

COMMONWEALTH OF KENTUCKY SUPREME COURT
Nos. 1999-SC-001028-DG, 1999-SC-001029-DG, 2000-SC-000444-DG

ESTATE OF TOMMY SMITH, et al.

APPELLANTS/CROSS-APPELLEES

v.

FORD MOTOR CO., et al.

APPELLEES/CROSS-APPELLANTS

ON DISCRETIONARY REVIEW FROM
THE KENTUCKY COURT OF APPEALS
Nos. 1997-CA-2420-MR, 1997-CA-2583-MR

BRIEF OF THE PRODUCT LIABILITY ADVISORY COUNCIL, INC.
AS *AMICUS CURIAE* IN SUPPORT OF APPELLEES/CROSS-APPELLANTS

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INTEREST OF THE *AMICUS CURIAE*

Amicus Product Liability Advisory Council, Inc. (“PLAC”) is a nonprofit corporation with 131 corporate members from a broad cross section of American industry. PLAC’s purpose is to submit *amicus curiae* briefs in appellate cases involving significant issues affecting the law of product liability. PLAC has submitted numerous *amicus* briefs in appellate courts throughout the country, including in the appellate courts of Kentucky. In particular, PLAC has filed briefs in numerous cases in both the U.S. Supreme Court and state appellate courts presenting issues relating to the standards governing the imposition and calculation of punitive damages.

Cases such as this one, in which breathtaking amounts of punitive damages are awarded on the basis of conduct that barely (if at all) meets the standard for tort liability, have been the scourge of the legal system for the past decade and a half. PLAC and its members have a strong interest in the standards that courts apply in reviewing these enormous exactions to ensure that due process is observed and that legitimate business practices and product development are not chilled.

STATEMENT OF THE CASE

PLAC adopts Ford’s statement of the case.

ARGUMENT

This is the kind of case that leaves people scratching their heads about the rationality and fairness of the American litigation system. The jury in this case awarded the plaintiff \$3 million in compensatory damages — a substantial sum in its own right — and then heaped on another \$20 million in punitive damages even though (i) the

vehicle in question was in a state of severe disrepair; (ii) the design element complained of is standard in the industry; (iii) the relevant federal safety agency repeatedly has reviewed the claim that this design element renders vehicles defective and repeatedly has declined to find a defect; and (iv) numerous juries throughout the country have returned defense verdicts in cases alleging the precise claim on which plaintiff in this case hit the jackpot.

We strongly support Ford's contention that the evidence in this case was insufficient to support even the finding of liability for compensatory damages. We further strongly concur that, under either the statutory standard or the common-law standard, the issue of punitive damages never should have been submitted to the jury. We therefore believe that the Court should not need to address the issue of the amount of punitive damages and should instead overturn the punitive award in its entirety.

Nevertheless, we believe that this case also calls attention to the need for additional judicial guidance on the issue of the appropriate amount of punitive damages. In particular, this case implicates two concepts that arise regularly in punitive damages litigation, particularly in products liability cases: first, the significance of a high award of compensatory damages in evaluating an excessiveness challenge to punitive damages, and second, the significance of the fact that there may be other individuals injured by the same product or course of conduct.

As we explain in Section A, if compensatory damages are high and greatly exceed the defendant's profit from the alleged misconduct, they already serve a significant deterrent effect and thereby reduce the need for any significant amount of punitive damages. As we explain in Section B, it is inappropriate to justify a large

punitive award on the ground that the conduct or design at issue injured many individuals other than the plaintiff. Because those other individuals are entitled to bring their own suits in which they too could potentially receive an award of punitive damages or, as in Ford's case, in which juries might find the design not to be defective at all, it is unfair to punish the defendant in one case for the effect of the conduct on individuals not before the court. Instead, in determining whether the punitive award before it is excessive, the reviewing court should multiply the amount of that award by the number of other individuals allegedly injured by the design or conduct and, if that aggregate number would be excessive, so too would be the award in the individual case. Application of that analysis here demonstrates that the \$20 million punitive exaction against Ford is monstrously excessive and that, at a minimum, Ford should receive a new trial on punitive damages.

A. The Fact That The Compensatory Damages Are High Weighs Against, Not In Favor Of, The \$20 Million Punitive Exaction.

The present case raises the recurring issue of how to determine whether the ratio of punitive to compensatory damages in a particular case is excessive. The U.S. Supreme Court has indicated that a high ratio of punitive to compensatory damages is often an indication of an unconstitutionally excessive punishment. *BMW of North America, Inc. v. Gore*, 517 U.S. 559, 580-583 (1996). Yet that court has declined to “draw a mathematical bright line between the constitutionally acceptable and the constitutionally unacceptable that would fit every case.” *Id.* at 583 (internal quotation marks omitted). Thus, while finding no justification for the 500:1 ratio at issue in the case before it, the Court identified several circumstances in which a high ratio of

punitive to compensatory damages could be justified. *Id.* at 582. Most obvious is an intentional tort case in which the plaintiff suffers only nominal compensatory damages.

The converse is equally true. Just as there are circumstances in which a high ratio of punitive to compensatory damages would not be indicative of an excessive punishment, it is not uniformly the case that a modest ratio is indicative of a reasonable punishment.^{1/} In particular, just as a higher ratio may be appropriate when the compensatory damages are nominal or modest and the conduct is egregious, even a ratio of 1:1 may be unreasonable and indicative of an excessive punishment when the compensatory damages are high and the conduct does not involve intentional malice or a similarly egregious mental state.

It is a matter of common sense and wide judicial and scholarly recognition that large compensatory damages can, in their own right, serve deterrent purposes.^{2/} In

^{1/} By saying this, we do not mean to suggest that a ratio of nearly 7:1 is “modest.” In *BMW*, the Supreme Court equated the principle that punitive damages should bear a reasonable relationship to compensatory damages with the double (1:1), treble (2:1), and quadruple (3:1) damages remedies that prevailed under early English law and that remain a hallmark of federal remedial statutes. 571 U.S. at 580-581 & n.33. The ratio in this case is over twice the ratios found by the Supreme Court to be the forebears of the reasonable relationship requirement.

^{2/} See, e.g., *Memphis Community School Dist. v. Stachura*, 477 U.S. 299, 307 (1986) (“[d]eterrence * * * operates through the mechanism of damages that are compensatory”) (emphasis omitted); *San Diego Building Trades Council v. Garmon*, 359 U.S. 236, 247 (1959) (“The obligation to pay compensation can be, indeed is designed to be, a potent method of governing conduct and controlling policy.”); *Beliz v. W.H. McLeod & Sons Packing Co.*, 765 F.2d 1317, 1332-1333 (5th Cir. 1985) (under Farm Labor Contractor Registration Act, “[d]eterrent effect may be achieved without awarding exemplary damages” if compensatory damages are sufficiently large); *Koufakis v. Carvel*, 425 F.2d 892, 907 (2d Cir. 1970) (under New York law, factors to be considered in awarding punitive damages include “the sufficiency of an award of compensatory damages and other remedies to deter such conduct in the future”); *Howard v. Malcolm*, 658 F. Supp. 423, 435-436 (E.D.N.C. 1987) (deterrence purposes of liquidated damages

recognition of this principle, courts throughout the country have not hesitated to reduce or overturn punitive awards where the compensatory damages were “ample” and the “total verdict” was so large that the addition of substantial punitive damages was “not * * * responsive to the purpose of civil punishment.” *Chandler v. Denton*, 741 P.2d 855, 868 (Okla. 1987) (ordering a \$500,000 punitive damages award reduced to \$250,000 where compensatory damages were \$600,000).^{3/}

This principle applies with particular force when, as here, the compensatory damages greatly exceed the “profit” from the alleged misconduct. In a fraud or

under the Agricultural Workers Protection Act may be achieved by award of compensatory damages); *In re Kratzer*, 9 B.R. 235, 239 (Bankr. W.D. Mo. 1981) (quoting 22 AM. JUR. 2D *Damages* § 264, which states that punitive damages “should not be awarded in a case where the amount of compensatory damages is adequate to punish the defendant”); *Mirkin v. Wasserman*, 858 P.2d 568, 583 (Cal. 1993) (punitive damages are not needed in securities fraud cases because “actual damages, alone, represent a potentially crushing liability”).

^{3/} See also *Inter. Med. Supplies, Ltd v. EBI Med. Sys., Inc.*, 181 F.3d 446, 467-468, 468-469 (3d Cir. 1999) (observing that “high, easily calculable compensatory damages may more appropriately be accompanied by a lower punitive damages ratio” and reducing \$50 million punitive award to \$1 million, where compensatory damages were \$48 million), *cert. denied*, 120 S. Ct. 791 (2000); *Rosado v. Santiago*, 562 F.2d 114, 121 (1st Cir. 1977) (reversing punitive damages award because “[a]n award of actual damages coupled with reinstatement * * * is ample relief * * * and a sufficient deterrent to future wrongdoing”); *Brown v. Farkas*, 511 N.E.2d 1143, 1148 (Ill. App. Ct. 1986) (reducing punitive award on the basis of large compensatory award); *Maiorino v. Schering-Plough Corp.*, 695 A.2d 353, 370 (N.J. Super. App. Div. 1997) (concluding that “the large compensatory damage award to Maiorino of \$435,000 by itself provided significant deterrence even to an employer as large as Schering” and holding therefore that “[a]n \$8,000,000 punitive damage award was not necessary to punish Schering or to deter it and other employers from engaging in the type of conduct found to be discriminatory by the jury”); *Quick Air Freight, Inc. v. Teamsters Local Union No. 413*, 575 N.E.2d 1204, 1217 (Ohio Ct. App. 1989) (affirming denial of punitive damages because compensatory damages were sufficient to punish defendants and deter them and others from similar conduct); *Buzzard v. Farmers Ins. Co.*, 824 P.2d 1105, 1116 (Okla. 1991) (ordering \$2 million punitive exaction reduced to \$400,000 in light of the compensatory award of \$200,000, which, it noted, was “not an insignificant sum”).

conversion case, the defendant's ill-gotten gain or "profit" is typically the same as the plaintiff's loss, so that an award of compensatory damages alone will generally be insufficient to accomplish the deterrent function. *See generally Kemezy v. Peters*, 79 F.3d 33, 34-35 (7th Cir. 1996); *Walker v. Sheldon*, 179 N.E.2d 497, 499 (N.Y. 1961); Amelia J. Toy, *Statutory Punitive Damages Caps and the Profit Motive: An Economic Perspective*, 40 EMORY L.J. 303 (1991). A "dollop" of punitive damages in excess of compensatory damages may therefore be appropriate even when the compensatory damages are high. *See* RICHARD POSNER, *ECONOMIC ANALYSIS OF LAW* § 6.15, at 227 (5th ed. 1998). In a product liability case, by contrast, the compensatory damages typically greatly exceed the defendant's "gain," whether measured as the incremental per-unit cost of utilizing an alternative design or the profit from the sale of the particular unit involved in the injury to the plaintiff.^{4/} In such circumstances, no significant amount of punitive damages is needed to accomplish rational deterrence; indeed, anything more than a

^{4/} Often the compensatory damages awarded to a particular plaintiff will not exceed the incremental cost of using an alternative design for *all* units sold or the profit earned on *all* units sold. However, that comparison is inapt since it does not include damages and settlements paid to other individuals not before the court. Moreover, even if it were possible to ascertain that aggregate figure and then conduct a comparison of aggregate damages/settlements paid to aggregate "gain" or "profit," it would be inappropriate to do so. As discussed below, given the fact that other juries might conclude that there was nothing wrong with the product, it would be both unfair and bad policy to assume that the incremental cost of using an alternative design in all units or the "profit" from the sale of all units constitutes *ill-gotten* gain. The only fair way to address the fact that not every jury will agree that a product is defective is to compare the damages awarded to the particular plaintiff with the profit/gain from the sale to that plaintiff.

nominal punitive award would tend to result in undesirable overdeterrence — *i.e.*, a reluctance to develop and market new products.^{5/}

The foregoing analysis compels the conclusion that the \$20 million punitive exaction in this case is grossly excessive. Plaintiff's expert testified that the utilization of his proposed alternative design would have caused Ford *no* incremental expense. Tape 3, 6/25/97, 13:59:45. Hence, Ford made *no* "profit" by choosing the design it did. Moreover, although plaintiff failed to adduce evidence of the profit made by Ford from the sale of the truck involved in Smith's accident, it is manifest that this measure of "ill-gotten" gain comes nowhere near the \$3 million compensatory award. Because the compensatory damages greatly exceed any plausible measure of "profit" from the alleged misconduct, there is no need for any significant punitive add-on, let alone a \$20 million eye-popper. At a minimum, therefore, this Court should order a new trial on punitive damages.

^{5/} See generally A. Mitchell Polinsky & Steven Shavell, *Punitive Damages: An Economic Analysis*, 111 HARV. L. REV. 869, 882-883 & n.29 (1998) (citing examples and authorities); Cass R. Sunstein, Daniel Kahneman, and David Schkade, *Assessing Punitive Damages (with Notes on Cognition and Valuation in Law)*, 107 YALE L.J. 2071, 2077 & nn.22, 23 (1998) (observing that "a risk of extremely high awards is likely to produce excessive caution in risk-averse managers and companies" and citing examples of the chilling effects of large punitive damages awards); *Loitz v. Remington Arms Co.*, 563 N.E.2d 397, 403 (Ill. 1990) ("Threatened with liability for large punitive awards, product manufacturers may curtail their research and development of new and beneficial products."); *Perez v. Z Frank Oldsmobile, Inc.*, 2000 WL 1049185, at *3 (7th Cir. July 31, 2000) ("Excessive [punitive] awards tend to discourage participation in the underlying economic activity, for some level of error by employees is a risk of doing business.").

B. The Allegation That Roughly 200 Individuals Have Been Killed In So-Called “Park-To-Reverse” Accidents Weighs Heavily Against, Not In Favor Of, A \$20 Million Punishment In The Case Of A Single Individual.

Particularly in products liability cases (but also in consumer fraud cases), it is becoming standard practice for plaintiffs to attempt to jack up their punitive damages windfall by invoking injuries that have occurred to individuals who are not before the court. The present case is no exception. In seeking its monstrous punitive damages award, plaintiff repeatedly emphasized its allegation that roughly 200 individuals have been killed in what it calls “park-to-reverse” accidents. And the punishment reflects that this appeal was successful: the jury appears to have punished Ford \$100,000 for each of the 200 fatalities alleged by plaintiff to have been caused by Ford’s automatic transmission. We submit that, in an individual case (as opposed to a nationwide class action in which all injured persons are before the court and subject to the binding effect of any judgment), this is a manifestly improper basis for either setting or justifying the amount of punishment.^{6/}

^{6/} We are not suggesting that it would be feasible actually to try a nationwide class action under the laws of all fifty states. Our point is simply that the only situation in which it is appropriate to punish a defendant for conduct affecting multiple individuals is when all of those individuals are before the court. If, for whatever reason, those individuals cannot all be brought before the court, an individual plaintiff should receive no more than his or her apportioned share of what would be the maximum permissible punitive award if all individuals allegedly injured by the defendant’s conduct were before the court.

1. Basing punishment on the total number of individuals allegedly injured by the conduct or product violates principles of comity and is unconstitutional.

To begin with, it is now clear that, at least in the absence of evidence that the conduct at issue is universally regarded as both tortious and subject to punitive damages, it is unconstitutional and violates principles of comity for a jury in an individual case to punish defendants for transactions or accidents having no connection to the state whose law governs the case. *See BMW*, 517 U.S. at 571-574. Because other states may not regard the conduct as tortious or, if tortious, may not deem it subject to punitive damages, it would violate the sovereignty and trump the interests of those states to punish the defendant for transactions and/or conduct properly subject to the substantive law of those states and thereby effectively to regulate the defendant's conduct in those states. *Id.* at 572-573. Since the punitive award in this case was the product of an invitation to punish for fatalities throughout the nation, the Court need go no further to conclude that the punitive award is improper and to order a new trial on punitive damages.

2. This Court should hold, as a matter of Kentucky common law, that it is impermissible to base punishment on the total number of individuals allegedly injured by the defendant's conduct or product.

Even putting to one side the violation of principles of comity and the unconstitutionality of punishing Ford for so-called "park-to-reverse" accidents having no connection to Kentucky, the use of evidence of other injured individuals to support a large punishment in an individual case is neither fair nor good policy. Such an

approach implicates two serious problems, which we denominate the “aberrational verdict problem” and the “overkill problem.”

The aberrational verdict problem. First, and most significantly in this case, basing punishment on the total number of individuals allegedly injured by the defendant’s conduct or product fails to account for the fact that the jury’s finding of liability may be aberrational. The present case is a perfect illustration. In support of its post-trial motions, Ford submitted an uncontested affidavit stating that, during the last 20 years, Ford has prevailed in more than 74% of the transmission cases it has tried to a conclusion. Ford also showed that the National Highway Traffic Safety Administration (“NHTSA”) has, at the instance of plaintiffs’ lawyers, studied this very allegation of defect and repeatedly has concluded that the data do not support a defect finding. It is grossly unfair to allow a single jury to override the determinations of those other courts and juries, as well as the expert federal safety agency, by basing its punitive award on the total number of vehicles in which the same transmission design was used, the total number of accidents, or the total number of fatalities. The consequence of allowing any one jury that power is to ensure that, sooner or later, every manufacturer of any product that is involved in a non-negligible number of injuries would be subjected to at least one and maybe several enormous punitive exactions — even if, as here, the vast majority of juries would conclude not only that the defendant did not act with an egregious mental state but that the product was not defective at all. The result would be significantly higher prices for consumers and a severe chilling effect on product innovation.

The overkill problem. Second, reliance upon the total number of accidents ignores the fact that every other injured individual has the right to bring suit and, except

in a few states, to pursue an award of punitive damages. If the plaintiff in this case could obtain an award of punitive damages that is pegged to the number of individuals killed or injured by the allegedly defective product, then logically so could every other individual. The result is that the defendant could be punished repeatedly for the full extent of the harm allegedly caused by its design.

Numerous courts have recognized that this kind of punitive damages overkill is a problem of constitutional dimension.^{7/} But most have simply thrown up their hands and said that the problem could be dealt with in the future, when the aggregate punishment exceeds the constitutional maximum.^{8/}

As Judge Friendly pointed out 30 years ago, however, that is a totally unrealistic solution: “whatever the right result may be in strict theory, we think it somewhat unrealistic to expect a judge, say in New Mexico, to tell a jury that their fellow townsman should get very little by way of punitive damages because Toole in California and Roginsky and Mrs. Ostopowitz in New York had stripped that cupboard bare.”

Roginsky, 378 F.2d at 840. See also *Jackson v. Johns-Manville Sales Corp.*, 781 F.2d 394,

^{7/} See, e.g., *Racich v. Celotex Corp.*, 887 F.2d 393, 398 (2d Cir. 1989); *In re School Asbestos Litig.*, 789 F.2d 996, 1003-1005 (3d Cir. 1986); *Roginsky v. Richardson-Merrell, Inc.*, 378 F.2d 832, 839-840 (2d Cir. 1967); *Juzwin v. Amtorg Trading Corp.*, 705 F. Supp. 1053 (D.N.J.), order vacated on other grounds, 718 F. Supp. 1233 (D.N.J. 1989); *In re “Agent Orange” Prod. Liab. Litig.*, 100 F.R.D. 718, 728 (E.D.N.Y. 1983); *In re Northern Dist. of Cal. Dalkon Shield IUD Prods. Liab. Litig.*, 526 F. Supp. 887, 899 (N.D. Cal. 1981), vacated and remanded on other grounds, 693 F.2d 847 (9th Cir. 1982); *Owens-Corning Fiberglas Corp. v. Malone*, 972 S.W.2d 35, 50-51 (Tex. 1998).

^{8/} See, e.g., *Dunn v. HOVIC*, 1 F.3d 1371, 1389-1390 (3d Cir. 1993) (en banc); *King v. Armstrong World Indus., Inc.*, 906 F.2d 1022, 1033 (5th Cir. 1990); *Simpson v. Pittsburgh Corning Corp.*, 901 F.2d 277, 280-282 (2d Cir. 1990); *Juzwin*, 718 F. Supp. at 1235-1236; *W.R. Grace & Co.—Conn. v. Waters*, 638 So. 2d 502, 504-505 (Fla. 1994); *Davis v. Celotex Corp.*, 420 S.E.2d 557, 564-566 (W. Va. 1992).

405 (5th Cir. 1986) (en banc) (“We believe that the Mississippi Supreme Court would not deny to its own citizens the right to recover that which citizens of dozens of other states are already entitled to recover”); *Waters*, 638 So. 2d at 505 (expressing unwillingness to “place Floridians injured by asbestos on an unequal footing with the citizens of other states with regard to the right to recover [punitive] damages from companies who engage in extreme misconduct”).^{9/}

The only fair solution to these twin problems is to permit each injured individual no more than his or her apportioned share of the maximum permissible aggregate punishment. The reviewing court should ask what the maximum permissible aggregate punishment would be in a class action in which all persons injured by the defendant’s allegedly wrongful conduct were before the court and then divide that figure by the total number of injured persons.^{10/} If the verdict exceeds the quotient, it is excessive. To put

^{9/} In addition, the “pay now, get credit (maybe) later” approach unnecessarily promotes inequity among plaintiffs. See *Roginsky*, 378 F.2d at 839-840 (“Neither does it seem either fair or practicable to limit punitive recoveries to an indeterminate number of first-comers, leaving it to some unascertained court to cry, ‘Hold, enough,’ in the hope that others would follow. While jurists might comprehend why Toole in California should walk off with \$250,000 more than a compensatory recovery and Roginsky in the Southern District of New York and Mrs. Ostopowitz in Westchester County with \$100,000, most laymen and some judges would have some difficulty in understanding why presumably equally worthy plaintiffs in the other 75 cases before Judge Crooke or elsewhere in the country should get less or none.”); *Juzwin*, 718 F. Supp. at 1236 (“it would not be fair to bar plaintiffs [from receiving punitive damages] by reason of the conduct of other litigants in other actions without any prior notice”); *Davis*, 420 S.E.2d at 565 (“it seems highly illogical and unfair for courts to determine at what point punitive damage awards should cease”). This approach also encourages an unseemly and undesirable race to the courthouse (or, more accurately, to final judgment). See *Davis*, 420 S.E.2d at 565 (“Obviously, those plaintiffs whose cases were heard first would gain the punitive monetary advantage.”).

^{10/} In making that determination of the maximum permissible aggregate punishment, the court would need to consider both state-law and federal due process limitations on

the inquiry another way, the question for the reviewing court is whether the amount awarded to the plaintiff, if awarded to every other individual injured by the alleged defective design, would produce an excessive aggregate punishment.

This approach addresses the “aberrational verdict problem” because it means that no one jury would be able to override the decisions of other juries through a punitive award that in essence makes up for the amounts the other juries refused to impose. It also addresses the “overkill problem” because, by definition, when all punitive awards are added together they would not produce an excessive aggregate punishment.

Application of this approach in the present case is straightforward and compellingly demonstrates the excessiveness of the \$20 million exaction. Accepting *arguendo* the plaintiff’s assertion that 200 people have been killed in accidents involving the same essential design as the one at issue in this case, a \$20 million punishment in this case cannot be justified unless an aggregate punishment of 200 times that amount would be justified for the full scope and effects of Ford’s conduct. Of course, there can be no doubt that a punishment of **\$4 billion** for Ford’s use of a design that is standard in the industry, that NHTSA has examined and declined to find defective, and that numerous courts and juries have found not defective would be grossly excessive. Accordingly, there is no justification for allowing the plaintiff in this case to keep its proportionate share of that grossly excessive \$4 billion aggregate punishment.

CONCLUSION

the amount of punitive damages.

This case affords the Court the opportunity to provide useful guidance for the review of punitive awards challenged as excessive. If the Court does not reverse and render judgment in favor of Ford, as we think it should, we urge the Court to take that opportunity and hold (1) that no more than a modest punitive award is appropriate when, as here, the compensatory damages exceed the gain to the defendant from the conduct affecting the plaintiff; and (2) that a punitive award in an individual case is excessive if the product of the amount of the award and the total number of persons allegedly injured by the defendant's conduct or design would be excessive if awarded in a class action in which all injured persons were before the court.

Respectfully submitted,

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