

**SUPREME COURT OF KENTUCKY**  
**NO. 1999-SC-001029-DG, 2000-SC-000444-D**  
**(1997-CA-2420 AND -2583-MR)**

THE ESTATE OF TOMMY SMITH, INDIVIDUALLY  
BRENDA SMITH, WIDOW, INDIVIDUALLY;  
AND KRISTEN SMITH, AN INFANT, BY AND  
THROUGH HER NEXT FRIEND, BRENDA SMITH,  
JOINTLY, SEVERALLY AND INDIVIDUALLY

APPELLANTS/CROSS-APPELLEES

v.

FORD MOTOR COMPANY AND  
MID-EAST FORD MERCURY, INC.

APPELLEES/CROSS-APPELLANTS

1999-SC-001028-DG

SAND HILL ENERGY, INC.

APPELLANTS/CROSS-APPELLEES

v.

FORD MOTOR COMPANY AND  
MID-EAST FORD MERCURY, INC.

APPELLEES/CROSS-APPELLANTS

**AMICUS CURIAE BRIEF OF THE**  
**CHAMBER OF COMMERCE OF THE UNITED STATES**

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**CERTIFICATE OF SERVICE**

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## **INTEREST OF THE *AMICUS CURIAE***

The Chamber of Commerce of the United States of America (“the Chamber”) is the nation’s largest federation of business companies and associations, with an underlying membership of more than 3,000,000 businesses and professional organizations of every size and in every sector and geographic region of the country. An important function of the Chamber is to represent the interests of its members by filing *amicus curiae* briefs involving issues of national concern to American business.

Because few issues are of more concern to American business than those pertaining to the fair administration of punitive damages, the Chamber regularly files *amicus* briefs in significant punitive damages cases, including each of the cases in which the United States Supreme Court has addressed such issues during the past 15 years. The present case was remanded for reconsideration in light of the Supreme Court’s most recent pronouncements concerning punitive damages in *State Farm Mutual Automobile Insurance Co. v. Campbell*, 123 S. Ct. 1513 (2003), and promises to be among the first state Supreme Court decisions involving the procedural implications of *State Farm*.

The Chamber and its members have a substantial interest in the procedures that courts employ in punitive damages cases and, in particular, the instructions that courts give to juries tasked with determining liability for and the amount of such damages. The Chamber believes that its familiarity with the law of punitive damages can be of assistance to the Court not just in resolving the instructional issues raised in Ford’s appeal, but also in addressing the Supreme Court’s “concerns over the imprecise manner in which punitive damages systems are administered” (*State Farm*, 123 S. Ct. at 1520).

## ARGUMENT

There can be no denying that *State Farm* represents a major development in the law of punitive damages. Not only does it provide lower courts with wide-ranging guidance regarding the review of punitive awards for excessiveness, but it also admonishes courts about the need for more detailed jury instructions, going so far as to specifically require one instruction that Ford requested and was denied in this case. That holding alone compels the grant of a new trial. But this Court should not stop there. Given the Supreme Court's expressed concerns about "the imprecise manner in which punitive damages systems are administered" and, in particular, about "[v]ague instructions" that "leave the jury with wide discretion in choosing amounts" of punitive damages (123 S. Ct. at 1520), it is clear that Kentucky's tradition of allowing "bare-bones" jury instructions is constitutionally inadequate in the punitive damages context. The Court accordingly ought to use this opportunity to provide Kentucky trial courts with concrete guidance regarding the kind of instructions that should henceforth be given in punitive damages cases. As we discuss below, *State Farm* clearly identifies several principles on which juries should be instructed.

### **I. THE TRIAL COURT COMMITTED REVERSIBLE ERROR IN REFUSING TO INSTRUCT THE JURY ON THE PURPOSES OF PUNITIVE DAMAGES AND ON THE PROHIBITION AGAINST EXTRATERRITORIAL PUNISHMENT**

Tommy Smith was killed in a workplace accident when an unmanned 1977 Ford F-250 pickup truck owned by Smith's employer crushed him against a storage shed. *Sand Hill Energy, Inc. v. Ford Motor Co.*, Ky., 83 S.W.3d 483, 485-86 (2002). Smith's estate and

next-of-kin sued Ford, claiming that the accident leading to his death was the result of a defect in the truck's transmission. *Id.*

At the close of evidence, Ford proposed a set of jury instructions that included several charges designed to guide the jury's exercise of discretion in the setting of punitive damages. Consistent with the Supreme Court's opinion in *Pacific Mutual Life Insurance Co. v. Haslip*, 499 U.S. 1, 15, 19-20 (1991) — and with this Court's holding in *Hanson v. American National Bank & Trust Co.*, Ky., 865 S.W.2d 302, 310 (1993) — one of these submissions asked that the trial judge inform the jurors of the limited purposes of punitive damages — *i.e.*, punishment and deterrence. In addition, because plaintiffs had succeeded in placing before the jury accusations that roughly 200 individuals across the country had been killed as a result of Ford's allegedly defective transmission (*see* Tape 15, 16:53:57, 16:56:28), Ford requested that the jury be told that it could not punish the company for harms suffered by persons outside Kentucky.

The trial court, over Ford's due process objections, refused to give either of these instructions, limiting its guidance of the jury to the standard for punitive liability and the five factors identified in KRS 411.186. *See Sand Hill*, 83 S.W.3d at 493. When the case came before this Court on discretionary review, Ford renewed its challenge to the trial court's decision to forgo more detailed instructions. *See id.* This Court held that the omitted instructions were unnecessary under Kentucky's practice of giving "bare-bones" jury instructions. *Id.* It was sufficient, the Court reasoned, that plaintiffs' counsel "reminded the jury time and again that the purpose of punitive damages was to punish wrongdoing." *Id.* The Court proceeded to reduce the jury's punitive damages award from \$20 million to \$15

million, concluding that the larger amount was unconstitutionally excessive. *See id.* at 493-96.

After denial of rehearing, Ford petitioned the U.S. Supreme Court for a writ of *certiorari*. Six weeks after handing down *State Farm*, the Supreme Court granted Ford's petition, vacated this Court's judgment, and remanded the case for "further consideration in light of *State Farm*." *Ford Motor Co. v. Estate of Smith*, 123 S. Ct. 2072 (2003) (mem.).

*State Farm* compels reversal of the judgment against Ford. To begin with, the Court there stated in no uncertain terms that "[a] jury **must be instructed** \* \* \* that it may not use evidence of out-of-state conduct to punish a defendant for action that was lawful in the jurisdiction where it occurred." 123 S. Ct. at 1522-23 (emphasis added). Because Ford was denied just such an instruction, the verdict against it is constitutionally infirm and therefore must be reversed.<sup>1/</sup>

Moreover, in view of the *State Farm* Court's criticisms of "[v]ague instructions" (123 S. Ct. at 1520), it should be equally clear that the trial court committed reversible error in refusing to instruct the jury on the purposes of punitive damages. The presence of such an instruction was central to the Supreme Court's holding in an earlier case that Alabama's procedures for administering punitive damages, which included a post-verdict evidentiary hearing and two layers of searching judicial review, did not violate due process. *See Haslip*, 499 U.S. at 18-20. The Court there observed that, though the instructions in the case before it "gave the jury significant discretion in the determination of punitive damages \* \* \*[,] that

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<sup>1/</sup> Given the fact that the jury's punitive award (\$20 million) is a round multiple of the number of people around the country allegedly killed as a result of the supposed defect in Ford's transmission (200), it seems plain that the trial court's refusal to give an extraterritoriality instruction was prejudicial. Certainly, it cannot be said to have been so clearly harmless as to excuse a constitutional violation.

discretion was not unlimited. It was confined to deterrence and retribution, the state policy concerns sought to be advanced. \* \* \* The instructions thus enlightened the jury as to the punitive damages' nature and purpose, identified the damages as punishment for civil wrongdoing of the kind involved, and explained that their imposition was not compulsory.” *Id.* at 19.

Shortly after *Haslip* was decided, this Court construed it to hold “that instructions to the jury *must* define the purpose of punitive damages as punishment to the wrongdoer and as a deterrent to wrongdoers and others from such activities in the future \* \* \*.” *Hanson*, 865 S.W.2d at 310 (emphasis added). Although the Court departed from that interpretation in its opinion in this case (*see* 83 S.W.3d at 493), *State Farm*'s condemnation of “[v]ague instructions” compels the conclusion that, in so doing, the Court fell into error. An instruction on the purposes of punitive damages is an essential ingredient of even the most minimally acceptable set of punitive damages instructions. Accordingly, for this reason as well, Ford is entitled to a new trial.<sup>2/</sup>

**II. THIS COURT SHOULD EXERCISE ITS SUPERVISORY AUTHORITY AND PROVIDE KENTUCKY TRIAL COURTS WITH CONCRETE GUIDANCE REGARDING THE PRINCIPLES ON WHICH JURIES MUST BE INSTRUCTED IN PUNITIVE DAMAGES CASES.**

The Court can resolve this case simply by holding that the trial court committed reversible error in refusing to give the two instructions discussed in Part I. We urge it,

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<sup>2/</sup>Contrary to this Court's statement in its original opinion, the fact that counsel for plaintiffs informed the jury of the purposes of punitive damages in his closing argument does not obviate the need for an instruction on this point. *See Taylor v. Kentucky*, 436 U.S. 478, 488-89 (1978) (“The Commonwealth also contends that no additional instructions were required, because defense counsel argued the presumption of innocence in both his opening and closing statements. But arguments of counsel cannot substitute for instructions by the court.”).

however, not to stop there. The Supreme Court's opinion in *State Farm* is a clarion call for state courts to reform the manner in which punitive damages are administered. Before turning to the excessiveness issue in the case, the *State Farm* Court observed that, though punitive awards "serve the same purposes as criminal penalties, defendants subjected to punitive damages in civil cases have not been accorded the protections applicable in a criminal proceeding." 123 S. Ct. at 1520. This, it explained, increased its "concerns over the imprecise manner in which punitive damages systems are administered." *Id.* The Court was particularly concerned about the adequacy of jury instructions, lamenting that "[j]ury instructions typically leave the jury with wide discretion in choosing amounts" of punitive damages and "do little to aid the decisionmaker in its task of assigning appropriate weight to evidence that is relevant and evidence that is tangential or only inflammatory." *Id.* In short, the "[v]ague instructions" (*id.*) that characterize many states' punitive damages systems are fundamentally inadequate to safeguard defendants' due process rights.

In view of these statements, it would seem clear that Kentucky's preference for "bare bones" instructions, though perhaps perfectly acceptable in a run-of-the-mill breach-of-contract case, is constitutionally inadequate in the punitive damages context. Unlike most other issues that jurors are called upon to decide, the setting of an appropriate civil punishment is a matter wholly beyond their experience. Juries also have neither the benefit of a statutory maximum to provide a framework within which to exercise their punishment discretion nor access to information regarding punishments meted out in other cases.

The compelling need to assist juries in this most difficult task dictates that this Court should not await case-by-case development of a body of punitive damages instructions or leave it to the editors of *Palmore's* to formulate pattern instructions. Instead, the Court

should use this case as a vehicle for providing guidance to Kentucky trial courts on the principles that must be embodied in punitive damages instructions (beyond the five KRS 411.186 factors) so as to meet its constitutional obligation to ensure that punitive damages are “based upon an application of law, rather than a decisionmaker’s caprice.” *Id.* at 1520-21 (internal quotation marks and citation omitted).

Other state supreme courts have done precisely that in response to the Supreme Court’s prior pronouncements on punitive damages. For example, shortly after *Haslip* the Tennessee Supreme Court used a retaliatory discharge case in which the jury had awarded \$375,000 in punitive damages to “announce a new procedure aimed at providing specific criteria to guide a jury in deciding whether to award punitive damages and, if so, in what amount.” *Hodges v. S.C. Toof & Co.*, 833 S.W.2d 896, 900 (Tenn. 1992). The court mandated a number of procedural safeguards, among them, importantly, detailed instructions on the purposes of punitive damages and the factors to be considered in setting an amount of such damages. *Id.* at 901-02.

The West Virginia Supreme Court of Appeals did precisely the same thing. *See Garnes v. Fleming Landfill, Inc.*, 413 S.E.2d 897, 908-09 (W. Va. 1991) (“Following the dictates of *Haslip*, we here set out a new system for the review of punitive damages awards in West Virginia. Foremost is our concern that there be: (1) a reasonable constraint on jury discretion \* \* \*. When the trial court instructs the jury, the court should carefully explain the factors to be considered in awarding punitive damages.”).

Similarly, two years after the Supreme Court decided *BMW of North America, Inc. v. Gore*, 517 U.S. 559 (1996), the Wyoming Supreme Court used an insurance bad faith case to mandate a comprehensive set of punitive damages instructions for future cases,

explaining: “*BMW* demands that we articulate objective standards for the imposition of punitive damages that can be communicated to the jury in the form of instructions and against which the imposition of the punitive award can be weighed in the process of judicial review. Otherwise we hazard litigants in our courts to future reversal by the Supreme Court of the United States because of the denial of due process of law resulting from the application of our current process.” *Farmers Ins. Exch. v. Shirley*, 958 P.2d 1040, 1045 (Wyo. 1998).

There can be no doubt that this Court has the same kind of supervisory powers and authority as the high courts of its sister states. As this Court has explained, “[i]t is the prime duty of this Court to assure to the best of its ability the orderly and effective administration of justice in this jurisdiction, and it has the inherent power to do what is reasonably necessary to attain that goal.” *Ex parte Farley*, Ky., 570 S.W.2d 617, 621 (1978) (internal quotation marks and citation omitted).

Fortunately, in performing this function, the Court is not starting with a blank slate. To the contrary, the Supreme Court’s opinion in *State Farm* is replete with guidance regarding the principles that should govern the punitive damages-setting function and hence should be given to juries in the form of instructions. We briefly discuss the most significant of these principles in the sections that follow.

#### **A. Purposes of Punitive Damages**

As discussed above, an indispensable component of any set of instructions on punitive damages is one that informs the jury of the limited purposes of punitive damages. Accordingly, we submit that this Court should mandate that in all punitive damages cases trial courts instruct the jury that the only purposes of punitive damages are to punish those

who have committed especially grave wrongs and to discourage such wrongdoers and others from acting in a similar manner in the future.

**B. Punitive Damages Should Be No Greater Than Necessary To Accomplish Kentucky's Interests In Punishment And Deterrence**

One important principle that emerges clearly from the Supreme Court's decisions in *BMW* and *State Farm* is that punitive damages may not exceed the amount reasonably necessary to accomplish the state's interests in deterrence and punishment. *See State Farm*, 123 S. Ct. at 1521 (“a more modest punishment for this reprehensible conduct could have satisfied the State's legitimate objectives, *and the Utah courts should have gone no further*”) (emphasis added); *BMW*, 517 U.S. at 584 (the constitutional question is “whether a lesser deterrent would have adequately protected the interests of Alabama consumers”). Accordingly, juries should be instructed to impose the least amount of punitive damages necessary in their judgment to adequately punish the defendant and deter future misconduct.

**C. Deterrent Effect Of Compensatory Damages And Awards Of Attorneys' Fees**

In *State Farm*, the Supreme Court recognized the commonsense proposition that large compensatory awards, particularly awards of non-economic damages, have a substantial deterrent effect in their own right. 123 S. Ct. at 1524-25. Similarly, in cases in which the plaintiff is entitled to an award of attorneys' fees, that additional award can have a substantial punitive and deterrent effect. *See, e.g., Smith v. Wade*, 461 U.S. 30, 94 (1983) (O'Connor, J., dissenting) (“awards of compensatory damages and attorney's fees already provide significant deterrence”). It follows that juries should be instructed to consider the deterrent and punitive effects of their compensatory awards, as well as any award of

attorneys' fees to which the plaintiff may be entitled, in determining the amount of punitive damages necessary to punish and deter.

**D. Punishment For Harms To Non-Parties Prohibited**

It is common in punitive damages litigation for plaintiffs' counsel to argue that a high punitive award is warranted because the defendant's conduct injured numerous individuals other than the plaintiff. Indeed, plaintiffs' counsel in this case took that very tack. *See* Tape 15, 16:53:57, 16:56:28. That also was a centerpiece of the plaintiffs' closing argument in *State Farm*, which caused the Supreme Court to hold in no uncertain terms:

Due process does not permit courts, in the calculation of punitive damages, to adjudicate the merits of other parties' hypothetical claims against a defendant under the guise of the reprehensibility analysis \* \* \*. Punishment on these bases creates the possibility of *multiple* punitive damages awards for the *same* conduct; for in the usual case nonparties are not bound by the judgment some other plaintiff obtains.

123 S. Ct. at 1523 (emphasis added; citations omitted).

To effectuate this constitutional limitation on the scope of punishment, this Court should require trial courts to instruct juries that a defendant may not be punished for the impact of its conduct on non-parties.

**E. Limitations On The Consideration Of Extraterritorial Conduct**

As indicated above, the Supreme Court unequivocally held in *State Farm* that “[a] jury must be instructed \* \* \* that it may not use evidence of out-of-state conduct to punish a defendant for action that was lawful in the jurisdiction where it occurred.” 123 S. Ct. at 1522-23. Accordingly, such an instruction must be given in any case in which the plaintiff adduces evidence of extraterritorial conduct.

## **F. Reprehensibility**

The Supreme Court held in *State Farm* that “punitive damages should *only* be awarded if the defendant’s culpability, after having paid compensatory damages, is so reprehensible as to warrant the imposition of further sanctions to achieve punishment or deterrence.” 123 S. Ct. at 1521 (emphasis added; citation omitted). Moreover, if the jury does find the conduct to be sufficiently reprehensible to require an award of punitive damages in excess of compensatory damages, the law is clear that the amount of punitive damages must not be disproportionate to the gravity of the conduct. *Id.* at 1526 (punitive damages must be “proportionate to the wrong committed”); *see also BMW*, 517 U.S. at 575 & n.24.

To effectuate these two principles, the Court should require trial courts to instruct juries (i) that punitive damages should be awarded only if the defendants’ conduct was so reprehensible as to warrant the imposition of sanctions beyond compensatory damages for the purposes of punishment or deterrence; and (ii) any award of punitive damages must not be disproportionate to the degree of reprehensibility of the defendant’s conduct.<sup>3/</sup>

## **G. Proportionality To The Plaintiff’s Injury**

Due process requires courts to “ensure that the measure of punishment is both reasonable and proportionate to the amount of harm to the plaintiff and to the general

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<sup>3/</sup>In both *BMW* and *State Farm*, the Supreme Court identified various factors that might bear on the determination of the degree of reprehensibility of the defendant’s conduct. The relevance of these (and other factors not mentioned by the Court) will vary from case to case. Moreover, any listing of factors by a trial court may well be taken as an indication that other factors (whether aggravating or mitigating) should not be considered. Accordingly, absent agreement of the parties on factors that are pertinent to the reprehensibility determination, this is an area that is better left to argument of counsel.

damages recovered.” *State Farm*, 123 S. Ct. at 1524. While the Supreme Court has “been reluctant to identify concrete constitutional limits on the ratio between harm, or potential harm, to the plaintiff and the punitive damages award,” in *State Farm* it identified several “principles” that it deemed “instructive.” *Id.* The Court specifically held that “few awards exceeding a single-digit ratio between punitive and compensatory damages, to a significant degree, will satisfy due process” and that awards four times larger than the compensatory damages “might be close to the line of constitutional impropriety.” *Id.* Moreover, the Court explained that, although higher ratios “may comport with due process where a particularly egregious act has resulted in only a small amount of economic damages,” “[t]he converse is also true, however. When compensatory damages are substantial, then a lesser ratio, perhaps only equal to compensatory damages, can reach the outermost limit of the due process guarantee.” *Id.* (internal quotation marks and citations omitted).

Propounding instructions that allow the jury to understand these fundamental principles is an important step toward “ensur[ing] both reasonableness and proportionality” in punitive damages awards. *See id.* at 1526. Specifically, we submit that the Court should require that, in any punitive damages case, the jury be instructed that the punitive damages must be proportionate to the damages suffered by the plaintiff (and only the plaintiff). In addition, juries should be instructed that the reasonableness of the relationship is dependent on the amount of compensatory damages: when the compensatory damages are small, a higher ratio may be permissible; when they are substantial the ratio must be more modest. Finally, where the trial court is able to identify a ratio that it finds to represent the outer limit of permissible punishment for the kind of case before it, it should be encouraged to tell the

jury what that limit is. Such guidance will go far toward assisting the jury to exercise its discretion within an appropriate framework.

#### **H. Comparable Fines and Penalties**

The third punitive damages “guidepost” established in *BMW* and reaffirmed in *State Farm* requires consideration of any legislatively or administratively prescribed fine or penalty for comparable conduct. *See State Farm*, 123 S. Ct. at 1526; *BMW*, 517 U.S. at 575, 583-84. It is not always the case that there will be a legislatively established penalty for comparable conduct. When there is, as happens to be the case here,<sup>4/</sup> the trial court should instruct the jury on the amount of the fine and further indicate that, while the punitive damages need not be limited to that amount, they should not be disproportionate to it either. *See BMW*, 517 U.S. at 583 (courts “should accord substantial deference to legislative judgments concerning appropriate sanctions for the conduct at issue”) (internal quotation marks and citation omitted).

Importantly, in making the determination as to the relevant civil penalty, the trial court should consider only penalties that realistically could be imposed for the conduct at issue, not “speculat[ive]” penalties that are only “remote[ly]” possible. *State Farm*, 123 S. Ct. at 1526. *See also Cooper Indus., Inc. v. Leatherman Tool Group, Inc.*, 532 U.S. 424, 442-43 (2001); *Johansen v. Combustion Eng’g, Inc.*, 170 F.3d 1320, 1337 (11th Cir. 1999).

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<sup>4/</sup>At the time Ford sold the truck involved in Mr. Smith’s accident, the congressionally established maximum fine for selling a vehicle that did not satisfy federal motor vehicle safety standards was \$1,000 and the maximum fine for selling a fleet of such vehicles was \$800,000. *See* 49 U.S.C.A. §§ 30112(a), 30115, 30165(a) (West 1997). Although it is beyond the scope of this brief, we note that multiple punishment and extraterritoriality concerns dictate use of the per-vehicle, not the per-fleet, fine.

## I. Financial Condition Irrelevant

The Supreme Court repeatedly has expressed concern that “juries will use their verdicts to express biases against big businesses, particularly those without strong local presences.” *State Farm*, 123 S. Ct. at 1520 (quoting *Honda Motor Co. v. Oberg*, 512 U.S. 415, 432 (1994)). And it also has explained that “[t]he fact that [a defendant] is a large corporation rather than an impecunious individual does not diminish its entitlement to fair notice” of the extent to which it can be punished (*BMW*, 517 U.S. at 585), which is the touchstone of the due process limitation on punitive damages (*id.* at 574). Indeed, the Court has made clear, corporate financial condition “bear[s] no relation to [a punitive] award’s reasonableness or proportionality to the harm” and reliance on it represents “a departure from well-established constraints on punitive damages.” *State Farm*, 123 S. Ct. at 1525.

Kentucky, of course, long has prohibited consideration of a defendant’s financial condition in the setting of punitive damages. *See Fowler v. Mantoath*, Ky., 683 S.W.2d 250, 253 n.1 (1984) (citing *Shield’s Adm’rs v. Rowland*, Ky., 152 S.W.2d 943 (1913)); *see also* KRS 411.186(2) (list of factors that a trier of fact may consider in calculating punitive damages does not include the defendant’s wealth). Even so, jurors in cases involving large, familiar corporations like Ford, are apt to assume that the defendant is exceptionally wealthy. Accordingly, to ensure that the prohibition against consideration of corporate financial consideration is observed, this Court should require trial courts to instruct juries, on request, that a large corporate defendant may not be punished more severely than other parties simply on account of its financial condition.

## CONCLUSION

The Court should reverse the judgment against Ford and order a new trial because *State Farm* establishes that the trial court erred in refusing to instruct the jury on the purposes of punitive damages and on the limitations on extraterritorial punishment. In addition, the Court should take the opportunity presented by this case to provide trial courts with guidance regarding the instructions that must be given in punitive damages cases in order to satisfy procedural due process.

Respectfully submitted,

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