APPEALS OF PUNITIVE DAMAGES AWARDS

September 13, 2018

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Introduction

The first appeal of a punitive damages award in Georgia occurred 165 years ago. In 1852, a jury returned a verdict for Isaac McCrary in the amount of $1,049 for the intentional seduction of his 21-year-old daughter. Defendant moved for a new trial arguing that plaintiff had only proven actual damages in the amount of forty-nine dollars – the balance of the award was some form of "vindictive" damages. The trial court denied the motion for new trial.

On appeal Justice Lumpkin, writing for the Supreme Court of Georgia, held that the Court would not limit the "vindictive" damages awarded by the jury.

> *It has been truly said, that more instructive lessons are taught in Courts of Justice, than the Church is able to inculcate. Morals come in the cold abstract from the pulpit; but men smart under them practically, when Juries are the preachers.*

Kendrick v. McCrary, 11 Ga. 603, 606 (1852) (emphasis added). With this holding, punitive damages firmly took their place in Georgia law.

There are many appellate issues that arise from punitive damages decisions by trial courts and juries. The most fruitful grounds for reversing a punitive damages award (and thus the grounds that should be anticipated and prepared for by plaintiffs) include:

A) The claim proven was not a tort claim;

B) The tort was one such as a simple negligence that cannot sustain an award of punitive damages;

C) No compensatory damages were proven/awarded;

D) Failure to specifically request punitive damages in the pleadings;

E) Jury charge errors;

F) Improper arguments;

G) Lack of bifurcation;

H) Exceeding the cap – specific intent to cause harm;

I) Common law excessiveness;

J) Constitutional excessiveness.

A. Punitive Damages Available in Tort Actions Only

Punitive damages are restricted to tort claims. O.C.G.A. § 51-12-5.1(b).[1] There are a number of appellate decisions overturning punitive damages awards because the claim on which the plaintiff prevailed before the jury was not a tort claim – even if it was denominated as one. *See ServiceMaster Co. v. Martin*, 252 Ga. App. 751, 757 (2001) (reversing $135 million punitive damages verdict after concluding the duty breached was contractual in nature: "It is well settled that punitive damages are not available in breach of contract claims."); *Howell v. Normal Life of Georgia, Inc.*, 2016 Ga. App. LEXIS 405 (Ga. Ct. App. July 7, 2016) ("Punitive damages are not available in actions for breach of contract."); *Trust Co. Bank v. Citizens & S. Trust Co.*, 260 Ga. 124, 126 (1990) (reversing trial court on grounds that "[p]unitive damages are not available in actions for breach of contract."); *McDuffie v. Argroves*, 230 Ga. App. 723, 726 (1998) ("punitive damages are not authorized in cases asserting a breach of

[1] In addition to O.C.G.A. § 51-12-5.1, there are other sections of the Georgia Code that expressly allow recovery for statutory violations. For example, the Fair Business Practices Act authorizes punitive damages in addition to mandating treble damages for intentional violations. *Conseco Fin. Servicing Corp. v. Hill*, 252 Ga. App. 774 (2001).

contract"); *Geiger v. Ga. Farm Bureau Mut. Ins. Co.*, 305 Ga. App. 399, 403 (2010) ("This is true even in situations where the contract is breached in bad faith, where the courts have consistently held that punitive damages are not available because there has been no tort."). There are many more cases overturning punitive damages because plaintiffs did not identify or prove a tort duty. However, this does not always preclude an award of punitive damages in an action arising out of a contract, if the breach of contract also constitutes a tort. *Thomas v. Atlanta Cas. Co.*, 253 Ga. App. 199 (2001). "A plaintiff in a breach of contract case has a tort claim only where, in addition to breaching the contract, the defendant also breaches an independent duty imposed by law." *Lancaster v. Storage USA P'ship, L.P.*, 300 Ga. App. 567, 570 (2009). *See Taylor v. Powertel, Inc.*, 250 Ga. App. 356 (2001) (if breach of contract also constitutes a breach of public duty, punitive damages may be recovered as tort, not contract, damages).

The punitive damages verdict also goes away if a verdict for the plaintiff on a valid tort theory is reversed, leaving only an affirmed verdict on a contract claim. *See, e.g., Cline v. Lee*, 260 Ga. App. 164, 169-70 (2003) ("we reverse the jury's verdict with regard to the fraud claim. And because that leaves only the breach of contract claim, we also reverse the award of punitive damages. It is well settled that punitive damages are not available in breach of contract claims.").

The plaintiff seeking punitive damages in a case in which there is a contractual relationship should take extra care to identify, argue and support with evidence the existence of a duty imposed by law independent of the contract.

In *Lyman v. Cellchem International, Inc.*, 300 Ga. 475 (2017), punitive damages were awarded in a case that included traditional tort claims, and a statutory claim for violation of the Georgia Computer Systems Protection Act ("GCSPA"). The GCSPA allows the recovery of "any damages sustained" by violation of the act. Unlike some other statutes discussed by the Supreme Court, it does not mention punitive damages. The Court held that punitive damages were not compensatory and thus were not "sustained" by a plaintiff but rather "imposed" upon a defendant. Thus, punitive damages were not available for a violation of the GCSPA. This was not a holding that punitive damages are not available for statutory causes of action. Rather, the Court required a textual analysis of the statute to reach the conclusion that no punitive damages were available under this statute.

B. Mere Negligence Not Enough – Aggravation Is Required

Not all torts will support a claim for punitive damages. A finding of negligence, even gross negligence, is insufficient to support a claim for punitive damages. *Southern Ry. Co. v. O'Bryan*, 119 Ga. 147, 148-49 (1903). Thus, the record before the court, at the summary judgment stage, or the evidence adduced at trial must demonstrate willful or malicious conduct, or conduct demonstrating an entire want of care and an indifference to consequences, to authorize recovery of punitive damages. *Segars v. Cleland*, 255 Ga. App. 293 (2002).

For example, in *Langlois v. Wolford*, the court held that the defendant's conduct in leaving the scene of a collision without even speaking to the other party, as mandated by statute, was an intentional and culpable act. This conduct demonstrated a conscious indifference to the consequences and an entire want of care as to the victim's well-being

permitting the jury to find that such conduct was of an aggravated and indifferent nature for purposes of imposing punitive damages. 246 Ga. App. 209 (2000). *See also Middlebrooks v. Hillcrest Foods, Inc.*, 256 F.3d 1241 (11th Cir. 2001) (holding that restaurant cook's actions directed against plaintiff customers, including using profanity and a racial epithet, calling the police, and having plaintiffs removed from the restaurant, were the sort of willful misconduct that suffices to present a jury question on whether plaintiffs were entitled to punitive damages).

"In automobile collision cases decided under [O.C.G.A. § 51-12-5.1], punitive damages are not recoverable where the driver at fault simply violated a rule of the road." *Carter v. Spells,* 229 Ga. App. 441, 442 (1997) (citation omitted). However, "punitive damages are recoverable under the statute where the collision resulted from a pattern or policy of dangerous driving," such as driving while intoxicated or speeding excessively. *Id. See also Miller v. Crumbley*, 249 Ga. App. 403 (2001).

While punitive damages are restricted to tort claims, something more than the mere commission of a tort is necessary for their imposition. Punitive damages cannot be imposed without a finding of culpable conduct based upon either intentional and willful acts, or acts that exhibit an entire want of care and indifference to consequences. *MDC Blackshear, LLC v. Littell,* 273 Ga. 169 (2000) (holding that while trespass was intentional tort, evidence did not show clearly and convincingly that trespass occurred in wanton disregard for plaintiff's property rights); *Fulton v. Anchor Sav. Bank, FSB,* 215 Ga. App. 456 (1994); *Lewis v. Suttles Truck Leasing,* 869 F. Supp. 947 (S.D. Ga. 1994); *Howard v. Alamo Corp.,* 216 Ga. App. 525 (1995)*; Brown v. StarMed Staffing, L.P.*, 227 Ga. App. 749 (1997).

C. Punitive Damages Cannot Be Awarded Without Compensatory Damages

Punitive damages cannot be awarded in the absence of some award of compensatory damages. A finding of liability for a tort without the award of damages, and even a grant of injunctive relief, is not sufficient to support an award of punitive damages. Many appellate decisions reverse punitive damages awards where no compensatory damages are awarded, or where the award of compensatory damages is reversed on appeal:

> [T]he trial court awarded no compensatory damages. "[Punitive] damages cannot be awarded in the absence of any finding of compensatory damages." Although Virlyn Martin was awarded injunctive relief, "[t]here can be no recovery of [punitive] damages where the sole recovery is in equity." "In accordance with O.C.G.A. § 51-12-5.1, punitive damages can only be awarded as additional damages." Because the trial court awarded no monetary damages, the award of punitive damages was improper as a matter of law. The award of punitive damages is reversed.

Martin v. Martin, 267 Ga. App. 596, 597-98 (2004). *See Southern Gen. Ins. Co. v. Holt*, 262 Ga. 267, 270 (1992) ("'Punitive damages may not be recovered where there is no entitlement to compensatory damages'"); *Kilburn v. Patrick*, 241 Ga. App. 214, 218 (1999) ("As the jury awarded no actual damages on the breach of fiduciary duty claim, the only damages awarded stemmed from the conversion claim. As we reversed the directed verdict on conversion, the award of punitive damages and attorney fees cannot stand."); *Howell v. Normal Life of Georgia, Inc.*, 2016 Ga. App. LEXIS 405 (Ga. Ct. App. July 7, 2016) ("Because the plaintiff could not succeed on her substantive claims for negligence and breach of contract, her claims for punitive damages and attorney fees also failed as a matter of law.")

However, the *extent* of the actual tort injury and damages awarded to the plaintiff is not dispositive. Even where a fact finder may find that a plaintiff is entitled to only a nominal award for actual tort damages, this finding does not prohibit a punitive damages award. *See McClure v. Gower*, 259 Ga. 678 (1989) (allowing $1,500 in punitive damages, even though jury had returned verdict of only $33 in actual damages); *Tyler v. Lincoln*, 272 Ga. 118 (2000) (reversing trial court's grant of summary judgment although plaintiffs had not presented evidence of specific amount of damage at summary judgment stage holding that even where actual damages may be small, punitive damages are still recoverable).

D. Pleading Requirements

An award of punitive damages must be specifically prayed for in the complaint. O.C.G.A. § 51-12-5.1(d)(1). Although it may be difficult to believe this would come up, appellate courts will reverse a punitive damages verdict if there was no prayer for punitive damages in the pleadings prior to trial. This includes not only a request for punitive damages in the *ad damnum* clause, but pleading the aggravating facts which would justify such an award:

> "Punitive damages must be specifically prayed for in [the] complaint," which must be more than a mere prayer for punitive damages in the ad damnum. O.C.G.A. § 51-12-5.1(d)(1); "We cannot affirm an award of punitive damages in which the trial court declined to follow the procedures and standards now required by O.C.G.A. § 51-12-5.1, awarded punitive damages against [the defendant] to a party who did not pray for them." "[The plaintiff] is not entitled to punitive damages because the complaint's prayer for relief contained no specific prayer for punitive damages (O.C.G.A. § 51-12-5.1(d)(1)) on his behalf from [the defendant]." The complaint must set forth a claim for punitive damages as well as the aggravating circumstances which authorize such damages. Thus, the complaint must set forth facts that bring the claim within the aggravating circumstances authorized by statute, i.e., "willful misconduct, malice,

> fraud, wantonness, oppression, or that ... want of care which would raise the presumption of conscious indifference to consequences." O.C.G.A. § 51-12-5.1(b); In this case, punitive damages were not properly pled nor prayed for in the complaint.

Lawrence v. Direct Mortg. Lenders Corp., 254 Ga. App. 672, 683 (2002) (some internal citations omitted). *See Ticor Constr. Co. v. Brown*, 255 Ga. 547 (1986) (holding that defendant in default who had been put on notice that plaintiff was originally bringing suit for negligence could not be held to have consented to an amendment of the pleadings that would have supported an award of punitive damages). *See also Brandenburg v. All-Fleet Refinishing, Inc.*, 252 Ga. App. 40 (2001) (holding that exemplary damages prayed for under the Georgia Trade Secrets Act, unlike O.C.G.A. § 51-12-5.1(d)(1), does not require that punitive damages be specifically asked for in the complaint). The complaint must also contain factual allegations, which if true, would warrant the imposition of punitive damages.

If the plaintiff fails to put the prayer in the initial complaint, plaintiff may amend the complaint to cure that defect up to the day of trial if a pretrial order has not been entered. O.C.G.A. § 9-11-14. *See Lawrence*, 254 Ga. App. at 683 ("punitive damages were not properly pled nor prayed for in the complaint, which is an amendable defect").

In 2017, the Court of Appeals upheld an award of punitive damages against a conservator appointed by the court. A substitute temporary conservator accused the original conservator of wrongdoing, but did not request punitive damages. The conservator appealed the punitive damages award "because punitive damages were not specifically pled in the relief sought by the substitute temporary conservator." *In re Estate of Gladstone*, 341 Ga. App. 72, 76 (2017). The Court of Appeals noted that the

trial court had informed the conservator that it was considering imposing "damages or other redress." The trial court also cited a statute allowing for "sanctions" but which was silent as to punitive damages. The Court of Appeals held that given this notice, "compliance with the procedural requirements of O.C.G.A. § 51-12-5.1(d) was not necessary."

E. Jury Charge Errors

There are a number of jury charge issues which frequently arise in appeals from punitive damages verdicts.

In Phase I of a bifurcated trial, the jury should be instructed, *inter alia,* (a) the standard for the imposition of punitive damages; (b) that they are not to set an amount for the punitive damages at that time; (c) that the imposition of punitive damages must be based upon clear and convincing evidence; and (d) a definition of "clear and convincing evidence." Some courts have given the clear and convincing evidence charge only in Phase II.

A trial court should define the clear and convincing evidence standard at the end of the first phase of the trial *before* the jury has to apply the standard in determining whether punitive damages are appropriate. *Wal-Mart Stores, Inc. v. Johnson,* 249 Ga. App. 84 (2001), *overruled in part on other grounds by* 295 Ga. App. 326; *H & H Subs, Inc. v. Lim,* 223 Ga. App. 656, 658-59 (1996); *General Motors Corp. v. Moseley,* 213 Ga. App. 875, 885 (1994). A "clear and convincing" charge does not apply only to Phase II.

Another charge error that has arisen multiple times is the failure to charge the definition of specific intent to cause harm to get past the $250,000 cap imposed by O.C.G.A. § 51-12-5.1(g). "[W]e take this opportunity to adopt henceforth a bright line

rule requiring a party to request both a charge on specific intent to cause harm and a separate finding of specific intent to cause harm by the trier of fact in order to avoid the cap on punitive damages." *McDaniel v. Elliott*, 269 Ga. 262, 265 (1998). This charge error is subject to a special rule of preservation (or non-preservation) – no objection or post-trial motion is required to allow the defendant to raise this issue on appeal if the punitive damages verdict exceeds $250,000.

> Pretermitting whether or not Quay properly objected to the alleged omission/error at trial or raised the issue in a timely post-judgment motion, the bright line rule announced in McDaniel means that failure to object to the absence or inadequacy of a specific intent charge or finding does not constitute a waiver of the error for the purpose of appellate review. Because the claimant for punitive damages bears the burden of meeting the procedural requirements of OCGA § 51-12-5.1(g), a verdict for punitive damages in excess of $ 250,000 may not stand unless the record reflects both a request to charge on specific intent to cause harm and a separate finding of specific intent to cause harm by the trier of fact.

Quay v. Heritage Fin., Inc., 274 Ga. App. 358, 361 (2005).

Another charge error which arises in punitive damages cases is where the jury is instructed on the statutory scheme for the distribution or limitation of punitive damages. Under O.C.G.A. § 51-12-5.1(g), punitive damages in non-products liability cases are limited to a maximum of $250,000 for any tort action, unless the properly instructed jury finds that "the defendant acted, or failed to act, with the specific intent to cause harm." *Alta Anesthesia Assocs. of Ga., P.C. v. Gibbons*, 245 Ga. App. 79, 89 (2000). And, under O.C.G.A. § 51-12-5.1(e), 75 percent of punitive damages awards in products liability cases are paid to the state.

In *Ford v. Uniroyal Goodrich Tire Co.*, 267 Ga. 226 (1996), the court held that the requirement in O.C.G.A. § 51-12-5.1(e) that 75 percent of punitive damages awards

in products liability cases be paid to the state is an improper subject for a jury instruction. Such a jury instruction is improper because the *distribution* of a punitive damages award injects prejudicial issues that are irrelevant to the purpose of punitive damages – to penalize, punish and deter the wrongdoer. Although no appellate opinion directly so holds, it seems probable that the same logic would be applied to a jury instruction as to the $250,000 cap under O.C.G.A. § 51-12-5.1(g). It would be risky to instruct a jury as to the existence of the cap or the reason that they are being asked to answer the jury interrogatory as to specific intent to cause harm. *But see Rolleston v. Estate of Sims*, 253 Ga. App. 182, 187 (2001) (trial court instructed jury on $250,000 cap – verdict affirmed but objection to jury instruction not made or argued).

Other issues that have arisen as to jury instructions during Phase II include whether or not the jury should be told about certain tax implications involving punitive damage awards. In *Ford*, the Georgia Supreme Court held that it is improper to instruct the jury that it should consider the fact that defendants would have to pay tax on punitive damages. 267 Ga. at 230-32.

F. Improper Argument of Counsel

Arguments made by counsel can present a practitioner with appealable issues. For example, it is improper to argue that any punitive damages assessed against the defendant would not be paid by it, but would be paid by numerous reinsurers who were not parties to the case. *Myrick v. Stephanos,* 220 Ga. App. 520 (1996). However, it is entirely appropriate for a defendant to argue, during Phase II, that punitive damages are unnecessary due to a large compensatory award already made by the jury. *Ford*, 267 Ga. 226.

In *Shaw v. Brannon*, 253 Ga. App. 673, 674-75 (2002), the Georgia Court of Appeals indicated that, in making a closing argument that addresses whether compensatory damages should be awarded, counsel should not make a "send a message" argument. The court indicated that the making of such an argument is "tantamount to requesting punitive damages." *Id.* at 674. The court implies, therefore, that a "send a message" closing argument is appropriate in the punitive damages context.

In *Vineyard v. County of Murray*, 990 F.2d 1207, 1213-14 (11th Cir. 1993), a section 1983 excessive force case, the Eleventh Circuit concluded that the district court's cautionary instruction to the jury cured the defect caused by plaintiff's improper "send a message" closing argument. The plaintiff had argued to the jury that it should award punitive damages to send a message "to everybody in Murray County," including the politicians, the sheriff, and the deputies there. *Id*. at 1213. Upon defense counsel's objection, the district court instructed the jury that, with respect to punitive damages, "**the purpose of a verdict is not really to send messages out generally to people**," but to punish a specific defendant. *Id*. at 1214 (emphasis added).

More generally, in *Myrick v. Stephanos*, 220 Ga. App. 520, 523 (1996), the Georgia Court of Appeals ruled that the plaintiff should not make a "Golden Rule" argument to the jury, that is, an argument that "urges the jurors to place themselves in the position of plaintiff or to allow such recovery as they would wish if in the same position." *Id*. The opinion, however, does not differentiate closing arguments that address whether compensatory damages should be awarded from closing arguments that address whether punitive damages should be awarded.

In another case with application both to compensatory and punitive damages arguments, *Stoner v. Eden*, 199 Ga. App. 135, 136-37 (1991), the Georgia Court of Appeals stated that it was improper for defense counsel, during closing argument, to inform the jury that plaintiff's counsel was representing plaintiff on a contingency basis and that plaintiff's counsel would get "a piece of th[e] pie" of any damages awarded. The court noted that the defense counsel's comment "had no relevance to any issue of liability or damages in the case." *Id*. at 137.

G. Failure to Bifurcate

O.C.G.A. § 51-12-5.1(d), expressly requires a bifurcation of the punitive damages issues. The statute provides:

> (d)(1) ... In any case in which punitive damages are claimed, the trier of fact shall first resolve from the evidence produced at trial whether an award of punitive damages shall be made. This finding shall be made specially through an appropriate form of verdict, along with the other required findings.
>
> (2) If it is found that punitive damages are to be awarded, the trial shall immediately be recommenced in order to receive such evidence as is relevant to a decision regarding what amount of damages will be sufficient to deter, penalize, or punish the defendant in light of the circumstances of the case.

In a bifurcated trial, the issues for the first phase are liability, the amount of compensatory damages, and liability for punitive damages. The amount of punitive damages is to be determined in the second phase. *Webster v. Boyett*, 269 Ga. 191, 193 (1998). The issue of specific intent to cause harm is generally determined in the second phase.

Plaintiffs should be aware that if a trial court fails to comply with the procedural requirements of O.C.G.A. § 51-12-5.1(d), by not holding a bifurcated hearing to consider

the amount of punitive damages to be awarded, there must be an objection raised as to this deficiency or the error will be deemed waived. *Lawrence,* 254 Ga. App. 672; *Shaw v. Ruiz,* 207 Ga. App. 299, 300 (1993); *Wal-Mart Stores, Inc. v. Forkner,* 221 Ga. App. 209, 210 (1996). To preserve the right to a bifurcated trial, a party must request bifurcation or object to the court's refusal to bifurcate.

The questions to be answered in Phase II (the "punitive damages phase") are the amount of punitive damages and, if requested and appropriate, the question of the existence of specific intent to cause harm. The amount of punitive damages is generally left to the enlightened consciences of fair and impartial jurors.[2] However, that "enlightened conscience" is now subject to intense trial court scrutiny and "*de novo*" appellate review. Preparing to survive that review as a plaintiff and to overturn or reduce a punitive damages verdict through that review as a defendant are crucial parts of the trial of Phase II of a punitive damages case, as discussed in detail below.

Phase II is to follow immediately upon the conclusion of Phase I. O.C.G.A. § 51-12-5.1(d)(2). Each party is entitled to make a closing argument during Phase II. *McClure v. Gower,* 259 Ga. 678 (1989). Presumably, and as a matter of practice, each party is entitled to an opening statement. Evidence previously admitted in Phase I need not be re-tendered. The jury should be charged at the conclusion of Phase II. The entire charge need not be repeated.

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[2]*Head v. John Deere Plow Co.,* 71 Ga. App. 276 (1944).

H. Exceeding the Cap – Specific Intent to Cause Harm

Both trial courts on motions for remittitur and the appellate courts on appeal are frequently asked to review punitive damages awards for alleged excessiveness. That excessiveness can take three forms – (1) a punitive damages verdict in excess of the statutory cap without the required finding of specific intent to cause harm and sufficient evidence to support that finding; (2) "common law excessiveness" – the punitive damages award exceeds the amount justified by the evidence and/or is the product of prejudice or bias; (3) constitutional excessiveness – the punitive damages award exceeds the amount allowed by the Constitution.

As set forth above, in non-products liability cases, punitive damages are limited to $250,000 in the absence of a finding of "specific intent to cause harm" and evidence to support that finding. O.C.G.A. § 51-12-5.1(g). The existence of the required finding is now a "bright line" without which any punitive damages award in excess of the cap will fail. The existence of specific intent need be proven only by a preponderance of the evidence, not clear and convincing evidence. *Kothari v. Patel*, 262 Ga. App. 168, 173-74 (2003). The existence of sufficient evidence to support a finding of specific intent to cause harm is reviewed under the "any evidence" standard. *Brewer v. Insight Tech., Inc.*, 301 Ga. App. 694 (2009).

The evidence sufficient to support a finding of specific intent must be evidence that the defendant "desires to cause consequences of his act, or that he believes that the consequences are substantially certain to result from it. On the other hand, the mere knowledge and appreciation of a risk, short of a substantial certainty, is not the equivalent of intent." *J. B. Hunt Transp. v. Bentley*, 207 Ga. App. 250 (1992). "A

finding of specific intent to cause harm may not be based on the rebuttable presumption that a person of sound mind and discretion is presumed to intend the natural and probable consequences of his acts as set forth in O.C.G.A. § 16-2-5." *Wal-Mart Stores v. Johnson*, 249 Ga. App. at 89.

The most recent analysis of this requirement is in *McGinnis v. Am. Home Mortg. Servicing, Inc.*, No. 17-11494, 2018 U.S. App. LEXIS 23596, at *17 (11th Cir. Aug. 22, 2018). The Eleventh Circuit (Branch, J.) held in a wrongful foreclosure case that specific intent to cause harm was supported by the evidence. The *McGinnis* court set forth the standard:

> Specific intent to cause harm exists where an actor desires to cause the harm resulting from his or her actions or believes that the resulting harm is substantially certain to result from his or her actions. *Action Marine*, 481 F.3d at 1313. In other words, specific intent can be established by showing that the actor engaged in a course of conduct even though he or she believed the conduct was almost certain to cause harm.

Id. The Court then found the standard was met by looking at four facts: (1) the defendant "knew its escrow analysis was in error yet proceeded to demand payment repeatedly without explanation and then foreclose;" (2) "putting [plaintiff's] payments in a suspense account from which it 'deducted, as its own income, late fees and other expenses' [that] were not in fact owed;" (3) a large volume of adversarial threats from the lender combined with communications from plaintiff complaining of stress and harm to her reputation; and, (4) "offering" to stop the foreclosure only if plaintiff paid all amounts claimed, including amounts not actually due. *Id*. at **17-20.

I. Common Law Excessiveness

A non-constitutional claim that a punitive damages award is excessive is reviewed "under an abuse of discretion standard," *Ga. Clinic, P.C. v. Stout*, 323 Ga. App. 487, 494 (2013), despite the adoption of a *de novo* standard of review for constitutional excessiveness claims. *Time Warner Entm't Co. v. Six Flags over Ga.*, 254 Ga. App. 598, 602 (2002). "When an appellant has not raised a federal constitutional due process claim, however, we apply state common law criteria for determining whether a punitive damages award is excessive." *Id.* at 603. An award of punitive damages will not be disturbed on appeal under a common law challenge unless it is "so excessive or inadequate as to shock the judicial conscience." *Clarke v. Cotton*, 207 Ga. App. 883, 883-84 (1993).

This test, which has been applied to damages awards based on jury verdicts generally, has a very long history and has been more fully elaborated thus:

> Before the verdict will be set aside on the ground that it is excessive, where there is no direct proof of prejudice or bias, the amount thereof, when considered in connection with all the facts, must shock the moral sense, appear exorbitant, flagrantly outrageous, and extravagant. It must carry its death warrant upon its face. Although a verdict may be large and generous, where the evidence abundantly authorized a finding for the plaintiff, this court does not feel authorized under the law to set the verdict aside on the sole ground that it is excessive, there being nothing in the record to indicate prejudice or bias on the part of the jury, and the verdict having been approved by the trial judge.

Time Warner Entm't Co., 254 Ga. App. at 604.

Although, as discussed below, the ratio of punitive damages to compensatory damages plays a major role in reviews for alleged constitutional excessiveness, it is not so important in reviews for alleged common law excessiveness:

> In Georgia, the purpose of punitive damages is to deter the repetition of reprehensible conduct by the defendant. OCGA § 51-12-5.1 (c). "Because deterrence is based on factors other than the actual harm caused, the Supreme Court of Georgia rejected the notion that punitive damages must necessarily bear some relationship to the actual damages awarded by the jury." ... Although we do not mechanically look to the ratio between general and punitive damages to resolve the question of excessiveness, that ratio is some evidence of whether the jury's award was infected by undue prejudice or bias.

Ga. Clinic, P.C., 323 Ga. App. at 493-94.

J. Constitutional Excessiveness

Appellate review of a punitive damages award for alleged constitutional excessiveness is controlled by three cases decided by the United States Supreme Court: *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559 (1996) ("*BMW*"); *Cooper Indus., Inc. v. Leatherman Tool Group, Inc.*, 532 U.S. 424 (2001) ("*Cooper*"); and, *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408 (2003) ("*State Farm*").

1. *BMW* Established Three "Guideposts" for Assessing Punitive Damages

Appellate courts are frequently asked to review punitive damages judgments for alleged constitutional excessiveness. The watershed case is *BMW*, 517 U.S. 559. In *BMW*, the Alabama jury awarded Dr. Gore $4,000 in compensatory damages and $4 million in punitive damages because BMW did not inform him that they repainted his "new" car after it sustained acid rain damage. The resulting ratio of punitive to compensatory damages was 1000:1.[3] Even after Alabama appellate courts cut the punitive damages award in half, a significant disparity between the punitive and compensatory damages remained – a 500:1 ratio. The Supreme Court held that "[t]he

[3] 517 U.S. at 562.

Due Process Clause of the Fourteenth Amendment prohibits a State from imposing a 'grossly excessive' punishment on a tortfeasor" and held the punitive damages award unconstitutional.[4] The facts of the case, as well as the lack of particularly reprehensible conduct, could not sustain a 500:1 ratio of punitive to compensatory damages.[5]

The Court's holding in *BMW* established the above-mentioned three constitutional "guideposts" for evaluating allegedly excessive punitive damage awards under the Constitution's Due Process Clause.[6] The "guideposts" include:

> the degree of reprehensibility of the [defendant's conduct]; the disparity between the harm or potential harm suffered by [the plaintiff] and his punitive damages award; and the difference between this remedy and the civil penalties authorized or imposed in comparable cases.[7]

None of the three guideposts are to be dispositive or mandatory. Rather, the Court envisioned weighing each against the others and intentionally selected the "guidepost" terminology.

The term "guideposts" does not connote or suggest a cumulative series of three "tests" or "elements" which must each be met. "Rather, ... the three guideposts [are] (a) considerations to be expressly taken into account in order to give coherence and some degree of structure to the Due Process analysis of quantum of punitive damages and (b) a multifactor balancing test in which the three guideposts might give contradictory indications which must be weighed against one another to achieve a final result."[8]

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[4] *Id*.

[5] *Id*. at 581-82.

[6] *Id*. at 575.

[7] *Id*.

[8] *In re New Orleans Train Car Leakage Fire Litig.*, 795 So. 2d 364, 386-87 (La. App. 2001), *cert. denied*, 538 U.S. 944 (2003) (affirming $850 million punitive damages

The first, and "most important" of the three guideposts, is the degree of reprehensibility of the defendant's conduct.[9] The Constitution permits larger punitive damage awards against defendants with a higher level of culpability. As the "most important" guidepost, courts are to give reprehensibility the greatest weight. Certain aggravating factors, such as intentional torts,[10] repeated misconduct, or a course of misconduct over years,[11] fraudulent conduct,[12] lying or destroying evidence to hide misconduct or evil motive,[13] and misconduct by a defendant in a fiduciary capacity,[14] allow courts and juries to impose larger punitive damage awards. These aggravating factors enhance reprehensibility because they "provide relevant support for an

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award despite fact that third guideposts counseled a substantial reduction of award). *See also Swinton v. Potomac Corp.*, 270 F.3d 794, 820 (9th Cir. 2001), *cert. denied*, 535 U.S. 1018 (2002) (where analysis of third guidepost counsels reducing punitive damages award and analysis of first and second guideposts counsels leaving verdict intact, court weighs the competing factors and does not reduce punitive award).

[9] "[T]he most important *indicium* of the reasonableness of a punitive damages award is the degree of reprehensibility of the defendant's conduct." *BMW*, 517 U.S. at 575.

[10] Particularly reprehensible conduct includes "acts of affirmative misconduct." *BMW*, *id.*, at 606.

[11] *BMW*, *id.* at 576-77 ("evidence that a defendant has repeatedly engaged in prohibited conduct while knowing or suspecting that it was unlawful would provide relevant support for an argument that strong medicine is required to cure the defendant's disrespect for the law."); *Johansen v. Combustion Eng'g, Inc.*, 170 F.3d 1320, 1336 (11th Cir. 1999) (greater punitive damages would be authorized against "a recidivist that continually repeats certain misconduct.").

[12] Particularly reprehensible conduct includes "deliberate false statements." *BMW*, 517 U.S. at 606. *See Jordan v. Shaw Indus.*, No. 6:93CV542, 1996 U.S. Dist. LEXIS 17917, at *63 (M.D.N.C. Aug. 13, 1996) (intentional misrepresentations constituted particularly reprehensible conduct under *BMW* and justified punitive damages in ratio of 488:1 to compensatory damages), *aff'd*, 1997 U.S. App. LEXIS 33589 (4th Cir. Nov. 26, 1997).

[13] Particularly reprehensible conduct includes "concealment of evidence of improper motive." *BMW*, 517 U.S. at 606.

[14] *Campbell v. State Farm Mut. Auto. Ins. Co.*, 65 P.3d 1134 (Utah 2001) (breach of fiduciary duty is particularly reprehensible conduct under *BMW*, justifying a high ratio of punitive damages to compensatory damages), *rev'd, remanded* 538 U.S. 408 (2003), *cert. granted*, 535 U.S. 1111 (2002).

argument that strong medicine is required to cure the defendant's disrespect for the law."[15]

The second guidepost mandates a review of the punitive to compensatory damages ratio. Punitive damages should have some "'reasonable relationship'" to the compensatory damages in the case.[16] Additionally, reviewing courts may weigh punitive damages against the **potential** harm that could result from the defendant's conduct if that potential harm exceeds the actual harm.[17] While the 500:1 ratio exceeded constitutional limits due to the facts of *BMW*, the Court declined to set a constitutional boundary based upon ratios. "We need not, and indeed we cannot, draw a mathematical bright line between the constitutionally acceptable and the constitutionally unacceptable that would fit every case."[18]

In fact, after *BMW*, a wide range of ratios fell within the bounds of constitutional propriety. The United States Supreme Court has affirmed cases with ratios of 526:1; 117:1; 258:1; and 4:1.[19] Georgia Courts, even after *BMW*, have continued to affirm even

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[15] *BMW*, 517 U.S. at 576-77.

[16] *Id.* at 581.

[17] *Id.*

[18] *Id.* at 582-83.

[19] *TXO Prod. Corp. v. Alliance Resources Corp.*, 509 U.S. 443 (1993) ($10 million jury award of punitive damages did not violate due process, even though only $19,000 in actual damages were awarded – a 526:1 ratio); *Browning-Ferris Indus. v. Kelco Disposal, Inc.*, 492 U.S. 257 (1989) (Court would not disturb a state court punitive damages award of $6 million in a case with $51,146 in compensatory damages – a 117:1 ratio). *See Honda Motor Co. v. Oberg*, 512 U.S. 415 (1994) (affirming punitive damages 258 times plaintiff's out of pocket losses); *Pacific Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1 (1991) (affirming punitive damages four times compensatory damages).

larger ratios.[20] In a case arising under Georgia law, the Eleventh Circuit applied *BMW* and held that where the conduct was not egregious and barely met the standard for imposition of punitive damages in the first instance, the maximum ratio allowable was 100:1. The Eleventh Circuit remitted the punitive damages verdict to 100:1, but rejected a defense request for further remittitur.[21]

Ratios allowed after *BMW* continued to be substantial, depending primarily upon the level of reprehensibility.[22] Following *BMW*, courts held that, given the pervasiveness of treble damage schemes, which have repeatedly withstood constitutional challenges, punitive damages awards of less than twice the compensatory award are *per se* reasonable without further analysis.[23] Indeed, the very concept of a

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[20] *Southeastern Sec. Ins. Co. v. Hotle*, 222 Ga. App. 161 (1996) (ratio of 45,000:1 for one defendant and 20,000:1 for another upheld after discussion of *BMW*). *See generally Bibb Distrib. Co. v. Stewart*, 238 Ga. App. 650 (1999) (punitive damages of $12.5 million on compensatory damages of $236,000 (ratio of 53:1) approved after *BMW* analysis); *Tunsil v. Jackson*, 248 Ga. App. 496 (2001) (ratio of 23:1 approved in a breach of fiduciary duty case); *Soerries v. Dancause*, 248 Ga. App. 374 (2001) (punitive damages in ratio of 29:1 approved); *Ledee v. Devoe*, 250 Ga. App. 15 (2001) (punitive damages in ratio of 10:1 approved in fraud case).

[21] *Johansen*, 170 F.3d 1320.

[22] *See Jordan v. Shaw Indus., Inc.*, No. 96-2189, 1997 WL 734029 (4th Cir. Nov. 26, 1997) (affirming ratio of 101:1 for one defendant and 488:1 for another); *United States v. Big D. Enters., Inc.*, 184 F.3d 924, 933 (8th Cir. 1999) (affirming ratio of 100:1); *Williams v. Aetna Fin. Co.*, 700 N.E.2d 859 (Ohio 1998) (affirming ratio of 100:1). *See Pavon v. Swift Transp. Co.*, 192 F.3d 902, 909 (9th Cir. 1999) ("Nor does the ratio of 250 to 1 between the punitive damage award and plaintiff's out-of-pocket loss support a reduction of the award."); *Grabinski v. Blue Springs Ford Sales, Inc.*, No. 93-1209-CV-W-6, 1998 WL 755019 (W.D. Mo. Oct. 27, 1998) (approving 99:1 ratio of punitive damages to compensatory damages in fraud and deceit case, and approving 50:1 ratio between punitive damages and applicable civil or criminal penalties); *Routh Wrecker Serv., Inc. v. Washington*, 980 S.W.2d 240 (Ark. 1998) (affirming 75:1 ratio in commercial case).

[23] *See Clark v. MetroHealth Found., Inc.*, 90 F. Supp. 2d 976, 986 (N.D. Ind. 2000) (punitive damages in ratio of 3:1 or less reasonable "as a matter of law" given prevalence

proportionality/ratio requirement had its "pedigree" in the long acceptance of treble damage awards.[24] Additionally, some courts held after *BMW* that given the Supreme Court's approval of a 4:1 ratio in *Haslip*, a ratio under 4:1 is *per se* reasonable and constitutional as a matter of law.[25]

The third guidepost requires that reviewing courts compare the punitive damages award to other potential civil or criminal sanctions for "comparable" misconduct.[26] This guidepost permits comparisons to criminal fines, civil fines, regulatory fines, and prior punitive damages awards for comparable conduct.[27] Of course, many torts do not constitute the violation of any statute or regulation.

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of treble damages awards); *United States EEOC v. AIC Sec. Investigations*, 55 F.3d 1276, 1287 (7th Cir. 1995) (punitive damages in ratio of 3:1 reasonable because of prevalence of treble damages statutes).

[24] *BMW*, 517 U.S. at 580-81 (principle that punitive damages should have a rational relationship to compensatory damages has as its pedigree the long history of treble damages statutes).

[25] *Zimmerman v. Direct Fed. Credit Union*, 262 F.3d 70, 82 (1st Cir. 2001) (because the Supreme Court in *Haslip* held that a ratio of 4:1 does not "cross the line into the area of constitutional impropriety," a ratio of 2:1 "presents no cause for concern."); *Colbert v. Furumoto Realty*, 144 F. Supp. 2d 251, 258 (S.D.N.Y. 2001).

[26] *BMW* requires only "comparable" misconduct for purposes of the third guidepost analysis (517 U.S. at 583), and this does not require that the conduct committed actually constitute the offense. *See, e.g., Campbell*, 65 P.3d 1134 (focus under third guidepost is maximum penalties available for "comparable" misconduct, not penalties that were imposed for the precise conduct at issue). *But see Johansen*, 170 F.3d at 1337 n.34 (holding that the fine imposed in this case is the most relevant comparison, but that "[t]his is not to say that there may not be a case where the record reveals that the actual civil penalty imposed does not adequately reflect the state's interest in the specific conduct at issue in the case.").

[27] *See BMW*, 517 U.S. at 575.

Many courts have completely refused to consider the third guidepost factor after finding that there was either no applicable statutory penalty for comparable conduct[28] or the relevant statutory sanction was too paltry and, thus, provided "little basis for determining a meaningful punitive damages award."[29] However, a criminal statute that includes a prison sentence as a potential penalty puts defendants on notice of

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[28] *See, e.g., AutoZone, Inc. v. Leonard*, 812 So. 2d 1179, 1188 (Ala. 2001) ("[w]e cannot consider this guidepost, because Alabama law provides no sanctions, either civil or criminal, for a retaliatory discharge"); *Paracelsus Health Care Corp. v. Willard*, 754 So. 2d 437, 445 (Miss. 1999) (disregarding third guidepost because "there are no other sanctions which would be imposed under the facts of this case"); *Allsup's Convenience Stores, Inc. v. North River Ins. Co.*, 976 P.2d 1, 19 (N.M. 1998) (disregarding third guidepost because "there is no statutory fine for this or similar misconduct"); *Jacque v. Steenberg Homes, Inc.*, 563 N.W.2d 154, 165 (Wis. 1997) ("We consider this factor largely irrelevant in the present case because the 'conduct at issue' here was scarcely that contemplated by the legislative action."); *Vandevender v. Sheetz, Inc.*, 490 S.E.2d 678, 692 (W. Va. 1997) (disregarding third guidepost where state law provided only a "cause of action" without establishing a "penalty limit that could be referred to for comparison purposes"); *Ford Motor Co. v. Ammerman*, 705 N.E.2d 539, 562-63 (Ind. Ct. App. 1999) ("In this case ... there is no comparable civil statutory penalty for the manufacture and sale of a defective product. The same is true for criminal penalties. Thus this portion of the [*BMW*] indicia of excessiveness is not applicable"); *Blume v. Fred Meyer, Inc.*, 963 P.2d 700, 709 (Or. Ct. App. 1998) ("[*BMW*'s third] guidepost is of limited assistance here where, unlike in *BMW*, there are no legislatively enacted civil sanctions against which to measure the prohibited conduct and criminal offenses have only limited similarity to defendant's conduct."); *Guzman v. Tower Dev., Inc.*, No. 96-17232, 1997 U.S. App. LEXIS 36006, at *5 (9th Cir. Dec. 19, 1997) (upholding the punitive award even though the defendant's conduct "involved a violation of tort duties that do not readily lend themselves to a comparison with statutory penalties").

[29] *Winn Dixie v. Colburn*, 709 So. 2d 1222, 1225 (Ala. 1998). *See also Union Sec. Life Ins. Co. v. Crocker*, 709 So. 2d 1118, 1122 (Ala. 1997) (reasoning that because "the maximum statutory sanction against insurance fraud in this state is meager ... 'there is little basis for comparing it with any meaningful punitive damages award.'") (*quoting BMW II*, 701 So. 2d at 514); *Ford Motor Co. v. Sperau*, 708 So. 2d 111, 122 (Ala. 1997) ("a $2,000 statutory penalty for deceitful conduct is so meager that there is little basis for comparing it with any meaningful punitive damages award").

substantial risk. Thus, even if the fine component of a penal scheme is small, the potential of even a short incarceration can justify large punitive damages.[30]

In looking at comparable cases rather than fines for a third guidepost analysis, the courts compare the **ratios** of punitive damages to compensatory damages with the **ratios** in the other, similar cases. It is important not to look at absolute damages numbers.[31]

2. *Cooper* Imposed *de novo* Appellate Review of Punitive Damages Excessiveness Challenges

BMW did not end the Supreme Court's discussion of the review of allegedly excessive punitive damages awards, however. In *Cooper Industries, Inc. v. Leatherman Tool Group, Inc.*, the Court discussed "the proper standard for reviewing *the District Court's* due process determination," as opposed to "the *substantive* standard for determining *the jury award's* conformity with due process."[32]

In *Cooper*, the United States Supreme Court carefully explained that it was deciding a different question from the one it resolved in *BMW*. As the Supreme Court noted, *BMW* had "already ... answered" the question of the substantive standard for

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[30] *See Haslip*, 499 U.S. at 23; *Bielicki v. Terminix Int'l Co., L.P.*, 225 F.3d 1159, 1166 (10th Cir. 2000); *Neibel v. TransWorld Assur. Co.*, 108 F.3d 1123, 1133 (9th Cir. 1997) (potential twenty year sentence constituted "severe criminal penalties" and "dictates that the punitive damages award in this case is not 'grossly excessive' under *BMW*.").

[31] *See, e.g., Ammerman*, 705 N.E.2d at 563 (under the third guidepost, when looking at other cases for comparable punitive awards, court must look to ratio rather than absolute numbers). Collecting other cases with high ratios (but low total punitive awards), the Court held that "In our view Ford knew or should have known that an award of punitive damages could have resulted in a ratio as high as 100 to 1 [citations omitted]. That is especially so given ... Ford's economic wealth."

[32] 532 U.S. 424, 431 n.4 (2001) (emphasis added).

reviewing the jury award itself.[33] Nothing in *Cooper* changed that substantive standard; indeed, the Court noted that *Cooper* confirms that verdicts still may only be reduced for "gross excessiveness."[34]

The *Cooper* court held that, in reviewing a district court's determination of a punitive damages verdict's alleged constitutional excessiveness under the federal due process clause, federal circuit courts of appeal should not defer to the legal conclusions in the district court's *BMW* analysis, but should analyze those conclusions *de novo*. When conducting the *de novo* review, the Supreme Court clearly noted that **appellate courts could not tamper with the underlying factual findings supporting the trial court's analysis** unless the findings were clearly erroneous.[35] Further, the analysis of reprehensibility is not subject to the same level of *de novo* review as the other two *BMW* guideposts:

> The reprehensibility judgment thus deserves extremely careful examination. The Court in *Cooper*, however, noted that this factor can be influenced by the demeanor and credibility of witnesses, matters on which any appellate court must defer substantially to the jury. *Cooper*, 121 S. Ct. at 1687-88. It thus appears that the reprehensibility factor presents a mixed issue for appellate review: to the extent that the judgment-call on reprehensibility can be traced to a jury's assessment of witnesses, independent appellate review is essentially meaningless.[36]

Thus, in responding to a remittitur motion, a plaintiff should consider asking the trial court to make express factual findings, including a discussion of the degree of

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[33] *Id.*

[34] *Id.* at 436.

[35] *Id.*

[36] *Rhone-Poulenc Agro, S.A. v. DeKalb Genetics Corp.*, 272 F.3d 1335, 1348 (Fed. Cir. 2001), *vacated, remanded by* 538 U.S. 974 (2003).

reprehensibility and the credibility of key witnesses. Such findings may help sustain a trial court's ruling on remittitur.

The *Cooper* court recognized that its holding changing the required standard of review would not make a difference in most cases: "[t]he standard of review applied by the Court of Appeals will affect the result of the *Gore* analysis in only a relatively small number of cases."[37] Indeed, *Cooper* itself (a 90:1 ratio) was not *reversed* by the Supreme Court. It was instead remanded for reconsideration because of several factors. First, the 90:1 ratio of punitive to compensatory damages put the case into a questionable category. Second, the Court held that the trial court improperly and incorrectly instructed the *Cooper* jury that the defendant's conduct was unlawful, an instruction that the Court held could have influenced the amount of punitive damages awarded.[38] Third, the Court noted that the trial court looked in its *BMW* analysis not at the actual damages awarded but at the "**potential** harm Leatherman would have suffered had Cooper succeeded in its wrongful conduct."[39] In so doing, the trial court apparently miscalculated that potential harm.[40] The trial court's apparent mistakes led the Supreme Court to conclude that *de novo* review "might well have led the Court of Appeals to reach a different result," and that the outcome of that particular case "may depend upon the standard of review."[41]

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[37] *Cooper*, 532 U.S. at 441.
[38] *Id.* at 441-42.
[39] *Id.* at 442 (emphasis added).
[40] *Id.*
[41] *Id.* at 441, 443.

Subsequent cases have reiterated *Cooper's* holding that the standard of review generally does not make a difference; it may only make a difference in a few borderline cases.[42] *Cooper* did not, however, answer all questions about the proper standard of review. A question arose as to whether *Cooper* promulgated a constitutional rule binding upon the states or exercised supervisory authority over federal courts in a manner that does not impact the states.[43] Many state courts have seemingly disregarded this question, choosing instead to apply *Cooper* to federal constitutional challenges without analyzing the question.

Numerous courts have held that even after *Cooper*, claims of factual or state law excessiveness as opposed to federal constitutional excessiveness **are not** subject to the mandatory application of the *de novo* standard of review, but can be reviewed for abuse of discretion. "[I]f no constitutional issue is raised, the role of the appellate court, at least in the federal system, is merely to review the trial court's determination under an

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[42] *See Foster v. Time Warner Entm't Co., L.P.*, 250 F.3d 1189, 1194 n.3 (8th Cir. 2001) (punitive damages review would reach same result under abuse of discretion or *de novo* review where ratio was 1.8:1). *See generally Alison H. v. Byard*, 163 F.3d 2, 3 (1st Cir. 1998) (whether proper standard is abuse of discretion or *de novo* review makes no difference where the outcome would be the same under either standard).

[43] *See, e.g., Waddill v. Anchor Hocking, Inc.*, 27 P.3d 1092, 1097 (Or. App. 2001) (discussing without deciding whether *Cooper* court was stating a requirement of due process rather than exercising its supervisory authority), *vacated, remanded by* 538 U.S. 974 (2003), *adhered to on recon.*, 78 P.3d 570 (2003). *See generally Greene v. Georgia*, 519 U.S. 145, 147 (1996) (although Georgia is free to adopt the standard of review promulgated by United States Supreme Courts for use by federal appellate courts, "it need not do so."); *Greene v. State*, 268 Ga. 47, 47-48 (1997) (same).

abuse-of-discretion standard."[44] Therefore, *Cooper*'s *de novo* review requirement only applies if a party raises a federal due process challenge to the punitive damages award.

An important distinction should be made, however. The *Cooper* requirement that the appellate court conduct a *de novo* review **does not** allow a defendant to raise additional arguments before the appeals court. Defendants must expressly raise and preserve each argument relating to the appropriate level of review.[45] For example, in *Six Flags II*, the Georgia Court of Appeals found that *Cooper* "applies only to excessiveness claims raised under the due process clause of the federal constitution."[46] Additionally, defendants must expressly raise and preserve their federal constitutional challenge, (*id.*), and raise and preserve each specific *BMW* guidepost under which they intend to argue. Plaintiff should be alert for waiver.

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[44] *Cooper*, 532 U.S. at 433. *See Northrop v. Hoffman of Simsbury, Inc.*, 12 F. App'x 44, 51 (2d Cir. 2001) ("When no constitutional challenge is raised, we review a district court's decision to reduce punitive damages for abuse of discretion.") (*citing Cooper); Foster*, 250 F.3d at 1194 n.3 ("Time Warner has not argued that the punitive damages award violated its right to due process which would require a *de novo* review of the denial of its motion, *see Cooper* ..., but our ultimate conclusion [affirming punitive damages without remittitur] would be the same under that standard."); *Middlebrooks*, 256 F.3d at 1249 n.5 (abuse of discretion review used for claim of excessiveness of punitive damages after *Cooper* because "Hillcrest does not argue that the punitive damages award violates its due process rights.") (*citing Cooper*); *Stroud v. Lints*, 760 N.E.2d 1176, 1180 (Ind. Ct. App. 2002) (where no constitutional issue is raised as to excessiveness of punitive damages, *Cooper* allows abuse of discretion review), *superseded, remanded by* 790 N.E.2d 440 (Ind. 2003); *Time Warner Entertainment Co., L.P.*, 254 Ga. App. at 600 (holding that "if the federal constitutional claim is not raised in the court below, such arguments on appeal are 'unavailing.'").

[45] *Bocci v. Key Pharms, Inc.*, 35 P.3d 1106, 1111 (Or. App. 2001) (refusing to consider argument under *BMW's* first guidepost where issue not properly preserved, on the grounds that "[n]othing in *Cooper Industries* suggests that appellate courts are required to consider unpreserved issues.").

[46] 254 Ga. App. at 601.

Post-*Cooper* cases support the proposition that the substantive standards enunciated in *BMW* have not changed. For example, in *Simon v. San Paolo U.S. Holding Co.*,[47] a fraud case that was remanded ("GVR'd") by the United States Supreme Court in light of *Cooper* (and again, as discussed below, in light of *State Farm)*, the state appellate court, on remand, again affirmed a punitive damages verdict of 340:1.[48] In *Six Flags II*,[49] the Court held that federal constitutional review under *BMW* and the application of *Cooper* had been waived, but nonetheless conducted the *BMW* review de novo, and affirmed a punitive damages verdict in a ratio of 1.3 to 1. Again, the standard of review did not change the outcome, and should not do so except in borderline cases with high ratios and low reprehensibility.

3. *State Farm* Provided Greater (if Arbitrary) Guidance to Courts Assessing Punitive Damages

In a widely-criticized decision, the United States Supreme Court in *State Farm* held that "in practice, few awards exceeding a single-digit ratio between punitive and compensatory damages, **to a significant degree**, will satisfy due process." 538 U.S. at 410 (emphasis added).

State Farm arose from a car accident in which one driver was killed and another permanently disabled. State Farm proceeded to trial despite its own investigations finding its insured (Campbell) at fault. State Farm declined policy limits settlement offers. The jury returned a verdict against Campbell for $185,849. State Farm then

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[47] 2001 Cal. App. Unpub. LEXIS 1860 (Nov. 7, 2001), *vacated and remanded,* 538 U.S. 974 (2003).

[48] *See also Callantine v. Staff Builders, Inc.*, 271 F.3d 1124 (8th Cir. 2001) (affirmed remittitur of punitive damages from 578,000:1 to 25,000:1 – denied further remittitur).

[49] 254 Ga. App. at 600.

refused to cover the excess liability (policy limits were $50,000) and notified Campbell to begin selling his property to pay the judgment. State Farm refused to post an appeal bond for Campbell.

State Farm later covered the excess liability verdict. Campbell sued State Farm, alleging bad faith and claiming damages for emotional distress arising out of being told to sell his house. At trial, the evidence showed that State Farm had instituted a scheme to meet corporate fiscal goals by capping pay-outs on claims nationwide. The Utah jury returned a verdict against State Farm for its bad faith, awarding Campbell $2.6 million in compensatory damages and $145 million in punitive damages. The trial court reduced the verdict to $1 million in compensatory damages and $25 million in punitive damages. On appeal, however, the Utah Supreme Court conducted a *de novo* review pursuant to *Cooper*, and considered the three *BMW* guideposts. The Utah Supreme Court reinstated the original $145 million punitive damages award. In reversing and remanding, the Supreme Court reiterated the use of the *BMW* three guidepost analysis. The key language is below:

> 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** .... **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, *id.*, at 582, 116 S. Ct. 1589, or, in this case, of 145 to 1 .... 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. Where 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. In sum, courts must ensure that the measure of punishment is both reasonable and proportionate to the amount of harm to the plaintiff and to the general damages recovered.

State Farm, 538 U.S. at 425-26 (emphasis added).

Criticism of the *State Farm* decision began within the Court. In dissent, Justices Scalia and Thomas reiterated their view (expressed earlier in a dissent in *BMW*) that the federal Constitution does not regulate the size of punitive damage awards from State courts. They went on to also state that they were "also of the view that the punitive damages jurisprudence which has sprung forth from *BMW v. Gore* is **insusceptible of principled application**; accordingly, [we] do not feel justified in giving the case *stare decisis* effect." *Id.* at 429 (emphasis added). In *her* dissent, Justice Ginsburg suggested that federal court checks on punitive damages from state courts is inappropriate, and also that appellate judges are ill-equipped to substitute their judgment for state legislatures. "In a judicial decree imposed on the states by this Court under the banner of substantive due process, the numerical controls today's decision installs seem to me boldly out of order." *Id.* at 438.

Commentators have also roundly criticized both the holding and the reasoning of *State Farm*. Perhaps the most interesting is that published by conservative columnist George Will:

> There is Supreme Court propensity to legislate when it thinks legislatures should but won't. However, that propensity is injurious to constitutional law and democratic practices, even when the resulting court-made social policy would be desirable if established by legislation ... what, other than the justices' instincts, provides criteria of proportionality and arbitrariness? The justices supposedly are construing the Constitution,

> not their instincts. And what *principle* makes the justices' instincts superior to the jury's regarding State Farm's documented practices? Furthermore, even if the jury's award was unjust, the idea that "unjust" and "unconstitutional" can be synonymous gives it a license to legislate ... [concerning idea that ratios in excess of single digits violate due process clause]. Where in the name of James Madison did *that* come from? From the justices' viscera, not Madison's Constitution. Their viscera will be consulted in future cases to clarify those "few" awards that may deviate from the justices' rule to a degree that is "significant." ... The court propounded three sensible guidelines for determining when damage awards violate due process. What was not sensible was pretending the guidelines were emanations of the Constitution.

George Will, *License to Legislate*, Wash. Post, April 17, 2003.[50]

4. Supreme Court Punitive Damages Jurisprudence After *State Farm*

Perhaps the most interesting "post-*State Farm*" developments are those from the Supreme Court itself. At the time it decided *State Farm*, the Supreme Court had before it at least 11 petitions for certiorari from punitive damages decisions. In the vast majority of these cases, the Court granted the petition for certiorari, vacated the appellate decision affirming the punitive damages award, and remanded for reconsideration in light of *State Farm*. This procedure, known as a "GVR" (Grant,

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[50] *See* Richard Thornburgh & David Fine, *A Recent Supreme Court Punitive Damages Decision Unites Usually-Opposed Justices On The Need For More Guidance In This Area*, FindLaw.com, May 28, 2003 (the dissents of Scalia and Ginsberg are correct – strange where "most liberal " and "most conservative" members of Court agree); Fred B. Moore, *A Collective Sigh of Relief*, In Layman's Terms, April 2003 ("the Court overstepped its bounds and ruled on an area that should be left to the legislature."); *Punitive Damages Capped by High Court*, Court Monitor, June 21, 2003 ("It is not entirely clear what constitutional principle justified the Court's decision."); Dan Ackman, *The Supreme Court's Wacky Guideposts*, Forbes.com, April 8, 2003 ("Before the Supreme Court decides policy for the system, it might consider the millions of cases it never sees rather than simply focus on the one case it deigns to decide"); Stuart Lieberman, *State Farm Decision Is Bad News For Property Owners*, Realty Times, April 17, 2003 ("the Campbell case is too pro-business, pro insurance industry. For the rest of us, it is not great news.").

Vacate & Remand) was followed in every case then pending that the author could identify **except** *Six Flags II*. In *Six Flags II*, the ratio of punitive damages to compensatory damages was 1.3 to 1; the compensatory damages were over $197 million; and, the punitive damages were $257 million – in excess of a 1:1 ratio, but still within single digits. The United States Supreme Court denied certiorari, and denied an express request to "GVR" the *Six Flags II* decision in light of *State Farm*. 538 U.S. 977 (2003).

An examination of the other cases considered by the United States Supreme Court in light of *State Farm* shows that ratios as low as 3.33 to 1 were subject to a "GVR." However, a GVR is not an expression of disapproval of the result below. And, appellate courts around the country are regularly affirming punitive damages well in excess of that ratio since *State Farm*. Indeed, appellate courts continue to affirm cases with ratios well in excess of the "single digit" ratios referenced in *State Farm*.

Cases considered by the U.S. Supreme Court in light of *State Farm*

compensatory damages (rounded)	punitive damages	ratio[51]	outcome
$197,000,000	$257,000,000	1.3 to 1	cert. denied[52]
$15,000,000	$50,000,000	3.33 to 1	GVR[53]
$3,000,000	$15,000,000	5.0 to 1	GVR[54]
$101,000	$1,000,000	9.92 to 1	GVR[55]

[51] Punitive damages to compensatory damages. Ratio is as of time case was considered by United States Supreme Court. Some punitives had been remitted by lower courts.

[52] *Six Flags II.*

[53] *DeKalb Genetics Corp. v. Bayer CropScience, S.A.*, 538 U.S. 974 (2003) (GVR granted by Supreme Court.) For ratios and amounts, *see Rhone-Poulenc Agro, S.A. v. DeKalb Genetics Corp.*, 345 F.3d 1366 (Fed. Cir. 2003) (affirming verdict after GVR).

[54] *Ford Motor Co. v. Estate of Smith*, 538 U.S. 1028 (2003) (jury verdict of 7 to 1 ratio, remitted to 5:1 – GVR granted by Supreme Court). For ratios and amounts, *see Sand Hill Energy, Inc. v. Ford Motor Co.*, 83 S.W.3d 483 (Ky. 2002).

compensatory damages (rounded)	punitive damages	ratio[56]	outcome
$2,336,000	$3,000,000	12.7 to 1	GVR[57]
$89,000	$1,700,000	19.1 to 1	GVR[58]
$200,000	$7,500,000	37.5 to 1	GVR[59]
$500,000	$22,500,000	45 to 1	GVR[60]
$6,227,000	$290,000,000	46.6 to 1	GVR[61]
$821,000	$79,500,000	97 to 1	GVR[62]
$5,000	$1,700,000	340 to 1	GVR[63]

5. Punitive Damages Awards in Excess of Single Digit Ratios Continue to be Affirmed by Other Courts After *State Farm*

Although several courts have reduced punitive damages awards to nine to one (or lower) ratios in response to *State Farm*, many courts have taken seriously the Supreme

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[55] 538 U.S. 408 (2003) (GVR granted by Supreme Court). For ratios and amounts, *see Waddill v. Anchor Hocking, Inc.*, 78 P.3d 570 (Or. App. 2003) (reducing verdict to 4:1 ratio after GVR).

[56] Punitive damages to compensatory damages. Ratio is as of time case was considered by United States Supreme Court. Some punitives had been remitted by lower courts.

[57] *Chrysler Corp. v. Clark*, 540 U.S. 801 (2003) (ratio of 12.73 to 1 – GVR granted by Supreme Court). For ratios and amounts, *see Clark v. Chrysler Corp.*, 310 F.3d 461, 464 (2002).

[58] *Nat'l Union Fire Ins. Co. v. Textron Fin. Corp.*, 538 U.S. 974 (2003). For ratios and amounts, *see Textron Fin. Corp. v. Nat'l Union Fire Ins. Co.*, No. G020323, 2002 WL 1399105 (Cal. App. June 28, 2002). $89,000 was compensatory award on tort claims only.

[59] *Cass v. Stephens*, 538 U.S. 1054 (2003) (GVR granted by Supreme Court). For ratios and amounts, *see Cass v. Stephens*, No. 08-97-00582, 2001 WL 28092 (Tex. App. Jan. 11, 2001). $200,000 was compensatory award on tort claims only.

[60] *Bocci v. Key Pharms., Inc.*, 76 P.3d 669 (Or. App. 2003) (reducing verdict to 7:1 ratio after GVR).

[61] *Ford Motor Co. v. Romo*, 538 U.S. 1028 (2003) (46.57 to 1 ratio – GVR granted by Supreme Court). For ratios and amounts, *see Romo v. Ford Motor Co.*, 122 Cal. Rptr. 2d 139 (Cal. App. 2002).

[62] *Philip Morris USA Inc. v. Williams*, 540 U.S. 801 (2003) (ratio after the trial court's remittitur was 39 to 1 – GVR granted by Supreme Court). For ratios and amounts, *see Williams v. Philip Morris, Inc.*, 48 P.3d 824 (Or. App. 2002).

[63] *San Paolo U. S. Holding Co. v. Simon*, 538 U.S. 974 (2003). For ratios and amounts, *see Simon v. San Paolo U.S. Holding Co.*, 2001 Cal. App. Unpub. LEXIS 1860 (Cal. App. Nov. 7, 2001).

Court's statement that it was not establishing a "bright-line" at the single-digit mark, and have continued to affirm higher ratios, even where substantial compensatory awards existed, depending upon the facts of the case.[64] This outcome was anticipated and authorized in *State Farm*.

In the case of comparatively small compensatory awards, even larger ratios are still being affirmed after *State Farm*.[65]

6. Defendants' Financial Status Remains Relevant to Punitive Damages After *State Farm*

The United States Supreme Court held in *State Farm* that:

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[64] Cases since *State Farm* with ratios of punitive to compensatory damages greater than single digits include: *Mathias v. Accor Econ. Lodging, Inc.*, 347 F.3d 672 (7th Cir. 2003) (holding that *State Farm* did not establish a bright line rule and affirming punitive damages in a ratio of 37.2 to 1); *S. Union Co. v. Sw. Gas Corp.*, 281 F. Supp. 2d 1090, 1099 (D. Ariz. 2003) (punitive verdict of $60 million on compensatory verdict of $390,072.58 (ratio of 153 to one) affirmed in light of *State Farm*), *aff'd in part, vacated in part*, 415 F.3d 1001 (2005); *Jones v. Rent-A-Center, Inc.*, 281 F. Supp. 2d 1277 (D. Kan. 2003) (29 to 1 ratio affirmed in Title VII case in light of *State Farm*); *Dunn v. Put-In-Bay, Ohio*, No. 3:02CV7252, 2004 U.S. Dist. LEXIS 882 (N.D. Ohio Jan. 26, 2004) (15:1 ratio between the compensatory damage and punitive damage awards affirmed in light of *State Farm*). *See also Madeja v. MPB Corp.*, 821 A.2d 1034 (N.H. 2003) (punitive damage award for the plaintiff of 35 times the compensatory damage award was not excessive under S*tate Farm*).

[65] *See, e.g., Tate v. Dragovich*, No. 96-4495, 2003 U.S. Dist. LEXIS 14353 (E.D. Pa. Aug. 14, 2003) (civil rights case alleging discrimination and retaliation, punitive award 10,000 times the amount of non-punitive damages affirmed in light of *State Farm*, where compensatory award was small); *Williams v. Kaufman County*, 343 F.3d 689, 711 (5th Cir. 2003) (ratio of 150 to 1 affirmed in light of *State Farm*); *Local Union No. 38, Sheet Metal Workers' Int'l Ass'n v. Pelella*, 350 F.3d 73, 90 (2d Cir. 2003) (ratio of 25,000 to one affirmed in light of *State Farm* where compensatory award was very small – there was also a waiver issue, discussed below); *Willow Inn, Inc. v. Public Serv. Mut. Ins. Co.*, No. 00-5481, 2003 U.S. Dist. LEXIS 9558 (E.D. Pa. July 21, 2003), *aff'd*, 876 A.2d 1136 (Conn. 2005) (affirming punitive award of 75 to 1 in light of *State Farm* where potential harm was greater). *See also Hadelman v. DeLuca*, CV9700602795, 2003 Conn. Super. LEXIS 1748, at *15 (Conn. Super. Ct., June 12, 2003), *aff'd*, 876 A.2d 1136 (Conn. 2005) ("where the monetary value of the noneconomic harm suffered by the plaintiffs was difficult to determine," award of $0 compensatory damages and $300,000 punitive damages affirmed despite "infinite" ratio).

> The wealth of a defendant cannot justify an otherwise unconstitutional punitive damages award. *Gore*, 517 U.S., at 585 ("The 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"); *see also id*. at 591 (BREYER, J., concurring) ("[Wealth] provides an open-ended basis for inflating awards when the defendant is wealthy.").

538 U.S. at 427-28. After *State Farm*, a number of commentators seizing upon that language in isolation have opined that *State Farm* had rendered inadmissible evidence of a defendant's wealth or financial status at the punitive damages phase of a case.[66] Such reports simply ignore the balance of the same paragraph from the *State Farm* opinion, which continues:

> "That does not make its [evidence of wealth of a defendant] use unlawful or inappropriate; it simply means that this factor cannot make up for the failure of other factors, such as "reprehensibility," to constrain significantly an award that purports to punish a defendant's conduct."

Id. at 428. Consistent with this express holding of *State Farm*, since *State Farm*, virtually all reported cases have held that such evidence remains admissible.

> [I]f punitive damages are to continue to serve the broader functions of deterrence and retribution, see 123 S. Ct. 1513, the defendant's wealth must be a consideration in calculating any award .... The Court concludes that if the punitive damages award is to have any punitive or deterrent effect – the stated rationale of such damages – then it is apparent that Amana's wealth and financial condition *must* be taken into consideration.

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[66] *See, e.g.*, Kathryn Kranhold, *Mega-damages Against Industry May Be History*, Wall St. J., Apr. 9, 2003, at B1, B4 ("The Supreme Court ruling says a jury can't consider a defendant's wealth."); Tony Mauro, *Justices Say Intimidation Isn't Free Speech*, Nat'l Law J., April 8, 2003 ("the Court ruled that neither a defendant's wealth nor its out-of-state conduct could be a factor in calculating punitive damages."); Linda Greenhouse, *Supreme Court Sets Limits on Size of Damage Awards*, N.Y. Times, April 8, 2003 (after S*tate Farm*. juries will "not be permitted to consider a defendant's wealth when setting a punitive damage award.")

Eden Elec., LTD v. Amana Co., 258 F. Supp. 2d 958, 972 (N.D. Iowa 2003), *aff'd*, 370 F.3d 824 (8th Cir. 2004) (citing *State Farm*) (emphasis in original). Although "[a] defendant's wealth is not a sufficient basis for **awarding** punitive damages" after *State Farm*, it is "**relevant**" to assessing the amount of punitive damages. *Mathias*, 347 F.3d at 677 (emphasis added).[67]

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[67] *See DiSorbo v. Hoy*, 343 F.3d 172, 189 n.9 (2d Cir. 2003) (in punitive damages trial, "District Court should admit evidence of Pedersen's financial situation. One purpose of punitive damages is deterrence, and that deterrence is directly related to what people can afford to pay.") (*citing State Farm*); *Freund v. Nycomed Amersham*, 347 F.3d 752 (9th Cir. 2003) (post-*State Farm* case affirming consideration of defendants' financial condition in punitive damages analysis) (*citing State Farm)*; *Horney v. Westfield Gage Co.*, 77 F. App'x 24 (1st Cir. 2003) (defendant's net worth may be (but is not required to be) before the jury in assessing punitive damages *(citing State Farm)*); *TVT Records v. Island Def Jam Music Group*, 279 F. Supp. 2d 413 (S.D.N.Y. 2003) (after *State Farm*, jury may consider, but may not give "undue weight" to defendant's wealth) (*citing State Farm). See also Liggett Group, Inc. v. Engle*, 853 So. 2d 434, 458 (Fla. App. 2003) (after *State Farm*, punitive damages award "cannot be justified **solely** upon the wealth of the defendant.") (emphasis added) (*citing State Farm); Honzawa v. Honzawa*, 766 N.Y.S.2d 29, 30-31 (N.Y. App. Div. 2003) (given "the immense value of the family businesses ... [and] [s]ince the purpose of punitive damages is solely to punish the offender and to deter similar conduct on the part of others, a more substantial penalty than $ 10 million is appropriate.") (*citing State Farm*); *Trinity Evangelical Lutheran Church v. Tower Ins. Co.*, 661 N.W.2d 789, 804 (Wis. 2003) ("Defendant's wealth is oftentimes a significant factor. In this case, the evidence presented to the jury ... appears sufficient to justify the size of the punitive damages award.") (*citing State Farm*); *Gibson v. Overnite Transp. Co.*, 671 N.W.2d 388, 395 (Wis. Ct. App. 2003) ("As a final factor, we consider Overnite's wealth. Wealth of the wrongdoer is an appropriate factor in determining the amount of punitive damages to award.") (*citing State Farm*); *Fritzmeier v. Krause Gentle Corp.*, 669 N.W.2d 699, 710 (S.D. 2003) ("The fourth factor is consideration of the wrongdoer's financial condition. We look at both net income and net worth.") (*citing State Farm*); *Brandstetter v. Holiday Retreats, Inc.*, No. E032364, 2003 Cal. App. Unpub. LEXIS 9863, at *21 (Cal. App. Oct. 21, 2003) ("The record also provided sufficient indicia of defendants' wealth to permit appropriate assessment of punitive damages.") (*citing State Farm*); *Taylor Woodrow Homes, Inc. v. Acceptance Ins. Cos.*, G029532, 2003 Cal. App. Unpub. LEXIS 5208, at *12 (Cal. App. May 28, 2003) ("punitive damages cannot be so low as to allow the defendant to absorb the award with little or no discomfort. Nor should an award be so small that it can be simply written off as part of doing business.") (*citing State Farm*).

In remitting a punitive damages verdict from $5 billion to $4 billion in light of *State Farm*, the District of Alaska addressed this issue as follows:

> "The wealth of a defendant cannot justify an otherwise unconstitutional punitive damages award." *State Farm*, 123 S. Ct. at 1525. However, the Court also observed that it was neither unlawful nor inappropriate to consider the defendant's wealth. *Id*. Punitive damages are intended to punish and deter; they are not intended to be an economic death sentence. Here, after judgment was entered on the punitive damages award, Exxon's treasurer advised the court that "**the full payment of the Judgment would not have a material impact on the corporation or its credit quality**." n108. In fact, **Exxon was able to protect itself from the risk of the plaintiffs executing on the $5 billion judgment by posting an irrevocable, syndicated standby letter of credit for over $6 billion**. There is absolutely no chance of a $5 billion punitive damages award amounting to an economic death sentence for Exxon. **This is at least some evidence of the absence of overdeterrence**. In any event, this is not a case where Exxon's size and wealth has been used by the plaintiffs as a surrogate for the "'failure of other factors, such as "reprehensibility."'" *State Farm*, 123 S. Ct. at 1525 (quoting *BMW*, 517 U.S. at 591 (Breyer, J., concurring)).

In re Exxon Valdez, 296 F. Supp. 2d 1071, 1105-06, *vacated, remanded*, 490 F.3d 1066 (D. Alaska 2004) (emphasis added).

There is another important issue as to evidence of the defendant's financial status. A number of cases have held that a punitive damages award is excessive if it would financially destroy or bankrupt a defendant.[68] Thus, a defendant's financial status can be used to support or attack a punitive damages award, depending upon that financial status and the amount of the punitive damages award eventually entered.

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[68] "[W]hatever relative wealth or power an offender may possess, the force driving a penalty cannot be motivated beyond punishment to impoverishment, or calculated not to deter but to paralyze, and utterly to prostrate rather than properly humble the offender into compliance with the law. 'An award should not be so high as to result in the financial ruin of the defendant ... Nor should it constitute a disproportionately large percentage of a defendant's net worth.'" *TVT Records*, 279 F. Supp. 2d at 452. *See Liggett Group*, 853 So. 2d at 456 ("It is well established that punitive damages may not be assessed in an amount which will financially destroy or bankrupt a defendant.").

> Our cases have determined **that a defendant's wealth can be either an aggravating or a mitigating factor in determining the size of a punitive damage award**, since punitive damages should be tailored to what is necessary to deter the particular defendant, as well as others similarly situated, from repeating the prohibited conduct.

Smith v. Fairfax Realty, Inc., 82 P.3d 1064, 1072 (Utah 2003) (emphasis added) (*citing State Farm*).

For this reason a defendant objecting to admission of evidence of financial condition must realize that the exclusion of such evidence could backfire in the event of a really large award. This is so because courts uniformly require that the defendant offer evidence of financial status as a prerequisite to making the argument that the award will financially destroy or bankrupt the defendant:

> Finally, if the trial court deems it appropriate to reduce the punitive damages awards as so "grossly excessive" in violation of due process on the basis of the individual defendants' ability to pay**, it may do so only to the extent the record substantiates their wealth.**

Bell v. Clackamas County, 341 F.3d 858, 868 (9th Cir. 2003) (emphasis added) (reversing trial court's remittitur of punitive damages in light of *State Farm*). Other cases concur:

> [D]efendants argue that the punitive damage award here is excessive because it would "bankrupt the defendants," whom they say are "now retired and living on government pensions" .... However, the defendants offered no evidence at trial as to the financial status of Mr. Edwards or Mr. Velasco. The Court may not review a punitive damages award based on the defendant's alleged financial status, when the defendants chose not to offer evidence of financial status at trial.

Jones v. Sheahan, No. 99C3669, 2003 U.S. Dist. LEXIS 19804, at *67 (N.D. Ill. Nov. 3, 2003) (*citing State Farm*).[69] This was the law long before *State Farm* as well.[70] Plaintiffs confronted with a motion to exclude evidence of financial status should not only point out that *State Farm* does not preclude such evidence; it should affirmatively request a representation from defendant that it does not intend to and will not make the "financial destruction" argument in response to any punitive damages verdict.

Finally, several courts have indicated that, by making the argument that its financial condition renders a punitive damages verdict excessive, the defendant may make relevant the existence of insurance coverage or indemnification agreements, or

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[69] *See Horney*, 77 F. App'x at 34 ("Under Federal law, the burden of showing net worth is placed on the defendant," and trial court's rejection of punitive damages award because plaintiff did not offer evidence of defendant's finances sufficient to show defendant could pay the award is reversed); *S. Union Co.*, 281 F. Supp. 2d at 1093 ("the burden is on Irvin to show that the verdict would actually financially destroy him."); *Jones*, 281 F. Supp. 2d at 1283 (D. Kan. 2003) ("it was defendant's burden to present evidence [of its financial status] to minimize any potential punitive damages") (*citing State Farm*); *Freund*, 347 F.3d 752 (defendant may not complain of insufficiency of financial evidence to show it could pay punitive damages award where it did not put in evidence to contradict or clarify financial evidence from plaintiffs).

[70] *Provost v. City of Newburgh*, 262 F.3d 146, 163-64 (2d Cir. 2001) (placing the burden on the defendant to show evidence of financial condition warranting a limitation in a punitive damages award); *Mathie v. Fries*, 121 F.3d 808, 816 (2d Cir. 1997) ("under well established precedent in this Circuit, 'it is the defendant's burden to show that his financial circumstances warrant a limitation of the award.'" (*quoting Smith v. Lightning Bolt Prods, Inc.*, 861 F.2d 363, 373 (2d Cir. 1988)). *See Zarcone v. Perry*, 572 F.2d 52, 56 (2d Cir. 1978) ("[T]he decided cases and sound principle require that a defendant carry the burden of showing his modest means [by] facts peculiarly within his power if he wants this considered in mitigation of damages."); *Fishman v. Clancy*, 763 F.2d 485, 490 (1st Cir. 1985) (declining to overturn a jury verdict where the defendants "failed to create a record of their financial capabilities"); *Tri-Tron Int'l v. Velto*, 525 F.2d 432, 438 (9th Cir. 1975) (refusing to "interfere with [a punitive damages] award" because the defendants "offered no evidence on their financial ability to pay"); *El Ranco, Inc. v. First Nat'l Bank*, 406 F.2d 1205, 1218-19 (9th Cir. 1968) (same).

conversely, that the existence of such liability insurance prevents the award from being excessive.

> Similarly, to the degree that the defendants seek reduction of punitive damages because of their inability to pay, any indemnification by the County for the payment of such damages may be taken into account.

Bell, 341 F.3d at 868 (reversing trial court's remittitur of punitive damages in light of *State Farm*).

> Shiv-Ram concedes that it has liability insurance and it proffers no evidence that payment of the damages awarded will cause it any undue financial hardship. Therefore, this factor weighs against a finding of excessiveness.

Shiv-Ram, Inc. v. McCaleb, 892 So. 2d 299 (Ala. 2003).

> A related dimension of the defendant's wealth arises in connection with other considerations, also in contention here: the availability and relevance of insurance covering punitive damages, and indemnification agreements and vicarious liability principles.

TVT Records, 2003 U.S. Dist. LEXIS 15271, at *46-47. *See Kent*[71] (absence of insurance coverage relevant to assessment of alleged excessiveness of punitive damages, because defendant would have to satisfy compensatory damages and attorneys' fees award out of his personal assets, as well as punitive damages award.).

This is not a new concept. There is ample caselaw in other circumstances indicating that where there is an issue as to ability to pay or worldly circumstances, evidence of insurance coverage becomes admissible. For example, in *Whelan v. Moone*, 242 Ga. App. 795, 796 (2000), the court affirmed the admission of a lack of insurance

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[71] *Kent v. A.O. White, Jr. Consulting Eng'rs, P.C.*, 253 Ga. App. 492, 501 (2002) (*overruled in part, Time Warner Entm't Co. v. Six Flags over Ga., LLC*, 254 Ga. App. 598 (2002), *cert. denied*, Sept. 16, 2002, U.S. *cert. denied*, 538 U.S. 977 (2003)).

coverage where ability to pay was put at issue: "Although as a general rule evidence relating to the wealth of the parties and the existence of insurance coverage is inadmissible, an exception exists where issues concerning those matters have been made relevant by the parties." *Id.* *See McGee v. Jones*, 232 Ga. App. 1, 3 (1998), where an issue was raised as to a plaintiff's failure to follow her doctor's advice so as to mitigate her damages. She claimed she was unable to afford the recommended surgery. This made the presence or absence of insurance coverage relevant. However, the evidence of insurance was properly excluded in that case because the defendant was unable to show that the surgery was covered by the available insurance.

More fundamentally, however, evidence of the existence of insurance coverage will be admissible to rebut or impeach a defendant's testimony that it cannot afford to pay a judgment or will be put out of business by a judgment. In *Warren v. Ballard*, 266 Ga. 408, 410 (1996), the Court held that "impeachment by evidence of collateral sources is only allowed if the false testimony is related to a material issue in the case." In the punitive damages phase, it seems clear that untrue evidence of the financial impact of a judgment or a defendant's inability to pay would be material, allowing the use of evidence of collateral sources to impeach.

Even if not deemed admissible before the jury, at the least, plaintiffs should put in the record the existence and extent of applicable insurance coverage. If there is no coverage, defendant should make a record of that.

7. "Other Bad Acts" Remain Relevant in Punitive Damages Cases

State Farm criticized the Utah Supreme Court's reliance on "other bad acts" of State Farm (including particularly bad acts from other states), in order to justify the punitive damages verdict. Although some commentators immediately assumed that other bad acts evidence (particularly that from other states) would no longer be admissible, subsequent cases have established that such evidence remains admissible for certain purposes, and subject to appropriate limiting instructions.

> The Supreme Court found that the Utah courts erred in relying and awarding punitive damages on evidence of lawful out-of-state conduct that bore no relation or was dissimilar to the conduct which harmed the plaintiffs. *Id.* at 1523-26. The Court expressly stated, however, that "evidence of other acts need not be identical to have relevance in the calculation of punitive damages." *Id.* at 1523. Thus, evidence of similar conduct or conduct having a nexus to the specific harm suffered by the plaintiff may still be admitted and considered in assessing punitive damages.

Librado v. M. S. Carriers, Inc., No. 3:02-CV-2095, 2003 U.S. Dist. LEXIS 8276, at *7-8 (N.D. Tex. May 9, 2003). Similarly:

> Defendant contends that these limitations render the award here unconstitutional because the jury heard substantial evidence of wrongful conduct outside California, conduct that may have been lawful where (and when) it occurred, and conduct having no causal connection to the harm suffered by plaintiff.... Defendant also substantially overstates this aspect of *Campbell* by suggesting that it rendered such evidence categorically inadmissible. On the contrary, the court acknowledged that such evidence may be considered if a sufficient "nexus" is shown to the plaintiff's claim.

Henley v. Philip Morris Inc., 5 Cal. Rptr. 3d 42, 83 (Cal. App. 2003).

Admissibility of evidence of other misconduct outside of the state was also addressed in *In re Exxon Valdez*, 296 F. Supp. 2d at 1093, which held in considering such evidence:

> The Supreme Court stated in *State Farm* that even "[l]awful 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."

Perhaps the most detailed analysis is from a state court in Texas:

> Haggar cites *Campbell*, 123 S. Ct. at 1523, in support of its argument that the trial court impermissibly allowed the jury to consider evidence involving other Haggar employees in the award of punitive damages. Haggar argues that in *Campbell*, the U.S. Supreme Court held the consideration of such "other acts" evidence in the calculation of punitive damages to be a violation of due process. *See id*. In *Campbell*, the Supreme Court held that a punitive damages award of $145 million, where full compensatory damages were $1 million, was excessive and violated the due process clause of the Fourteenth Amendment. *Id*. at 1526. *Campbell* involved whether evidence of State Farm's national scheme to meet corporate fiscal goals by capping claim payments and engaging in fraudulent practices was properly admitted for purposes of calculating punitive damages in a suit against the insurer for bad faith, fraud, and intentional infliction of emotional distress. *Id*. at 1518-19. The Supreme Court found that the Utah courts erred in awarding punitive damages on evidence of lawful out-of-state conduct that bore no relation or was dissimilar to the conduct that harmed the plaintiffs. *Id*. at 1523-24. The Court noted that the *Campbells* had identified "scant evidence of repeated misconduct of the sort that injured them." *Id*. at 1523 (emphasis added). The Court expressly stated, however, that "evidence of other acts need not be identical to have relevance in the calculation of punitive damages." *Id*. Thus, evidence of similar conduct or conduct having a nexus to the specific harm suffered by the plaintiff may still be admitted and considered in assessing punitive damages. *See id*. Here, the evidence Haggar complains of involved testimony regarding its practices and treatment of injured employees at its Weslaco plant over a period of time including the time Hernandez was employed there. We hold that the "other acts" evidence admitted was relevant to the calculation of punitive damages and that the trial court did not err in admitting it. *See id*. at 1523-24*; see also Gore*, 517 U.S. at 577 (repeated misconduct is more reprehensible than an individual instance of malfeasance).

Haggar Clothing Co. v. Hernandez, 164 S.W.3d 407, 420-21 (Tex. App. 2003).

8. Waiver Remains an Issue After *State Farm*

As discussed earlier, it has long been clear that constitutional challenges to excessiveness of punitive damages can be waived. *See, e.g., Time Warner Entm't,* 254 Ga. App. 598. This remains true after *State Farm*. For example, in *Local Union No. 38, Sheet Metal Workers' Int'l Ass'n v. Pelella,* 350 F.3d 73, 90 (2d Cir. 2003), the Court held that a constitutional challenge to excessiveness of a punitive damages award had been waived because the defendant had not raised it in the trial court. The Court rejected defendant's contention that it need not have raised the issue because it could not have anticipated the holding of *State Farm*, noting that *State Farm* did not change the substantive test set forth in *BMW*. The Court affirmed a 25,000 to one ratio based upon this waiver.

9. Eleventh Circuit and Georgia Cases Applying *State Farm*

The first case from the Eleventh Circuit applying *State Farm* is *Bogle v. McClure,* 332 F.3d 1347 (11th Cir. 2003).[72] *Bogle* was a Section 1983 case arising out of the discriminatory transfer of seven Fulton County, Georgia, librarians, on the basis of their race. In *Bogle,* the jury awarded compensatory damages of $7 million and punitive damages of approximately $16 million. The trial court remitted the awards to $3.5 million in compensatory damages and $13.3 million in punitive damages.

After remittitur, the punitive damages in *Bogle* were in a ratio of less than four to one. The Eleventh Circuit expressly discussed and applied each of the three

[72] For the sake of full disclosure, the author of this paper was associated as appellate co-counsel for the plaintiffs in *Bogle*.

"guideposts" set forth in *BMW*.[73] The Eleventh Circuit expressly conducted the *de novo* review mandated by *Cooper*.[74] It discussed at length and applied the strictures set forth in *State Farm*, noting that the 4:1 ratio was well within the "single digit" ratio discussed in *State Farm*.

In discussing reprehensibility, the Eleventh Circuit held that:

> Appellants' wrongdoing was more than mere accident. There was evidence that, in the face of repeated warnings, Appellants intentionally discriminated against the Librarians on the basis of race and used trickery and deceit to cover it up under the guise of a "reorganization." Furthermore, Appellants intentionally discriminated against the Librarians with full knowledge of recent cases of employment discrimination brought by Caucasian employees against other Fulton County officials which resulted in jury verdicts for the plaintiffs or settlements. A reasonable jury could have concluded from the evidence that Appellants knew that transferring the Librarians on the basis of race was illegal, were warned not to make the transfers, and knew that other Fulton County officials had been caught and punished for making employment decisions on the basis of race; yet Appellants intentionally discriminated against the Librarians and concocted the "reorganization" plan to hide their discriminatory motives. Repeatedly, courts have found intentional discrimination to be reprehensible conduct under *Gore*'s first guidepost.

Bogle, *id.* at 1361. The Eleventh Circuit ultimately held that "[a]pplying the *Gore* guideposts to the facts in this case, we conclude the punitive damages ... are not so excessive as to violate due process." *Id.* at 1362.

There are several appellate cases from the state courts in Georgia applying *State Farm*. In *Craig v. Holsey*, 264 Ga. App. 344, 349-50 (2003), the Court of Appeals addressed an award of $8,801 in compensatory damages and $200,000 in punitive damages, arising out of an automobile accident where the defendant was driving under

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[73] *See Bogle*, 332 F.3d at 1360-62.

[74] *See Bogle*, 332 F.3d at 1360.

the influence of drugs. This is a ratio of 22 to one. The court affirmed the award, focusing, as authorized by *BMW*, 517 U.S. at 580, on the much greater *potential* harm that could have resulted from the conduct. The analysis of the risks associated with driving under the influence and potential harm that could result therefrom pre-dates and anticipates the careful analysis of the district court in *In re Exxon Valdez*, 296 F. Supp. 2d 1071. The *Craig* court also noted that the third guidepost issue of notice of the potential severity of the potential penalty for the conduct at issue was satisfied by O.C.G.A. § 51-12-5.1(f), which exempts from the $250,000 statutory cap on punitive damages torts committed under the influence of drugs or alcohol. Finally, the *Craig* court affirmed the admission of evidence of defendant's other misconduct (other, including subsequent, drug use and driving under the influence), the details of a criminal conviction, and evidence that the defendant had violated the terms of his probation.

In *Bowen & Bowen Construction Co. v. Fowler*, 265 Ga. App. 274 (2004), the Court of Appeals affirmed a punitive damages verdict arising out of claims for nuisance and fraud. The ratio was five to one, well within the guidance of *State Farm*. Consistent with the many cases cited above, the Court of Appeals interpreted *State Farm* to mean what it says about the defendant's wealth – while wealth cannot salvage an excessive award, consideration of wealth is not prohibited.

> Bowen also argues that the wealth of the defendant cannot justify an otherwise unconstitutional punitive damages award. It cites to testimony showing that Millard Bowen, the sole shareholder and president of the company was paid $1.5 million in salary in the past year and that the company also made a profit of $1.5 million that year. Because we have held that the award of punitives was not unconstitutional, we need not consider this argument.

Bowen & Bowen Constr. Co., 265 Ga. App. at 278.

A recent trial court opinion from Georgia dealing with the *discoverability* of defendant's financial status in light of *State Farm* reaches the same conclusion:

> The Court specifically rejects Defendants' arguments that a defendant's wealth is not relevant in determining the amount of punitive damages and thus, not discoverable.

Patterson v. Life Care Centers of America, Inc., State Court of DeKalb County, Civil Action File No. 02A: 93670-3 (Order of Feb. 11, 2004, at 2-3) (Purdom, J.). The *Patterson* Court went on to hold that:

> Although, in *State Farm* the high Court reasoned that "[t]he wealth of a defendant cannot justify an **otherwise** unconstitutional punitive damages award," the Court further explained: "That does not make its use unlawful or inappropriate; it simply means that this factor cannot make up for the failure of other factors, such as 'reprehensibility,' to constrain significantly an award that purports to punish a defendant's conduct."

Patterson, at 2-3 n.2 (emphasis in original) (citations omitted).

The most recent case applying *BMW* and *State Farm is McGinnis v. Am. Home Mortg. Servicing, Inc.*, No. 17-11494, 2018 U.S. App. LEXIS 23596 (11th Cir. Aug. 22, 2018), the wrongful foreclosure case discussed above. The court found a high degree of reprehensibility in part because the harm was not purely economic, but physical (emotional distress) as well. *Id.* at *10. The Court also focused on the fact that the wrongful conduct included repeated actions rather than an isolated event. *Id.* at ** 10-11. Finally, the Court noted that the lender refused to correct its error when it was pointed out, could not explain at trial how the "error" occurred, and that its use of a suspense account to seize disputed fees and penalties "involved malice, trickery, or deceit." *Id.* at ** 11-12.

On the *State Farm* ratio analysis, *McGinnis* affirmed that a ratio of 5.9:1 was acceptable, rejected as *dicta* the language in *State Farm* suggesting a lower ratio for higher dollar compensatory awards, and rejected the argument that the Court "must discount emotional distress damages when conducting the ratio analysis...." *Id.* at ** 13-15.