verdict. *Id.* at ¶ 46 (citing *Jacque v. Steenberg Homes, Inc.*, 209 Wis. 2d 605, 626, 563 N.W.2d 154 (1997)). These two pronouncements appear to be fundamentally at odds – either the jury determination is subject to *de novo* review or it is not.

Indeed, the Court of Appeals’ treatment of the standard of review in this case highlights this tension in Wisconsin law. The Court of Appeals acknowledged that the three-part test articulated by the U.S. Supreme Court in *Campbell*, 538 U.S. 408, and *BMW of North America, Inc. v. Gore*, 517 U.S. 559, 575 (1996), is the appropriate test to analyze the constitutionality of a punitive damages award. Citing *Trinity*, however, the Court of Appeals went on to state:

In weighing these factors against the facts of a particular case, “the evidence must be viewed in the light most favorable to the plaintiff, and a jury’s punitive damages award will not be

disturbed, unless the verdict is so clearly excessive as to indicate passion and prejudice.” When a punitive damages award is appealed as unconstitutionally excessive, we review the award de novo.

Kimble v. Land Concepts, Inc., 2012 WI APP 132, ¶¶ 40-41, 345 Wis. 2d 60, 823 N.W.2d 839 (unpublished). The Court of Appeals, tracking *Trinity*’s ambiguity, appears to have reviewed the punitive damages award under the abuse of discretion standard instead of the more rigorous, and U.S. Supreme Court-mandated, *de novo* standard. *Id.*

This Court should resolve the issue and unequivocally state that *de novo* review of punitive damages awards is mandatory when the constitutionality of the award is placed in doubt. That is the only appropriate standard to ensure that a jury award comports with constitutional due process guarantees. U.S. Supreme Court precedent on this issue is clear. This Court should embrace the same approach.

B. This Court should expressly adopt and apply the U.S. Supreme Court’s three-part test for analyzing whether a punitive damage award comports with constitutional due process guarantees.

While this Court previously has acknowledged the *Campbell* three-part test as precedent for analyzing a punitive damages award, subsequent Wisconsin cases have strayed from the *Campbell* Court’s guidance. In *Campbell*, the Court noted that Fourteenth Amendment Due Process protections require “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.” 538 U.S. at 417 (citing *Cooper Indus.*, 532 U.S. at 433 and *Gore*, 517 U.S. at 574). To effectuate the notice requirement, the Court endorsed the following three factors for a court to weigh:

- (1) the degree of reprehensibility of the defendant’s misconduct;
- (2) the disparity between the actual or potential harm suffered by the plaintiff and the punitive damages award;
- and (3) the difference between the punitive damages awarded the jury and the civil penalties authorized or imposed in comparable cases.

Campbell, 538 U.S. at 418 (citing *Gore*, 517 U.S. at 575).

While Wisconsin courts acknowledge this three-part test, they have strayed substantially from the U.S. Supreme Court's pronouncements in applying the test – in ways that jeopardize constitutional due process guarantees. Wisconsin law must be clarified to ensure that due process protections are maintained.

- 1. *A punitive damages award amounting to a large multiplier of a compensatory damages award should be subject to increased scrutiny.***

Although the *Campbell* Court declined to impose a bright-line ratio that a punitive damage award may not exceed, the Court noted that “in practice, few awards exceeding a single-digit ratio between punitive and compensatory damages, to a significant degree, will satisfy due process.” *Campbell*, 538 U.S. at 425. The Court invoked *Pacific Mutual Life Ins. Co. v. Haslip*, 499 U.S. 1 (1991), where it noted that an award of more than four times the amount of compensatory damages might be close to the line

of constitutional impropriety. *Id.* at 23-24. Wisconsin courts' dismissal of this statement as mere "dicta" is highly alarming. *See Strenke v. Hogner*, 2005 WI App 194, ¶ 24, n.14, 287 Wis. 2d 135, 704 N.W.2d 309.

The Supreme Court also has suggested that one useful guidepost for determining whether a ratio of compensatory to punitive damages is grossly excessive is to compare the statutory penalty available for the same conduct to the punitive damage award. In the instant case, the available penalty would be, at most, \$10,000 for a violation of "any insurance statute or rule of this state" under Wis. Stat. § 601.64(4). The ratio between the potential penalty and the punitive damage award in this case – 100 to 1 – clearly is unreasonable. (*c.f. Trinity Evangelical Lutheran Church v. Tower Ins. Co.*, 2002 WI App 46, ¶ 40, 251 Wis. 2d 212, 641 N.W.2d 504 (ratio 7 to 1).)

2. Damages stemming from bodily injury or violence may warrant a punitive award constituting a higher multiplier of compensatory damages than damages from breach of contract or business torts.

In *Campbell*, the Supreme Court underscored its previous pronouncement that “the most important indicium of the reasonableness of a punitive damages award is the degree of reprehensibility of the defendant’s conduct.” *Campbell*, 538 U.S. at 419 (citing *Gore*, 517 U.S. at 575). The Court clarified that this “reprehensibility analysis” requires consideration of whether the harm was physical as opposed to economic, whether the tortious conduct “evinced an indifference to or a reckless disregard of the health or safety of others,” whether “the target of the conduct had financial vulnerability,” whether the conduct was isolated or repeated, and whether “malice, trickery, or deceit” caused the harm. *Campbell*, 538 U.S. at 419. Additionally, the Court noted that

[i]t should be presumed a plaintiff has been made whole for his injuries by compensatory damages, so punitive damages should only be

awarded if the defendant's culpability, after having paid compensatory damages, is so reprehensible as to warrant the imposition of further sanctions to achieve punishment or deterrence.

Id.

This Court should adopt the U.S. Supreme Court's position that conduct involving violence or trickery is more blameworthy than non-violent acts, including negligence and breach of contract. *Gore*, 517 U.S. at 575-56. In *Gore*, the Court struck down as "grossly excessive" a punitive damages award against BMW for its failure to inform a customer that it had repainted a car before selling it as a new car, noting that the "harm BMW inflicted on Dr. Gore was purely economic in nature" and "evinced no indifference to or reckless disregard for the health and safety of others." *Id.* at 576.

The conduct of BMW, like the conduct of First American in this case, involved no possible threat of bodily harm or severe economic impact, and it stands in stark contrast to a drunk driver injuring another motorist, for example, *Strenke v. Hogner*, 2005 WI 25, 279 Wis. 2d 52,

694 N.W.2d 296, or a social worker committing repeated acts of sexual assault on his minor client, *J.K. v. Peters*, 2011 WI APP 149, ¶ 52, 337 Wis. 2d 504, 808 N.W.2d 141 (Ct. App. 2011).

3. *The wealth of the defendant does not justify an otherwise unconstitutional award of punitive damages.*

Wisconsin courts should adopt the Supreme Court's position that the "wealth of a defendant cannot justify an otherwise unconstitutional punitive damages award." *Campbell*, 538 U.S. at 427 (citing *Gore*, 517 U.S. at 585). In this case, the wealth of the defendant was one of the only factors supporting the award of punitive damages. This Court should clarify that this fact alone cannot form the basis of an excessive punitive damages award.

II. SOUND PUBLIC POLICY MILITATES AGAINST PUNITIVE DAMAGES AWARDS AMOUNTING TO MANY MULTIPLES OF COMPENSATORY DAMAGES.

Excessive punitive damage awards have the potential to create extreme financial hardship, and they are almost

impossible to plan for. Therefore, sound public policy weighs against their frequent imposition.

Many liability insurance policies contain express exclusions for punitive damage awards. Nearly all contain express exclusions for intentional acts and occurrences – the types of conduct that most frequently form the basis for punitive damages awards. Hence, insurance coverage often is unavailable to defendants subjected to punitive damages awards. Most individuals, and indeed many corporations, would have a very difficult time paying large punitive damages awards, resulting in unpredictable financial hardship to those defendants who are subjected to them.

Excessive punitive damages awards also are inherently unpredictable, making it nearly impossible for an insurance company to underwrite for the risk they pose. Furthermore, where there is no insurance, individuals and companies cannot easily budget for punitive damages. This type of uncertainty in mitigating risk is exactly why the Supreme

Court has mandated that a defendant must be on notice of the size of the monetary penalty to which he may become subject if he undertakes a certain course of conduct.

Because punitive damage awards many times greater than the underlying harm are, by their very nature, extremely difficult to predict with precision, it is extremely difficult to provide defendants with constitutionally required notice of the types of conduct for which they may become subject to such an award and how large that award may be. *Cooper Indus.*, 532 U.S. at 433; *Gore*, 517 U.S. at 562.

The Wisconsin Legislature agrees. With 2011 Act 2, the Legislature created Wis. Stat. § 895.043(6), reigning in awards of excessive punitive damages.

(6) Limitation on Damages. Punitive Damages received by the plaintiff may not exceed twice the amount of any compensatory damages recovered by the plaintiff or \$200,000, whichever is greater.

Wis. Stat. § 895.043(6). This new statutory limitation on punitive damages applies to actions commenced on or after February 1, 2011. Unfortunately, it does not apply to actions

already in the pipeline as of the effective date, including this case. For those lawsuits not covered by 2011 Act 2, this Court should scrutinize excessive punitive damage awards based on state and federal due process protections.

III. AN INSURANCE COMPANY’S DENIAL OF COVERAGE, MADE AFTER A REASONED THOUGH INCORRECT ANALYSIS, THAT RESULTS IN NO PHYSICAL INJURY, IS NOT PROPERLY THE BASIS FOR EXCESSIVE PUNITIVE DAMAGES UNDER U.S. SUPREME COURT JURISPRUDENCE.

A. Punishment via punitive damages awards many times greater than compensatory damages is not constitutionally sound for an incorrect coverage denial, not part of a larger pattern of misconduct, that does not result in bodily injury.

The purpose of punitive damages is to punish “the defendant and ‘to deter others from like conduct.’” *Kink v. Combs*, 28 Wis. 2d 65, 81, 135 N.W.2d 789 (1965) (quoted source omitted). Punishment is not appropriate in most cases of misconduct, nor even in all cases involving bad faith. In fact, this Court expressly has cautioned that a bad faith cause of action does not necessarily warrant punitive damages.

Wangen v. Ford Motor Co., 97 Wis. 2d 260, 294 N.W.2d 437 (1980) (superseded by statute on other grounds). As previously discussed, punishment is typically appropriate only in circumstances where bodily injury or extreme reckless disregard for the rights of another is evinced. *See Strenke*, 2005 WI App 194; *Gore*, 517 U.S. 559. *Trinity*, in particular, is distinguishable from this case because it involved an insurance company that was told by the Wisconsin Supreme Court 30 years prior what to do in the event of a situation of mutual mistake, and it did not follow the Court's instruction. *Trinity*, 251 Wis. 2d 212, ¶ 26. In a case such as this one, where bodily injury, reckless disregard, or other egregious circumstances do not underlie the defendant's conduct, excessive punitive damages simply are not appropriate nor constitutionally sound.

B. An insurer already has a strong incentive to properly analyze coverage and, thus, there is no need for additional deterrence.

The objective of deterrence is not served by permitting punitive damages awards far in excess of the contract damages against insurance companies who incorrectly deny coverage. Insurance companies already have a strong incentive to properly analyze coverage under their policies because, if they refuse coverage and are later found to have breached their duty to provide coverage, the insurance company may have to pay damages necessary to put the insured in the same position he would have been in had the insurance company fulfilled the insurance contract – irrespective of policy limits. *Newhouse v. Citizens Sec. Mut. Ins. Co.*, 176 Wis. 2d 824, 838, 501 N.W.2d 1 (1993).

In light of the harsh consequences in Wisconsin for an insurer who breaches its coverage obligations, no additional deterrence is necessary to encourage an insurer to comply with its legal duties.

CONCLUSION

For the reasons stated above and based on the entire record in this action, the Wisconsin Insurance Alliance, the Wisconsin Civil Justice Council, Inc., and Wisconsin Manufacturers & Commerce respectfully request that this Court reverse the decision of the Court of Appeals.

Dated this 26th day of November, 2013.

Respectfully submitted,

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By:

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CERTIFICATION

I hereby certify that this brief conforms to the requirements of Wis. Stat. §§ 809.19(8)(b) and (c), for a brief produced with a proportional font. The length of this brief is 2,756 words.

Dated: November 26, 2013.

s/ James A. Friedman
James A. Friedman

**CERTIFICATION OF COMPLIANCE WITH
RULE 809.19(12)**

I hereby certify that:

I have submitted an electronic copy of this brief, which complies with the requirements of Wis. Stat. § 809.19(12). I further certify that:

This electronic brief is identical in content and format to the printed form of the brief filed as of this date.

A copy of this certificate has been served with the paper copies of this brief filed with the Court and served on all opposing parties.

Dated: November 26, 2013.

s/ James A. Friedman
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