

**IN THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT**

—————
MILTON HAMBRICE, INC.,

Plaintiff-Appellee,

v.

STATE FARM FIRE AND CASUALTY COMPANY,

Defendant-Appellant.

—————

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF ARKANSAS, EL DORADO DIVISION

—————

BRIEF FOR THE APPELLANT

—————

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SUMMARY AND REQUEST FOR ORAL ARGUMENT

This is an appeal of a malicious prosecution judgment for \$7.5 million in punitive damages and \$312,000 in compensatory damages. State Farm Fire & Casualty Company brought the underlying lawsuit as a subrogation action against appellee Milton Hambrice, Inc. Hambrice had been the general contractor, on a cost-plus basis, for the remodeling of a restaurant, insured by State Farm, that caught fire during the remodeling. The fire was caused by wires that had been disconnected from neon lighting in the course of the remodeling, but had been left exposed and powered. State Farm learned that Hambrice was responsible for removing the lights, and brought the subrogation action after Hambrice made clear that it would not settle the claim. Although it turned out that the lights had been removed by an independent roofer whom the building owner paid directly, under the general contract Hambrice imposed an 18% surcharge on the roofer's bill and inspected the roofer's work.

During discovery in the underlying action, State Farm learned, after the disconnected wires had produced sparks, an electrician had made two separate service calls to the restaurant and had warned an assistant manager about the danger. After learning this information, State Farm believed that the insured would be found to be more than 50% liable (which would preclude recovery under Arkansas law) and voluntarily dismissed the case.

Hambrice then brought and tried this action. The jury found that State Farm had initiated the subrogation action without probable cause and with malice, awarding more than \$7.8 million in damages.

Appellant requests oral argument of 30 minutes per side, to provide a full airing of the numerous and complex issues presented.

CORPORATE DISCLOSURE STATEMENT

Appellant State Farm Fire and Casualty Company is a wholly owned subsidiary of State Farm Mutual Automobile Insurance Company, an Illinois corporation mutually owned by its policyholders. State Farm Fire and Casualty Company has no subsidiaries or affiliates that have issued shares to the public.

TABLE OF CONTENTS

	Page
SUMMARY AND REQUEST FOR ORAL ARGUMENT	i
CORPORATE DISCLOSURE STATEMENT	ii
TABLE OF AUTHORITIES	v
PRELIMINARY STATEMENT	xi
STATEMENT OF ISSUES	xi
STATEMENT OF THE CASE	1
SUMMARY OF ARGUMENT	7
ARGUMENT	9
I. STATE FARM CANNOT BE HELD LIABLE FOR MALICIOUS PROSECUTION ...	9
A. State Farm Had Probable Cause To Sue Hambrice	9
B. There Was Insufficient Evidence Of Malice	16
C. State Farm's Voluntary Dismissal Did Not Constitute A Termination In Favor Of Hambrice	18
D. Hambrice Failed to Rebut State Farm's Advice Of Counsel Defense	19
II. STATE FARM IS ENTITLED TO A NEW TRIAL ON LIABILITY	21
A. The District Court Erroneously Admitted "Expert" Testimony That State Farm Had Sued Hambrice Without Probable Cause	21
B. The Trial Court Erred In Refusing To Instruct On The Difference Between Probable Cause And Proof Of Liability	22
III. THE AWARD OF COMPENSATORY DAMAGES GROSSLY EXCEEDED THE AMOUNT, IF ANY, THAT WAS SUPPORTED BY THE EVIDENCE	23
A. Hambrice's Bald Assertions Cannot Support An Award Of Legal Expenses	23

B.	The Evidence Of Past And Future Economic Loss Was Impermissibly Speculative	24
IV.	THE IMPOSITION OF PUNITIVE DAMAGES CANNOT STAND	30
V.	THE PUNITIVE DAMAGES WERE EXCESSIVE AS A MATTER OF ARKANSAS LAW AND DUE PROCESS	35
A.	The Punitive Damages Were Excessive Under Arkansas Law	36
1.	The \$7.5 Million Punitive Exaction Shocks The Conscience	36
2.	The Punitive Damage Award Plainly Is The Product Of Passion And Prejudice	38
B.	The Punitive Damages Award Is Inconsistent With Due Process	41
1.	State Farm's Conduct Was Insufficiently Reprehensible To Warrant A \$7.5 Million Penalty	41
2.	The 24:1 Ratio Between Punitive Damages And Compensatory Damages Is Excessive	43
3.	The \$7.5 Million Penalty Greatly Exceeds The Prescribed Punishment For Comparable Conduct	45
4.	State Farm's Wealth Cannot Salvage The Excessive Award	46
	CONCLUSION	48

TABLE OF AUTHORITIES

Cases	Page(s)
<i>Alpha Zeta Chapter of Pi Kappa Alpha Fraternity v. Sullivan</i> , 740 S.W.2d 127 (Ark. 1987)	34
<i>American Fidelity Fire Insurance Co. v. Kennedy Brothers Construction, Inc.</i> , 670 S.W.2d 798 (Ark. 1984)	28
<i>Bankers Life & Casualty Co. v. Kirtley</i> , 307 F.2d 418 (8th Cir. 1962)	38
<i>BMW of North America, Inc. v. Gore</i> , 116 S.Ct. 1589 (1996)	<i>passim</i>
<i>Bryant v. Brooklyn Barbecue Corp.</i> , 932 F.2d 697 (8th Cir. 1991)	46
<i>Carpenter v. Automobile Club Interinsurance Exchange</i> , 58 F.3d 1296 (8th Cir. 1996)	33-34
<i>Chemical Sales Co. v. Diamond Chemical Co.</i> , 766 F.2d 364 (8th Cir. 1985)	22
<i>Cordes v. Outdoor Living Center, Inc.</i> , 781 S.W.2d 31 (Ark. 1989)	10
<i>Cox v. McLaughlin</i> , 867 S.W.2d 460 (Ark. 1993)	10
<i>Davidson v. Smith</i> , 530 S.W.2d 356 (Ark. 1976)	13
<i>Day v. Woodworth</i> (1852) 54 U.S. (13 How.) 362	47
<i>Diamond Shamrock Corp. v. Phillips</i> , 511 S.W.2d 160 (Ark. 1974)	30
<i>Duncan v. Foster</i> , 609 S.W.2d 62 (Ark. 1980)	24
<i>Eagle Properties, Inc. v. West & Co.</i> , 412 S.W.2d 605 (Ark. 1967)	30
<i>Estes v. Moore</i> , 993 F.2d 161 (8th Cir. 1993)	21

<i>Farm Service Cooperative, Inc. v. Goshen Farms, Inc.</i> , 590 S.W.2d 861 (Ark. 1979)	18
<i>Feibelman v. Worthen Nat'l Bank</i> , 20 F.3d 835 (8th Cir. 1994)	9, 31
<i>First Commercial Bank v. Kremer</i> , 728 S.W.2d 172 (Ark. 1987)	36
<i>First National Bank & Trust Co. v. Hollingsworth</i> , 931 F.2d 1295 (8th Cir. 1991)	23-24
<i>Florez v. Delbovo</i> , ___ F. Supp. ___, 1996 WL 529410 (N.D. Ill. Sept. 12, 1996)	45
<i>Foster v. Pitts</i> , 38 S.W. 1114 (Ark. 1897)	16
<i>Gordon v. McLearn</i> , 185 S.W. 803 (Ark. 1916)	31
<i>Green v. Uccelli</i> , 255 Cal. Rptr. 315 (Cal. App. 1989)	18
<i>Hardin v. Pennington</i> , 403 S.W.2d 71 (Ark. 1966)	23
<i>Harold McLaughlin Reliable Truck Brokers, Inc. v. Cox</i> , 922 S.W.2d 327 (Ark. 1996)	<i>passim</i>
<i>Hernon v. Revere Copper & Brass, Inc.</i> , 494 F.2d 705 (8th Cir. 1974)	10
<i>Hiatt v. Mazda Motor Corp.</i> , 75 F.3d 1252 (8th Cir. 1995)	7
<i>Higgins v. Elliott's Feed, Seed, & Fertilizer Co.</i> , 451 S.W.2d 884 (Ark. 1970)	29
<i>Hollingsworth v. First National Bank & Trust Co.</i> , 846 S.W.2d 176 (1993)	10, 22
<i>Hollins v. Powell</i> , 773 F.2d 191 (8th Cir. 1985)	38
<i>Holmes v. Hollingsworth</i> , 352 S.W.2d 96 (1961)	39
<i>Honda Motor Co. v. Oberg</i> , 114 S. Ct. 2331 (1994)	39

<i>Iannone v. Harris</i> , __ F. Supp. ___, 1996 WL 544241 (S.D.N.Y. Sept. 25, 1996)	45
<i>In re Bratton</i> , 119 B.R. 166 (Bankr. W.D. Ark. 1990)	46
<i>J.B. Hunt Transport, Inc. v. Doss</i> , 899 S.W.2d 464 (Ark. 1995)	31, 33
<i>Kable v. Carey</i> , 204 S.W. 748 (1918)	16
<i>Kansas & Texas Coal Co. v. Galloway</i> , 74 S.W. 521 (Ark. 1903)	13, 14, 19
<i>Koch Engineering Co. v. Gibraltar Casualty Co.</i> , 78 F.3d 1291 (8th Cir. 1996)	9
<i>Kroger Co. v. Standard</i> , 670 S.W.2d 803 (Ark. 1984)	10
<i>Lakota Girl Scout Council v. Havey Fund-Raising</i> , 519 F.2d 634 (8th Cir. 1975)	26
<i>Leary v. United States</i> , 395 U.S. 6 (1969)	16
<i>Lewis v. Burdine</i> , 402 S.W.2d 398 (Ark. 1966)	31
<i>Little Rock Wastewater Authority v. Larry Moyer Trucking, Inc.</i> , 902 S.W.2d 760 (Ark. 1995)	28-29
<i>Lockett v. International Paper Co.</i> , 871 F.2d 82 (8th Cir. 1989)	15
<i>Louisiana & North West R.R. v. Willis</i> , 711 S.W.2d 805 (Ark. 1986)	30
<i>Machen Ford-Lincoln-Mercury, Inc. v. Michaelis</i> , 681 S.W.2d 326 (Ark. 1984)	19
<i>Malvern Brick & Tile Co. v. Hill</i> , 342 S.W.2d 305 (Ark. 1961)	<i>passim</i>
<i>McKay v. WilTel Communications Systems, Inc.</i> , 87 F.3d 970 (8th Cir. 1996)	22

<i>Mears v. Nationwide Mutual Insurance Co.</i> , 91 F.3d 1118 (8th Cir. 1996)	10
<i>Minneapolis, St. Paul & Sault Ste. Marie Ry.</i> <i>v. Moquin</i> , 283 U.S. 520 (1931)	41
<i>Ogilvie v. Fotomat Corp.</i> , 641 F.2d 581 (8th Cir. 1981)	36
<i>Orsini v. Larry Moyer Trucking, Inc.</i> , 833 S.W.2d 366 (Ark. 1992)	23, 33
<i>O'Dell v. Hercules, Inc.</i> , 904 F.2d 1194 (8th Cir. 1990)	21
<i>Patterson v. PHP Healthcare Corp.</i> , 90 F.3d 927 (5th Cir. 1996)	44
<i>Perrodin v. Rooker</i> , 908 S.W.2d 85 (Ark. 1995)	22
<i>Peterson v. City of Plymouth</i> , 60 F.3d 469 (8th Cir. 1995)	21
<i>Peterson v. Superior Court</i> , 642 P.2d 1305 (Cal. 1982)	38
<i>Pulla v. Amoco Oil Co.</i> , 72 F.3d 648 (8th Cir. 1995)	<i>passim</i>
<i>R.T. Rogers Co. v. General Electric Co.</i> , 341 F. Supp. 971 (W.D. Ark. 1972)	16
<i>Ray Dodge, Inc. v. Moore</i> , 479 S.W.2d 519 (Ark. 1972)	31
<i>Robertson Oil Co. v. Phillips Petroleum Co.</i> , 14 F.3d 373 (8th Cir. 1993)	31
<i>Robertson v. Ceola</i> , 501 S.W.2d 764 (Ark. 1973)	27
<i>Rogers v. Allis-Chalmers Credit Corp.</i> , 679 F.2d 138 (8th Cir. 1982)	23, 29
<i>Rush v. Scott Specialty Gases, Inc.</i> , 930 F.Supp. 194 (E.D. Pa. 1996)	44

<i>Schimizzi v. Illinois Farmers Insurance Co.</i> , 928 F.Supp. 760 (N.D. Ind. 1996)	45
<i>Shepherd v. Looper</i> , 732 S.W.2d 150 (Ark. 1987)	36
<i>Snow v. C.I.T. Corp. of the South</i> , 647 S.W.2d 465 (Ark. 1983)	23, 24
<i>Southern Farmers Ass'n v. Whitfield</i> , 383 S.W.2d 506 (Ark. 1964)	19
<i>Stoughton v. Colla</i> , 634 F.2d 1075 (8th Cir. 1980)	38
<i>Traylor v. Huntsman</i> , 488 S.W.2d 30 (Ark. 1972)	29
<i>Unique Systems, Inc. v. Zotos International, Inc.</i> , 622 F.2d 373 (8th Cir. 1980)	27
<i>United States v. Dura-Lux International Corp.</i> , 529 F.2d 659 (8th Cir. 1976)	27
<i>Utah Foam Products Co. v. Upjohn Co.</i> , 930 F.Supp. 513 (D. Utah 1996)	46
<i>Viking Insurance Co. v. Jester</i> , 836 S.W.2d 371 (Ark. 1992)	39
<i>Wasp Oil, Inc. v. Arkansas Oil & Gas, Inc.</i> , 658 S.W.2d 397 (Ark. 1983)	25
<i>WSM, Inc. v. Milton Hambrice, Inc.</i>	6
<i>Zazu Designs v. L'Oreal, S.A.</i> , 979 F.2d 499 (7th Cir. 1992)	42

Statutes and Regulations

Ark. Code Ann. § 16-22-309	<i>passim</i>
Ark. Code Ann. § 16-64-122	7
Ark. R. Civ. P. 11	14

Miscellaneous

3 S. Stein, *Construction Law* (1996) 12

T. Cooley, *Torts* 19

PRELIMINARY STATEMENT

United States District Judge Harry F. Barnes presided over the trial of this malicious prosecution case through the jury verdict on May 23, 1996. He denied post-trial motions on June 21, 1996. The case was removed from state court on the authority of 28 U.S.C. § 1441; the jurisdiction of the district court rested on the diversity of the parties' citizenship. 28 U.S.C. § 1332. A timely notice of appeal was filed on July 17, 1996. This Court has jurisdiction under 28 U.S.C. § 1291.

STATEMENT OF ISSUES

An electrical fire caused by the negligent removal of a lighting fixture during a remodeling project destroyed a restaurant insured by appellant State Farm. State Farm filed a subrogation action seeking contribution from appellee Milton Hambrice, Inc., the putative general contractor for the renovation. After State Farm voluntarily dismissed that action, Hambrice brought the instant suit alleging malicious prosecution and was awarded \$312,000 in compensatory damages and \$7,500,000 in punitive damages. This appeal presents the following issues:

I. Whether State Farm was entitled to judgment as a matter of law on any of the following grounds:

A. That the facts known to State Farm as a result of its investigation of the fire created probable cause for the underlying suit as a matter of law. *Hernon v. Revere Copper & Brass, Inc.*, 494 F.2d 705 (8th Cir. 1974); *Hollingsworth v. First National Bank & Trust Co.*, 846 S.W.2d 176 (1993); *Malvern Brick & Tile Co. v. Hill*, 342 S.W.2d 305 (Ark. 1961); *Kansas & Texas Coal Co. v. Galloway*, 74 S.W. 521 (Ark. 1903).

B. That there was legally insufficient evidence that State Farm acted with malice in suing Hambrice. *Kable v. Carey*, 204 S.W. 748 (Ark. 1918); *R.T. Rogers Co. v. General Electric Co.*, 341 F. Supp. 971 (W.D. Ark. 1972).

C. That State Farm's voluntary dismissal without prejudice did not constitute a termination of the underlying action in favor of Hambrice. *Farm Service Cooperative, Inc. v. Goshen Farms, Inc.*, 590 S.W.2d 861 (Ark. 1979); Ark. Code § 16-22-309(a)

D. That State Farm acted on advice of counsel in instituting the allegedly unfounded suit. *Machen Ford-Lincoln-Mercury, Inc. v. Michaelis*, 681 S.W.2d 326 (Ark. 1984); *Kansas & Texas Coal Co. v. Galloway*, 74 S.W. 521 (Ark. 1903).

II. Whether State Farm was entitled to a new trial on liability on any of the following grounds:

A. That it was reversible error to refuse a jury instruction clearly differentiating between having probable cause to file suit and ultimately having a winning case. *Estes v. Moore*, 993 F.2d 161 (8th Cir.1993); *Peterson v. City of Plymouth*, 60 F.3d 469 (8th Cir. 1995).

B. That an expert witness was improperly permitted to testify to an opinion that probable cause was lacking. *Perrodin v. Rooker*, 908 S.W.2d 85, 87 (Ark. 1995); *Chemical Sales Co. v. Diamond Chemical Co.*, 766 F.2d 364, 367 (8th Cir. 1985).

III. Whether the award of compensatory damages was supported by sufficient evidence. *First National Bank & Trust Co. v. Hollingsworth*, 931 F.2d 1295 (8th Cir. 1991); *United States v. Dura-Lux International Corp.*, 529 F.2d 659, 663 (8th Cir. 1976); *Orsini v. Larry Moyer Trucking, Inc.*, 833 S.W.2d 366, 368 (Ark. 1992); *American Fidelity Fire Insurance Co. v. Kennedy Brothers Construction, Inc.*, 670 S.W.2d 798 (Ark. 1984).

IV. Whether there was sufficient evidence to support imposition of punitive damages. *BMW of North America, Inc. v. Gore*, 116 S. Ct. 1589 (1996); *Carpenter v. Automobile Club Interinsurance Exchange*, 58 F.3d 1296 (8th Cir. 1995); *Feibelman v. Worthen Nat'l Bank*, 20 F.3d 835 (8th Cir. 1994); *Robertson Oil Co. v. Phillips Petroleum Co.*, 14 F.3d 373 (8th Cir. 1993).

V. Whether the \$7.5 million punishment is excessive under Arkansas law or under the United States Constitution. *BMW of North America, Inc. v. Gore*, 116 S. Ct. 1589 (1996); *Pulla v. Amoco Oil Co.*, 72 F.3d 648 (8th Cir. 1995); *Ogilvie v. Fotomat Corp.*, 641 F.2d 581 (8th Cir. 1981); *Holmes v. Hollingsworth*, 352 S.W.2d 96 (Ark. 1961).

STATEMENT OF THE CASE

State Farm Fire and Casualty Company appeals from a judgment holding it liable for malicious prosecution, and awarding substantial compensatory and massive punitive damages to appellee Milton Hambrice, Inc., a contractor that State Farm sued in a subrogation action arising from a fire at a remodeling site.

1. *Hambrice's Contract With Western Sizzlin'*. Milton Hambrice, a master electrician and master plumber, is the principal owner of Milton Hambrice, Inc.¹ In the summer of 1991, Hambrice entered into and performed the bulk of a contract that called for it to serve as the general contractor for the remodeling of a Western Sizzlin' restaurant in Magnolia, Arkansas. The Western Sizzlin' restaurant was owned by WSM Inc., a corporation controlled by Jack Daugherty. The general contract called for Daugherty to pay Hambrice for time and materials expended, with an 18% surcharge for the general contractor's overhead and profit. App. 24-31. The contract excluded only three aspects of the project: windows, kitchen equipment, and flooring. App. 26, 237.

2. *The Progress of the Work and the Removal of the Neon Lights*. Hambrice began work at the Western Sizzlin' in early August 1991, "[i]nitially as general contractor" App. 232. Hambrice's employees performed extensive carpentry, painting, and aluminum siding installation under the contract. App. 220-223. Daugherty dealt directly with "the plumber that [Hambrice] had used in the past," an air conditioning installer, and David Arrington, an electrician (Tr. 219-220), rather than allowing Hambrice to subcontract for those services. Although the contract remained unaltered and in effect throughout the job, Hambrice felt that Daugherty had taken over most of the job and

¹ We generally refer to Milton Hambrice, Inc., and Milton Hambrice interchangeably as "Hambrice." When we need to distinguish the two, we refer to "Hambrice Inc." and "Mr. Hambrice."

rendered Hambrice a subcontractor. App. 245. Despite this, Hambrice continued to charge and receive his 18% surcharge on the work of some non-employees working at the site. App. 238-240.

Part of the remodeling involved putting a new roof on the restaurant. Because Daugherty asked Hambrice to obtain the services of a roofer, one of Hambrice's carpenters, Jack Ellar, brought roofer Robert Davidson onto the site. App. 124-125, 157. Davidson addressed his invoices to Hambrice, but Daugherty paid Davidson directly. App. 065, 157. Hambrice charged and was paid 18% of the roofer's total charges for overhead and profit pursuant to the general contract. App. 065, 116-120, 238-240. In addition, Hambrice "bought the materials" used for the roof and inspected the roofing work. App. 224, 243.

When it appeared that the removal of the old shingles might damage the perimeter neon lighting at the restaurant, Hambrice suggested to Daugherty that the neon lights should be removed. App. 225-226. Davidson testified that, after Ellar passed this instruction along to him, he removed the lights with the help of his own assistant and handed them to Ellar, who remained on the ground. App. 126-128. The wires that supplied the lights with power were left exposed at various points around the building, although according to Arrington, even a journeyman electrician, much less a master, easily could have secured the wires so that they were safe. App. 155A-155B.

Davidson's invoice specifically charged for "removing neon lights." App. 65. Hambrice imposed his 18% general contractor's surcharge on that invoice. App. 239-240, 116-120. Hambrice, a master electrician App. 219, earned the 18% surcharge in part by inspecting and giving final approval of Davidson's work. App. 225, 243. He told Daugherty that Davidson's work — presumably including the removal of the neon lights — "looked like good workmanship." App. 224.

3. *The Fire and the Ensuing Investigation.* On September 18, 1991, before the remodeling was complete, the restaurant — which was insured against fire by State Farm — caught fire and

sustained extensive damage. Hambrice learned of the fire the night it happened, when someone who, as Hambrice put it, "knew" that Hambrice "was the general contractor" on the Western Sizzlin' site, called from a cellular phone to apprise Hambrice of the fire. App. 227. Because it was "common knowledge" in the community that Hambrice was the general contractor on the site, he was the target of some "ribbing" after the fire. App. 233, 247-248.

State Farm promptly paid Daugherty's claim. In addition, beginning the day after the fire, State Farm claims adjuster Mike Tucker investigated its cause, "speaking to a lot of people." App. 43A-43B; Tr. 335. State Farm retained a fire cause-and-origin investigator and a consulting electrical engineer to investigate the fire. App. 32-39, 40-42. The fire investigator concluded that "[T]he fire apparently was ignited by high voltage electrical activity at a transformer providing power for a neon tube, perimeter lighting system, which had been removed by the contractor installing siding over the wooden sections of the exterior of the building." App. 32-39. He further stated that "[t]he neon tubes had been removed by Mr. Milton Hambrice * * * and David Arrington, an electrical contractor." App. 38.

Among others, Tucker interviewed Daugherty and his son, Brian, who was on duty as manager of the restaurant at the time of the fire. App. 177, 181-182, 24-31.² Daugherty identified Hambrice to State Farm as the general contractor on the remodeling job (App. 185; Tr. 236, 243) and State Farm saw at least one invoice from Hambrice to Daugherty reading "Milton Hambrice, Inc., General Contractor." App. 44-49.

Daugherty said that he had expressed concerns about the neon lights to Hambrice. App. 161-163. The Daughertys told State Farm that the sign had been removed by workers under Hambrice's supervision so that it would not be damaged while the roofing and siding were being replaced. App.

² We refer to Jack Daugherty as "Daugherty" and to Brian Daugherty as "Brian."

186, 192, 32-39. The interviews did not firmly establish which individuals removed the lights, however.

4. *The Subrogation Letters and Ensuing Conversations.* In October 1991, Tucker sent out two subrogation letters asserting potential claims relating to the fire at the Western Sizzlin'. One letter went to Hambrice, the other to the electrician, Arrington. App. 337, 53. Tr. 338.

Hambrice called Tucker the day he received the subrogation letter, and for 11 minutes vehemently insisted that he was not the general contractor at the site, was not responsible for the fire, and would not agree to accept any responsibility for it. App. 183-184. Hambrice maintained that his company had "nothing to do with it" because, at the time of the fire, his company's only ongoing project was the installation of some aluminum siding. App. 228. Hambrice characterized his approach as "extremely forceful" and "pretty stern." App. 228-229. He "was probably talking fast," and Tucker had no chance to "say[] much." App. 246. Hambrice invited Tucker to "take [his] statement" but said he "would advise [his] insurance company never to pay." App. 228.

Hambrice notified his liability insurance agent, Charles Tripp, about the subrogation letter. Hambrice told Tripp that he "would not agree to let [his carrier] USF&G pay this claim" and that he "would fight it to the death." App. 230. Tripp in turn notified H.B. Moran, a claims adjuster for USF&G. Tr. 256. Moran noted on his file that Hambrice was the general contractor at the site. App. 168. Hambrice misleadingly insisted to Moran, however, that he was a subcontractor whose only involvement on the site was to put up siding. App. 164-165, 167.

On December 9, 1991, Moran telephoned the State Farm office in Texarkana. Although he asked for Tucker, neither Moran nor Tucker could recall actually speaking with each other. App. 167, 184, 187. Moran allegedly told the unidentified State Farm employee that sending two subrogation letters, one to the electrician and one to the general contractor, was a "shotgun" approach. App. 166.

He denied that Hambrice was responsible for the fire and made clear that USF&G would not pay anything on State Farm's claim unless forced to do so. App. 169-170. Contrary to the usual practice, however, USF&G never sent State Farm any written response to the subrogation letter. App. 180.

Arrington, who had business liability coverage through another company but had home and automobile insurance with State Farm, contacted his State Farm agent. App. 131. Arrington also called Tucker. App. 179. He told Tucker that he had not worked on or near the neon lights, or on the disconnected wires that caused the fire; Arrington *had* been called to the restaurant one time when another set of cables that had been disconnected from the perimeter neon lights began sparking, some 50 feet away from the cables that ultimately caused the fire. App. 44-49, 144-145, 154-155. Brian Daugherty confirmed this version of events. App. 180, 182.

5. *State Farm's Subrogation Action Against Hambrice.* On December 31, 1991, Tucker wrote to Michael Huckabay, an attorney who frequently represented State Farm, enclosing for Huckabay's review State Farm's entire claims file for the Western Sizzlin' fire. App. 54-55. Huckabay's firm often advised against pursuing litigation after reviewing State Farm files (App. 175; Tr. 309), but in this instance Huckabay "strong[ly] recommend[ed]" pursuing a subrogation action against Hambrice. App. 56. Tucker's supervisor, John Jennings, authorized Huckabay to file suit against Hambrice (App. 176), and Huckabay filed a complaint in February 1992 seeking \$180,000 in damages. App. 114-115.

Discovery in that case, *WSM, Inc. v. Milton Hambrice, Inc.* proceeded through 1992 and into 1993. In May 1993, after a discussion with former Western Sizzlin' assistant manager Leigh Bass, State Farm and Huckabay learned for the first time that WSM Inc. may have borne more responsibility for the fire than State Farm initially was led to believe. Bass was not on duty the night of the fire; he was on vacation for the rest of September 1991, and was already committed to new employ-

ment elsewhere. App. 160, 44-49. Consequently, Bass' name never "came up" during Tucker's investigation, and State Farm had not interviewed him in the aftermath of the fire. Tr. 51, 299.

In preparation for Arrington's deposition in May 1993, however, one of State Farm's lawyers, Ed Oglesby, located Bass in Little Rock and spoke with him. App. 58. Bass indicated that Arrington in fact had been out to the restaurant *twice* to respond to sparking cables and had warned Bass that the cables could cause a problem if the power to them was not disconnected or turned off. App. 189-190, 193-194, 059, 060-061; PX 12A. When he was deposed the next day, Arrington confirmed the story — with stronger emphasis on the warning. App. 60-61. Arrington explained that Bass had called him to the restaurant shortly after the neon lights had been removed because sparks were coming from the cables. App. 59. Arrington stopped the sparking and instructed Bass to prevent power from going to the lights. App. 136-142.

The same circuit powered the restaurant's large outdoor sign, however, so that one could not turn on the sign at night without also sending power to the disconnected cables; the sign, moreover, was operated by a timer switch rather than manually. App. 159. As a result, Arrington said, Bass (apparently having turned on the sign) called him again with the same problem a week or so later. App. 142-143. Bass had stopped the sparking by the time Arrington arrived, but this time Arrington made clear to Bass how dangerous the cables were if they were powered while disconnected. App. 143. Although Brian was present during this service visit, he was not there the second time and did not know that Arrington had been called out again. App. 172-173. Jack Daugherty was not present during either service call and did not receive a bill that would have put him on notice that they occurred. App. 132, 136, 173. Tr. 244.

Once he learned that Bass apparently had twice disregarded Arrington's warnings, Huckabay suggested that State Farm dismiss its action against Hambrice. App. 60-61. Although Hambrice's

liability was no less apparent than it had been before, Huckabay concluded that, in light of this new information, a jury was likely to find the restaurant's employees more than 50% at fault. App. 61, 191. Under Arkansas' modified comparative fault system, a plaintiff that is 50% or more at fault in a multi-actor negligence case cannot recover at all against other parties. *E.g., Hiatt v. Mazda Motor Corp.*, 75 F.3d 1252, 1255 (8th Cir. 1996); Ark. Code Ann. § 16-64-122. Accordingly, State Farm voluntarily dismissed its complaint against Hambrice in June 1993.

6. *Proceedings below.* Hambrice commenced the present malicious prosecution action in Arkansas state court in 1994. State Farm removed the case to the Western District of Arkansas, where it was tried to a jury in May 1996. Plaintiff concluded a four-day trial by asking the jury to "feel good" by showing the "courage to do good by [your] neighbor" (App. 281), and punish "this monster created by this \$3 billion company" (App. 275). The jury found State Farm guilty of malicious prosecution in bringing a subrogation action against Hambrice, awarding \$312,000 in compensatory damages and \$7.5 million in punitive damages.

SUMMARY OF ARGUMENT

In this case, plaintiff successfully persuaded the district court to allow and the jury to base liability for malicious prosecution on no more than arguably *negligent* prefiling investigation, to award \$312,000 of speculative economic damages, and to exact \$7.5 million in punitive damages. No part of the verdict can stand.

The case against State Farm does not satisfy the elements of the malicious prosecution tort: (1) termination in favor of the plaintiff of a lawsuit brought by the defendant, (2) without probable cause, but (3) with malice, and (4) causing damages to the plaintiff. *First*, State Farm *did* have probable cause to sue Hambrice on the theory that, as general contractor on the site, he was responsible for the loose ends left by the removal of the neon lights. There was no dispute that the fire was caused by

those live electrical wires that had been left dangling. There was no dispute that Hambrice had agreed to serve as the general contractor for the remodeling job, and that the contract continued unaltered. There was no dispute that the Daughertys (and the fire investigator) told State Farm that the lights had been removed by someone connected with Hambrice in order to facilitate the installation of a new roof and new siding. There was no dispute that pursuant to the contract Hambrice added and collected an 18% general contractor's fee on the roofer's charges for removing the lights (and creating the dangerous condition that caused the fire). There also was no dispute that Hambrice had inspected the roofer's workmanship, and that Hambrice's employee installed siding in the immediate vicinity of the dangling wires. State Farm acted on both credible and accurate information indicating that Hambrice was responsible for the dangerous condition, information that would have supported a verdict against Hambrice in the underlying case.

Second, the finding that State Farm acted with malice was insupportable as a matter of law. There was no evidence to justify a finding that State Farm was reckless in bringing the subrogation suit, let alone that it had the necessary improper or sinister motive. *Third*, as a matter of law, a voluntary dismissal does not constitute the favorable termination needed to predicate a malicious prosecution action. *Fourth*, State Farm had a conclusive defense because it conveyed to its attorney all of the information in its possession that was material to the evaluation of probable cause, and filed suit only on that attorney's advice.

Finally, the damages awards are also insupportable. Hambrice's evidence as to his alleged actual damages was either impermissibly insubstantial, insupportably speculative, or both. As for the punitive damages, State Farm did not have fair notice that its conduct could be punished at all, much less subjected to gargantuan punitive damages that were 75 times the largest award previously upheld in a malicious prosecution case in Arkansas, 24 times the inflated award of compensatory damages

in this case, and 1,500 times the penalty prescribed by statute for maintaining a baseless lawsuit in Arkansas.

ARGUMENT

I. STATE FARM CANNOT BE HELD LIABLE FOR MALICIOUS PROSECUTION

A plaintiff must prove five elements to prevail on a malicious prosecution claim: "(1) a proceeding instituted or continued by the defendant against the plaintiff; (2) termination of the proceeding in favor of the plaintiff; (3) absence of probable cause for the proceedings; (4) malice on the part of the defendant; (5) damages." *Harold McLaughlin Reliable Truck Brokers, Inc. v. Cox*, 922 S.W.2d 327, 331 (Ark. 1996). Even viewing the evidence and all *reasonable* inferences therefrom in the light most favorable to plaintiff (see *Feibelman v. Worthen Nat'l Bank*, 20 F.3d 835, 837 (8th Cir. 1994)), Hambrice proved only the first of these five elements.³ The evidence further compelled the conclusion that State Farm was entitled to prevail on the affirmative defense of advice of counsel because it fully and fairly disclosed to competent counsel all the material facts known to it, and brought suit only upon counsel's advice. *Ibid.*⁴

B. State Farm Had Probable Cause To Sue Hambrice

1. "[P]robable cause means such a state of facts or credible information which would induce an ordinarily cautious person to believe" that the defendant in the underlying case — that is, the malicious-prosecution plaintiff — was liable for the claims pressed in that case. *Harold McLaughlin Brokers*, 922 S.W.2d at 332. This inquiry turns on the facts known to the malicious prosecution

³ This Court reviews the district court's interpretation of Arkansas law *de novo*. *Koch Engineering Co. v. Gibraltar Casualty Co.*, 78 F.3d 1291, 1294 (8th Cir. 1996).

⁴ At a minimum, State Farm should be granted a new trial because the verdict "goes against the clear weight of the evidence," *Mears v. Nationwide Mutual Insurance Co.*, 91 F.3d 1118, 1123 (8th Cir. 1996), and the district court abused its discretion in denying State Farm's motion.

defendant *at the time it brought suit*, not what may later have been discovered. *Cordes v. Outdoor Living Center, Inc.*, 781 S.W.2d 31, 33 (Ark. 1989). Although disputes as to what the defendant knew must be considered in the light most favorable to the verdict, the question whether the facts, including all *undisputed* facts, support probable cause is a question for the court, and thus should be reviewed *de novo* on appeal. *Hernon v. Revere Copper & Brass, Inc.*, 494 F.2d 705, 707, 709 (8th Cir. 1974); *Cox v. McLaughlin*, 867 S.W.2d 460, 465 (Ark. 1993).

It does not matter that the facts may have equally — or even more strongly — supported an inference that the defendant in the underlying action was not liable. See *Hollingsworth v. First National Bank & Trust Co.*, 846 S.W.2d 176, 179 (Ark. 1993). As a matter of Arkansas law, if the facts available at the time the underlying suit was filed were susceptible to contrary inferences with regard to ultimate liability, probable cause exists. See *Kroger Co. v. Standard*, 670 S.W.2d 803, 807-808 (Ark. 1984).

2. Here, the undisputed facts establish that State Farm had what appeared to be a strong — and certainly a jury-submissible — case when it decided to sue Hambrice. At that time, its investigation had revealed powerful evidence of Hambrice's likely liability. There is, for instance, no dispute that State Farm knew from Daugherty that Hambrice had agreed to act as the general contractor on the remodeling project (App. 185); indeed, Hambrice admitted that he "went into it as a general contractor" (App. 245). State Farm also knew that Hambrice had submitted invoices to Daugherty that bore the legend "Milton Hambrice, General Contractor" (App. 45), that Hambrice held himself out as a general contractor (see App. 236), and that the community and his friends considered him to be the general contractor at the Western Sizzlin' site (App. 233, 247-248).

State Farm had been informed — correctly, as it happened — that whoever removed the neon lights did so under Hambrice's aegis. The fire investigator's report, on which State Farm was entitled

to rely, indicated that the neon lights had been removed in order to accommodate the attachment of new siding to the restaurant (App. 33, 38), and Hambrice admitted that he was responsible for putting siding on the building. *E.g.*, App. 223. The material elements of this information, and the more general information received from Daugherty that someone for whom Hambrice was responsible had removed the lights, was not just reasonably credible; it was true.

At trial, Hambrice admitted that he had agreed to be the general contractor responsible for all but three parts of the remodeling project, that the contract making him the primary contractor for the project was still in effect at the time of the fire, that the contract did not exclude roofing from his responsibilities, and that he levied his 18% surcharge on Davidson's charges for the roofing work -- noting that the work was performed "under this contract." App. 116, 220, 232, 237, 239-240, 242, 245. In addition, Hambrice, a certified master electrician (App. 219), inspected and gave final approval of Davidson's work, telling Daugherty that it "looked like good workmanship." App. 243, 224-225. A jury certainly would have been entitled to assign substantial *direct* fault to Hambrice based on Hambrice's failure to exercise the skill and supervision for which he was being paid by identifying and correcting the hazardous condition that Davidson's removal of the neon lights had caused.

3. Moreover, it is hornbook law that a general contractor is responsible for the work performed within the scope of his general contract, whether by employees, subcontractors, or other workers, unless the contract excludes or transfers responsibility in some way. See, *e.g.*, 3 S. Stein, *Construction Law* ¶ 16.04[7], at 16-156 (1996). Indeed, one of the leading reasons to hire a general contractor is to ensure that someone is broadly *responsible* for a project, providing insurance for mishaps and exercising some supervision over the job site as a whole. Hambrice admitted that his agreement to serve as general contractor on the Western Sizzlin' project excluded only three items —

windows, kitchen equipment, and flooring. App. 237, 26. It did *not* exclude either electrical work or roofing.

True, Hambrice testified that, over the course of the project, his role diminished and Daugherty's control of the site increased, so that by the time of the fire he considered Hambrice Inc. to be in practical effect a subcontractor rather than a general. App. 245. In Hambrice's view, "if anyone else handles anything in the job, you end up being a subcontractor in that job." App. 220. But, tellingly, Hambrice charged Daugherty the 18% general contractor's surcharge on the time and materials charged by Davidson, and did so under the contract that made Hambrice responsible for a range of work that included the roofing and the siding — the tasks that were associated with the removal of the lights. The terms of the contract and the 18% surcharge for inspecting and generally supervising Davidson's work not only confirm the credibility of Daugherty's identification of Hambrice Inc. as the general contractor responsible for removing the lights, but make that characterization of Hambrice Inc.'s role all but inevitable as a matter of law. See, e.g., *Davidson v. Smith*, 530 S.W.2d 356, 359 (Ark. 1975).

It does not matter that the jury in the subrogation action might have *believed* Hambrice's tale of his diminishing role. The evidence recited above strongly conflicted with Hambrice's account, and that conflicting evidence clearly would have taken State Farm's case to the jury. Such a case cannot form the basis of a valid claim of malicious prosecution. Indeed, because the scope of the contract had not been modified, and because the condition that caused the fire resulted from work performed subject both to Hambrice Inc.'s 18% general contractor fee and to Hambrice's personal oversight, it would have been difficult for a jury to conclude that Hambrice Inc. was *not* significantly responsible for the creation of the dangerous condition.

4. Hambrice's attack on the issue of probable cause relied primarily on a charge of negligent investigation. In essence, Hambrice argued that State Farm should have conducted a more extensive pre-suit investigation, should have talked to more people, and should have taken recorded statements before filing suit. *E.g.*, App. 271-272. That contention is invalid under longstanding Arkansas law. The assessment of probable cause does *not* encompass "all the facts that could have been ascertained by the exercise of reasonable diligence." *Kansas & Texas Coal Co. v. Galloway*, 74 S.W. 521, 525 (Ark. 1903). Indeed, the Arkansas Supreme Court *reversed* a malicious prosecution judgment precisely because the court had presented a "reasonable diligence" theory to the jury. *Ibid.* Unsurprisingly, Hambrice has not identified a single case in which a lack of probable cause was based, not on the facts known to the malicious-prosecution defendant, but on facts that might have been learned through a more thorough investigation (a shortcoming that is specifically addressed by Ark. R. Civ. P. 11 and its federal counterpart).

But even if a malicious prosecution claim could rest upon mere negligence, the evidence utterly refutes the suggestion that State Farm was negligent. Before filing suit, State Farm had interviewed its insureds at length, talked to Arrington, and had the cause of the fire investigated by an electrical engineer and a cause-and-origin expert. That investigation disclosed ample grounds to believe that Hambrice was responsible, at least derivatively, for causing the unsafe condition. And State Farm *did* talk to Hambrice, though he did most of the talking. After Hambrice flatly denied responsibility and minimized his role on the job site, State Farm had no duty to go back to him for more of the same.

In view of the fact that Hambrice offered nothing more than heated denials, State Farm had no duty to continue "to consult with" Hambrice "before taking [Daugherty's] word" for the allegation that Hambrice in his capacity as general contractor was directly or indirectly responsible for the work that

created the fire hazard when the neon lights were removed. See *Malvern Brick & Tile Co. v. Hill*, 342 S.W.2d 305, 308 (Ark. 1961). Additional investigation, if ever required, could be necessary only if the facts *known* to State Farm would place a reasonably cautious person "upon inquiry as to the existence of material facts unknown" to it; the mere denial of liability by a prospective defendant does not impose any such "duty to make further inquiries." *Kansas & Texas Coal*, 74 S.W. at 525.

In addition, before filing suit State Farm *had* contacted one of the witnesses who subsequently made its case impractical to pursue further. The independent electrician, Arrington, merely told State Farm at that time that he had not worked on or near the neon lights, and his account was confirmed by the Daughertys. App. 44-49, 180, 182. And although Arrington did mention during the original investigation that he had visited the restaurant to stop the disconnected lead wires from sparking, it was only later, after the lawsuit had been filed, that he disclosed that he had made a *second* visit to stop the sparking and had warned the restaurant's management to shut off the power to those cable-ends. It was *that* added information — that the restaurant had ignored the warning about the dangerous condition — that led Huckabay and State Farm to believe, not that Hambrice bore no fault, but rather that a jury likely would conclude that *Daugherty* and his managers were more to blame for the fire. See App. 60-61.

But even the additional information learned at the time of Arrington's deposition — which, we repeat, Arkansas law did not require State Farm to ferret out before filing suit — would not have sufficed to defeat probable cause. A jury could still have concluded that Hambrice and those for whom he was responsible bore more fault than State Farm's insured, which is all that is needed to support probable cause. Certainly, a jury *could* have found that Hambrice was a general contractor who was responsible for approving the work that caused the hazard in the first place, and that the principal responsibility for the fire arose from the creation of that hazard. And *only* the jury could

determine whether Hambrice's fault exceeded that of restaurant personnel: under the Arkansas comparative fault regime, whenever "there is evidence of negligence on the part of both plaintiff and defendant, apportionment of fault * * * becomes a matter *solely* within the province of the finder of fact." *Lockett v. International Paper Co.*, 871 F.2d 82, 84 (8th Cir. 1989) (emphasis added).

C. There Was Insufficient Evidence Of Malice

A lack of probable cause is not, standing alone, sufficient to support liability for malicious prosecution. Rather, "malice *and* want of probable cause are essential elements." *Malvern Brick*, 342 S.W.2d at 307. "Both must be proved," and to prove malice requires evidence of an "improper or sinister motive for instituting the suit." *Foster v. Pitts*, 38 S.W. 1114, 1114 (Ark. 1897).

Hambrice's attempts to show malice are strikingly weak. At most, he accuses State Farm of bringing the action in order to recover its losses (a legitimate goal) or to force Hambrice into carrying out an investigation (a puzzling and senseless accusation). App. 272, 275, 277. Finally, Hambrice has suggested (Tr. 818) that the entire action was improperly motivated by Tucker's resentment at Hambrice's 11-minute telephone harangue three months before the lawsuit was filed — a rank speculation, flatly denied by Tucker (App. 186) and not supported by any corroborating evidence, that fails to provide a rational foundation for a finding of malice.

True, some cases "say that malice may be inferred when there is lack of probable cause, even though there was no express showing of malice." *Malvern Brick*, 342 S.W.2d at 307. This does not mean, however, that malice may be inferred *whenever* lack of probable cause has been shown; the inference is permissible only when the facts proving that probable cause was lacking also provide a reasonable basis for the inference that the underlying action was brought with an improper motive.⁵

⁵ In any event, the Due Process Clause would not permit an inference of malice from facts that, although they may establish a want of probable cause, do not support a rational conclusion that an action was brought from an improper motive. *E.g., Leary v. United States*, 395 U.S. 6, 33-34 (1969).

Malice may *not* be inferred from a bare lack of probable cause "if all the facts disclosed" — such as the voluntary dismissal in this case — "lead to a different conclusion." *Kable v. Carey*, 204 S.W. 748, 750 (Ark. 1918); *R.T. Rogers Co. v. General Electric Co.*, 341 F. Supp. 971, 976 (W.D. Ark. 1972).

But this case bears no resemblance to the cases in which malice has been inferred from the facts establishing want of probable cause. There is no inference of outright fabrication (as in *Malvern Brick*), or in the misuse of a baseless criminal accusation (and two arrests secured by giving false information to prosecutors) to gain leverage in a commercial dispute (as in *Harold McLaughlin Brokers*). Rather, malice simply is not rationally inferable from the evidence in this case, even assuming a lack of probable cause, because State Farm's conduct of the action was wholly inconsistent with an improper or malevolent motive. State Farm investigated the fire with some care (even if arguably not enough), obtained and relied upon the advice of technical experts and of legal counsel, and promptly and voluntarily dismissed the action when it learned facts suggesting that the negligence of its own insured might preclude recovery. These are not the acts of an ill-motivated, vindictive litigant.

Moreover, there is no precedent for the inference of malice from lack of probable cause in any case in which the latter is due to negligence. That should be self-evident; the concepts of negligence and malice are fundamentally opposed, so that it would be especially irrational to infer that a defendant that had merely conducted an inadequate investigation before suing was motivated by malice.

Because no reasonable jury could have concluded that State Farm acted with malice — particularly in light of State Farm's reliance on the advice of outside counsel to file the suit, and its later voluntary dismissal — the judgment should be reversed.

D. State Farm's Voluntary Dismissal Did Not Constitute A Termination In Favor Of Hambrice

The Arkansas Supreme Court has not yet addressed the question whether the voluntary dismissal of a civil case can satisfy the requirement that the underlying proceeding have terminated in favor of the malicious-prosecution plaintiff.⁶ The courts of other states are divided. The Arkansas Legislature, however, has specifically addressed the sanctions available for filing a baseless lawsuit that the plaintiff dismisses upon learning that it lacks merit. Arkansas Code Section 16-22-309 permits the award of attorney's fees to a litigant who is subjected to a baseless action or claim. But the provision specifically *excuses* from penalty any action that is voluntarily dismissed within a reasonable time after its insufficiency is discovered. Ark. Code § 16-22-309(a). In light of that strong expression of state policy favoring timely voluntary dismissal upon learning that an action lacks merit, the Arkansas courts are unlikely to hold that a voluntary dismissal under those circumstances nevertheless constitutes a favorable termination for the defendant that may trigger massive tort liability. Such an interpretation would nullify the statutory protection for mistaken but good-faith litigants.

Not only would declining to treat a voluntary dismissal as a favorable termination accord with the Legislature's policy; it also makes good sense. As one of the courts espousing that rule held, for such partial litigations the sanctions available under rules and statutes governing civil procedure provide adequate remedies. *Green v. Uccelli*, 255 Cal. Rptr. 315, 319 (Cal. App. 1989).

⁶ The two most nearly apposite decisions of that court point in somewhat different directions. The court has held, on one hand, that the "dismissal without prejudice" of a civil action that could have been refiled and prosecuted to a successful conclusion "was not a termination of proceeding in the sense required by the definition of malicious prosecution." *Farm Service Cooperative, Inc. v. Goshen Farms, Inc.*, 590 S.W.2d 861, 867 (Ark. 1979). On the other hand, the same court earlier held in a case of malicious *criminal* prosecution that the element of favorable termination had been satisfied where the prosecutor failed to respond to the court's threat to dismiss if the case were not promptly brought to trial. *Southern Farmers Ass'n v. Whitfield*, 383 S.W.2d 506 (Ark. 1964).

By contrast, the district court's disposition of this issue — combined with the extraordinary damages imposed — provides a strong but perverse incentive to plaintiffs to cling to causes of action even though the facts revealed in discovery significantly undermine their cases. Thus, if allowed to stand, Hambrice's windfall will come at the expense of the unnecessarily prolonged embroilment of future litigants.

D. Hambrice Failed to Rebut State Farm's Advice Of Counsel Defense

Even if a party brought a lawsuit without probable cause and with malice, "it is a complete defense to a malicious prosecution action if * * * the defendant made a full and fair disclosure to competent counsel of all facts known to the defendant, and [the] defendant acted in good faith on [the attorney's] advice." *Harold McLaughlin Brokers*, 922 S.W.2d at 332; *Malvern Brick*, 342 S.W.2d at 308-309. The burden of proving this affirmative defense is on the defendant. *Harold McLaughlin Brokers*, 922 S.W.2d at 332. State Farm met that burden here.

There is no dispute that State Farm delivered its entire claims file relating to the Western Sizzlin' fire to Mike Huckabay, whose reputation for legal excellence was uncontested. See Tr. 500-501. There likewise is no dispute that Huckabay, who was selective in making such recommendations, "strong[ly] recommend[ed]" that State Farm sue Hambrice Inc. (App. 56), the apparent general contractor on the Western Sizzlin' remodeling project.

The only disputed issues of fact relating to State Farm's advice of counsel defense were (1) whether Mike Tucker had rendered State Farm's disclosure less than "full and fair" by writing to Huckabay that Hambrice had been "non-cooperative" in speaking to Tucker over the telephone, and that Hambrice had not "committ[ed]" to turn the matter over to his insurance company for handling; and (2) whether the disclosure was tainted by the failure to mention Moran's conversation with the

unidentified State Farm employee (even though there is no evidence that Tucker or his supervisor, John Jennings, knew of that conversation).

The duty to disclose all facts to one's attorney extends only to *material* facts, however; it does not require disclosure of facts that could not change the legal assessment of probable cause. *Machen Ford-Lincoln-Mercury, Inc. v. Michaelis*, 681 S.W.2d 326, 328 (Ark. 1984); *Kansas & Texas Coal*, 74 S.W. at 526 (quoting T. Cooley, *Torts* 183). Accepting the accounts given by Hambrice and Moran, neither conversation begins to approach the threshold of materiality. As a consequence, State Farm's failure to disclose those conversations to Huckabay cannot vitiate the advice-of-counsel defense.

Hambrice admitted that, in his 11-minute conversation with Tucker, he had simply protested that he was not responsible for the fire, and had clearly expressed his unwillingness to settle the case. App. 228-229. That is what Tucker's letter conveyed. App. 56-57. And the call — even Hambrice's offer to give a statement — could indicate only Hambrice's attitude, which has nothing to do with whether there was probable cause to sue his company for contribution.

The Moran conversation reflected the same basic denial of general contractor status and liability, and the same firm stance against settlement. App. 170. In Moran's view, after his call there "shouldn't have been" any question that USF&G would not pay a claim against Hambrice unless forced to do so. App. 170. Moran did not claim that he had spoken to Tucker (who remembered no conversation with Moran) (App. 167; Tr. 360); thus, there was no evidence that *Tucker* was misleading Huckabay about the conversation. Still, even a deliberate omission of Moran's alleged remarks cannot negate the advice-of-counsel defense because nothing in Moran's call bore on the probable cause inquiry.

In sum, State Farm, "by acting on the advice of competent counsel, entirely dispelled any claim that [it] acted without probable cause." *Malvern Brick*, 342 S.W.2d at 309. For this reason as well, the judgment should be reversed. See *ibid*.

II. STATE FARM IS ENTITLED TO A NEW TRIAL ON LIABILITY

A. The District Court Erroneously Admitted "Expert" Testimony That State Farm Had Sued Hambrice Without Probable Cause

Hambrice's insurance practices expert, John Youngblood, testified that in his opinion "there was no probable cause on the part of State Farm to pursue this action against Mr. Hambrice." App. 197. Admission of this testimony — after denying State Farm's motion in limine to preclude testimony on this legal issue (App. 123; Defendant's Motion in Limine, at 2; Defendant's Brief in Support of Motion in Limine, at 2-4) — was a clear abuse of discretion that demonstrably prejudiced State Farm and therefore requires a new trial. See *O'Dell v. Hercules, Inc.*, 904 F.2d 1194, 1200 (8th Cir. 1990).

Indeed, admission of that opinion would constitute plain error, because this Court recently and squarely held that a witness, expert or not, cannot give an opinion as to whether a certain set of facts constitutes probable cause because that "ultimate conclusion is a question of law." *Estes v. Moore*, 993 F.2d 161, 163 (8th Cir.1993) (per curiam). Youngblood's "testimony was, therefore, not opinion testimony but rather it was a statement of a legal conclusion." *Ibid*. See also *Peterson v. City of Plymouth*, 60 F.3d 469, 475 (8th Cir. 1995). In the face of this controlling precedent, the district court's error is plain under any standard.

Moreover, Youngblood's testimony was manifestly and substantially prejudicial. Like the expert testimony in *Peterson* that certain police conduct met "nationally accepted standards," Youngblood's testimony "led the jury to focus on the wrong question." 60 F.3d at 475. The "reasonableness of [defendants'] conduct" is not an issue for expert testimony in a malicious prosecution case (*ibid.*); the jury had to determine only whether the facts known to State Farm created probable cause, not whether

State Farm met insurance industry standards for investigation. But Youngblood's testimony was far worse than the distracting testimony that compelled reversal in *Peterson*, because his opinion as to an ultimate, purely legal conclusion amounted to spoon-feeding the jury with purported "expert" evidence that one of the elements of the tort of malicious prosecution had been satisfied.

B. The Trial Court Erred In Refusing To Instruct On The Difference Between Probable Cause And Proof Of Liability

The natural temptation for a jury in a malicious prosecution case is to decide the merits of the underlying case and to find liability for malicious prosecution if it concludes that the underlying case was not meritorious. To prevent confusion between the question whether State Farm would have prevailed in its case against Hambrice and the question whether State Farm merely had probable cause to bring an action (which is what matters in a malicious prosecution case), State Farm requested the court to instruct the jury that

the question of whether or not an agent or employee of Milton Hambrice was liable for causing the fire is not involved in this case. Although you may believe that Milton Hambrice, Inc. is liable or not liable, still if the Defendant had a good faith belief that an agent or employee of Milton Hambrice, Inc., was liable for causing the fire at the time the Defendant agreed to the filing of the lawsuit, your verdict should be for the Defendant.

App. 258.

The proposed instruction was entirely appropriate, and indeed was necessary to prevent confusion of the issues. The Arkansas Supreme Court has carefully drawn the same distinction: for the jury to conclude that Hambrice was entitled to prevail against State Farm's "allegations * * * is not the same as saying [State Farm] had no probable cause to file the action [in] the first place." *Hollingsworth*, 846 S.W.2d at 179. A determination of no liability plainly does not amount to a determination that probable cause was lacking. *Perrodin v. Rooker*, 908 S.W.2d 85, 87 (Ark. 1995). Under the circumstances of this case, that the district court's instruction on probable cause "was a correct statement of the law as far as it goes" did not suffice to guarantee State Farm a fair trial.

Chemical Sales Co. v. Diamond Chemical Co., 766 F.2d 364, 367 (8th Cir. 1985). In the absence of the proposed instruction, the jury instructions on probable cause did not "fairly and adequately state the substantive law"; and because the resulting confusion clearly prejudiced State Farm, "a new trial is necessary." *McKay v. WilTel Communications Systems, Inc.*, 87 F.3d 970, 976 (8th Cir. 1996); see *Hardin v. Pennington*, 403 S.W.2d 71 (Ark. 1966).

III. THE AWARD OF COMPENSATORY DAMAGES GROSSLY EXCEEDED THE AMOUNT, IF ANY, THAT WAS SUPPORTED BY THE EVIDENCE

In Arkansas, as elsewhere, the "long established rule of law * * * is that damages will not be allowed where they are speculative, based on conjectural evidence or the opinions of the parties or witnesses." *Orsini v. Larry Moyer Trucking, Inc.*, 833 S.W.2d 366, 368 (Ark. 1992). See *First National Bank & Trust Co. v. Hollingsworth*, 931 F.2d 1295, 1306 n.7 (8th Cir. 1991). The Court views the evidence in the light most favorable to the plaintiff, but through the prism of the Arkansas courts' assessment of what proffered evidence of damages is impermissibly speculative or conjectural. *E.g., Rogers v. Allis-Chalmers Credit Corp.*, 679 F.2d 138, 142 (8th Cir. 1982). In its \$312,000 verdict, the jury appears to have awarded about \$100,000 in future economic losses in addition to the \$201,000 claimed for past losses, and the \$12,000 claimed as legal fees in the underlying case. See App. 121, 254. All of these items were speculative at best.

A. Hambrice's Bald Assertions Cannot Support An Award Of Legal Expenses

Hambrice testified that he incurred \$12,000 in legal expenses defending the underlying lawsuit (Tr. 703), and the jury apparently agreed; that is the most reasonable explanation for the award of exactly \$312,000 in compensatory damages. But Hambrice offered no "documentary evidence in support of his bald assertion." *First National*, 931 F.2d at 1306 n.8. As this Court made clear in rejecting another uncorroborated claim for legal expenses, such "bare testimony, *as a matter of law*, does not provide a sufficient basis to support the jury's award of damages." *Ibid.* (emphasis added).

See *Snow v. C.I.T. Corp. of the South*, 647 S.W.2d 465 (Ark. 1983); see also *Orsini*, 833 S.W.2d at 368. The judgment therefore should be remitted by \$12,000.

B. The Evidence Of Past And Future Economic Loss Was Impermissibly Speculative

Hambrice's proof of economic damages was impermissibly speculative. See *Duncan v. Foster*, 609 S.W.2d 62, 64 (Ark. 1980). Hambrice needed to prove with reasonable certainty, first, that the pendency of the State Farm lawsuit *caused* economic damages, and second, that the lawsuit caused a reasonably ascertainable *amount* of economic injury. *E.g.*, *Wasp Oil, Inc. v. Arkansas Oil & Gas, Inc.*, 658 S.W.2d 397, 402 (Ark. 1983). Hambrice claimed four types of economic loss. *First*, Hambrice claimed that the lawsuit forced the company to incur increased bidding expenses. *Second*, Hambrice claimed that the lawsuit prevented it from earning a substantial sum performing contract temporary services for Entergy. *Third*, Hambrice alleged that it lost large construction jobs on which it could not bid due to bonding restrictions imposed while the lawsuit was pending. *Fourth*, Hambrice claimed that the effect of the lawsuit on its retained earnings could be translated into past and future lost profits using a mathematical formula.

Hambrice's evidence on all grounds is too weak to survive scrutiny. Because he has proved no damages at all, the judgment should be reversed. In the alternative, the court should order that damages be remitted to an amount supported by the evidence, or grant a new trial.

1. Hambrice claimed \$15,000 in increased bidding expenses for 1992 and 1993, but utterly failed to document these expenses. Accordingly, those damages must be disallowed. *E.g.*, *First National*, 931 F.2d at 1306 & n.8; *Snow*, 647 S.W.2d 465. Moreover, Hambrice could demonstrate no causal relationship between the hypothesized bidding expenses and the lawsuit. Hambrice claimed that the lawsuit forced it to submit more (and more distant) bids to get work, but the company doubled its sales from 1991 to 1992 (the year the lawsuit was filed). App.43. Moreover, as Robert Marsh,

State Farm's expert damages witness, pointed out without contradiction, owners do not invite (or accept) bids from contractors they mistrust. App. 253. Hambrice did not present evidence that he was excluded from bidding at any location except the Stamps power plant, which we consider below (at pp.25-28).

Moreover, neither Hambrice nor his expert witness, Dr. Ralph Scott, attempted to screen out market conditions or other factors that might have affected Hambrice's need "to bid more jobs to get work." App. 249. Among other things, Hambrice and Scott failed to factor in the huge increase in warranty work (that is, work done at no or minimal charge to repair projects) in 1993; that increase alone more than accounted for Hambrice's reduction in net income. App. 254. Accordingly, Hambrice's evidence did not provide the basis for a *rational* inference that bidding expenses were, in fact, greater in 1992 and 1993 as a result of the lawsuit.

2. Some of Hambrice's most extravagant — and least sustainable — damages claims involved the alleged loss of substantial work as a diversified temporary services contractor⁷ at the Entergy/Arkansas Power & Light plant in Stamps. In 1990 and 1991, Hambrice's childhood friend, high school classmate, and lead damages witness, Larry Hart was maintenance supervisor at the Stamps plant. Hambrice's largest job for Hart had a price-tag of approximately \$10,000; the company also was responsible for some still smaller, "menial type" jobs grossing perhaps \$10,000 altogether. App. 205. Although Hambrice grossed only \$20,000 over two years from Entergy, and although there was *no* evidence that Hambrice had earned a profit on that work, Hambrice and Hart testified that they had been discussing a way to funnel a vast amount of temporary services work to Hambrice in the

⁷ A temporary services contractor provides workers with a variety of skills to employers who need particular services but do not, for whatever reason, want to expand their own permanent payrolls. The workers are employees of the temporary services contractor, which pays their taxes, benefits, and workers compensation insurance, and essentially "rents" the workers to other companies.

future, involving not just construction but a variety of clerical and maintenance work as well. App. 198, 200, 230-231. Hart and Scott testified that Hambrice would have been able to charge \$29 per man-hour and realize a 42% profit on this work. App. 208, 215. The claim is untenable.

First, Hambrice had no experience in providing the general temporary services in question, and did not even attempt to present evidence as to the costs of doing so. Hart claimed that Hambrice would have received at least half of all the work outsourced at the Stamps plant, for a variety of functions that Hambrice had never performed or contracted for before. App. 200, 201. Hambrice had only a 12-employee construction company. App. 202. He did not (and, so far as the record shows, never did) run a multifaceted temporary service for bookkeepers and groundskeepers alike. Rather, the discussions with Hart were "about trying to plan a business plan where [Hambrice] could *start* supplying contract labor to AP&L." App. 231 (emphasis added). That alone marks as impermissibly speculative the lost profits damages claimed from foregone work at Stamps. This Court has recognized that "lost profits are generally considered unduly speculative where, as here, the business is an untried enterprise with no history of profitability." *United States v. Dura-Lux International Corp.*, 529 F.2d 659, 663 (8th Cir. 1976). See also *Unique Systems, Inc. v. Zotos International, Inc.*, 622 F.2d 373, 378-379 (8th Cir. 1980); *Lakota Girl Scout Council v. Havey Fund-Raising*, 519 F.2d 634 (8th Cir. 1975).

Second, apart from the general legal bar applied to lost profits for a new business, Hambrice's showing of lost profits fails the exacting test of proof applied to future lost profits damages under Arkansas law. It was undisputed that Entergy had made a firm-wide commitment to use two or three large temporary service firms — Mega Services, Southern Temporary Services (STS), and (later) Ora. App. 202-213. In view of that evidence, it was pure conjecture that Hambrice would have been able to retain *any* work at the Stamps plant at all, much less expand his business there several times over.

Moreover, Hambrice presented no evidence of prices and costs that would support the speculation that his *profits* from Entergy work would have increased dramatically. To the contrary, the evidence at trial undermines any such conclusion. That evidence established that Mega and STS were charging Entergy hourly labor rates of \$6.75 to \$18.99. App. 66, 251, 267-71. There is no record basis for a reasonable conclusion that Hambrice could have earned higher rates. In contrast to State Farm's expert, who analyzed the record of Hambrice's labor and overhead costs and compared them with the prices actually charged to Entergy (see App. 256), Dr. Scott took on faith Hambrice's ability to charge Entergy \$10 or more per hour above market rate and to earn a profit that would be nearly 20 times what Scott set out as the usual rate. See p. 30 & n.9, *infra*. To the extent that Hart's professed ability to deliver contracts on such unlikely terms is not wholly rebutted by the evidence that hiring for Entergy temporary services had been centralized, the implication that Hart would commit his company to overpay grossly for Hambrice's services is both disturbing and far-fetched.

In fact, there was no evidence of Hambrice's costs (or past profits) at all, because Hambrice had absolutely no experience in providing the range of temporary services that supposedly would generate his profits. Without a reasonable basis for estimating the costs of the particular work claimed to be lost, there can be no award of damages for lost profits from that work. *Robertson v. Ceola*, 501 S.W.2d 764, 766 (Ark. 1973); *Traylor v. Huntsman*, 488 S.W.2d 30, 33 (Ark. 1972). By assuming that Hambrice would have been able to charge Entergy \$10 per man-hour more than the large temporary services contractors that actually performed the work, Hambrice's expert, Scott, was able to confabulate six-figure losses out of little more than Hart's ever-loyal friendship. That is not a rational foundation for an award of damages.

Third, Hambrice failed to prove that the State Farm *lawsuit* caused any lost profits from work at the Stamps plant. To the contrary, Hambrice testified that his company "was removed from

consideration" for work at Stamps as soon as he reported to Hart that he had received the *subrogation letter*. Tr. 698.⁸ That admission proves beyond dispute that the filing of the lawsuit several months later could not have caused any damages at all.

Moreover, Hart was forced to admit that the hiring decisions for most outsourcing was taken away from him *before* State Farm sued Hambrice. App. 207, 209. Specifically, on February 3, 1992 — nine days before the lawsuit was filed — Hart was ordered to use Mega Services for the bulk of his needs. App. 203-204, 206-207. Another fiat soon allocated virtually all the rest of the work to STS and Ora. Tr. 601, 604. No reasonable jury could find that Hambrice had a chance at ascertainable additional work, much less *all* of the work at the Stamps plant.

Because Hambrice failed to prove lost profits from Stamps with reasonable certainty, the compensatory damages were excessive by at least \$85,230, see App. 121, and should be remitted in that amount. Alternatively, the Court should order a new trial.

3. Hambrice also claimed lost profits during the five-month period in 1993 when its bonding limit was reduced from \$1.5 million to \$1 million. Arkansas law accepts evidence of lost profits when the plaintiff is prevented from performing either a *successful* bid or an extant contract. *E.g.*, *Little Rock Wastewater Utility v. Larry Moyer Trucking, Inc.*, 902 S.W.2d 760 (Ark. 1995) (contract); *American Fidelity Fire Insurance Co. v. Kennedy Brothers Construction, Inc.*, 670 S.W.2d 798 (Ark. 1984) (bid). But it does not allow damages based on the possibility that a plaintiff would have won a competitive bid that it did not even *submit*, especially when the plaintiff presents no evidence of its costs to perform the prospective work, no reasonably certain estimate of its bid, and no proof of

⁸ For his part, Hart testified that mere rumors of Hambrice's responsibility for the fire, as general contractor at the Western Sizzlin' site, were sufficient to discourage him from pressing Hambrice's cause to his superiors. Tr. 578. Those rumors would have arisen and persisted whether or not State Farm filed a subrogation action.

the amount of the successful bid — items that a plaintiff must prove with a "reasonably complete set of figures" even if an informal contract is in place. *Higgins v. Elliott's Feed, Seed & Fertilizer Co.*, 451 S.W.2d 884 (Ark. 1970). See *Little Rock Wastewater*, 902 S.W.2d at 766.

Hambrice did not even attempt to meet this standard. Instead, he simply testified that he was refused a bond for and thus could not bid on two jobs between \$1 million and \$1.5 million. App. 235. He did not identify those jobs, however, and did not present any evidence to demonstrate to a reasonable certainty that he would have won the bids or that he would have earned a profit on the work. And, unlike the successful plaintiff in *Rogers v. Allis-Chalmers*, 679 F.2d at 142, Hambrice did not provide "specific cost estimates" of such items as "labor and insurance costs" or "equipment rental, maintenance and repair."

4. Hambrice relied on still flimsier evidence to support \$61,031 in claimed past economic damages and all claimed future economic losses — more than half of his compensatory damages in all. Scott testified that, by estimating what Hambrice's retained earnings should have been, multiplying that figure by a constant amount, and compounding that sum year by year, he could estimate Hambrice's losses. App. 216-218. The ratio of sales to retained earnings showed no discernible pattern, however, ranging from 2.2 in 1990, to 5.9 in 1991, 8.9 in 1992, 13.2 in 1993, 5.6 in 1994, and 8.4 in 1995. Scott chose 7 as the average multiplier, but that choice is as valid scientifically as saying that the average temperature of a burning man and a freezing man is quite comfortable indeed. Using an equally arbitrary process, Scott chose a 2.2% profit ratio for the increased sales, from a series that ran 3.9, 2.6, 3.7, 0.5, -0.6, 1.3, and 7.6.⁹ Working from his estimate of an \$80,000 loss in 1993 — a loss that Scott did not make the slightest effort to link causally to the lawsuit — Scott

⁹ It is curious, to say the least, that Scott so readily accepted the 42% profit margin claimed for the speculated Entergy work, but could find only a 2.2% rate reflected in Hambrice's actual experience.

simply multiplied the numbers and compounded them to estimate Hambrice's overall loss. For all the demonstrated predictive value of his "method," Scott may as well have multiplied Hambrice's birth date by his weight.

To make matters worse, Scott had no experience in *any* of the fields in which Hambrice operated. Tr. 643-644. Scott's figures were pulled from thin air, and bore no relation to real-world projects or economic conditions. The Arkansas courts will not award damages for future lost profits when "the testimony as to the contemplated [work] was vague, and the outcome doubtful." *Eagle Properties, Inc. v. West & Co.*, 412 S.W. 2d 605, 609 (Ark. 1967). That phrase aptly describes Scott's testimony.

Indeed, only one incontestable figure stood out among all the evidence concerning the financial condition of Hambrice's business: Hambrice's stockholders' equity has increased every year since 1989, including throughout the pendency of the State Farm subrogation actions. App. 250, 72-113, 043. Because Scott's retained earnings formula could not support a rational inference that Hambrice sustained either past or future economic losses as a result of the lawsuit, this element of damages, too, should be vacated or remanded for a new trial.

IV. THE IMPOSITION OF PUNITIVE DAMAGES CANNOT STAND

A. In Arkansas, as elsewhere, "[p]unitive damages `are not a favorite of the law.'" *Louisiana & North West R.R. v. Willis*, 711 S.W.2d 805, 808 (Ark. 1986), quoting *Diamond Shamrock Corp. v. Phillips*, 511 S.W.2d 160, 164 (Ark. 1974). As this Court has framed the issue, to warrant punishment, a defendant must "intentionally pursue[] a course of conduct for the purpose of causing harm." *Robertson Oil Co. v. Phillips Petroleum Co.*, 14 F.3d 373, 381 (8th Cir. 1993). Punitive damages are not justified simply because a defendant has committed an intentional tort; even a fraud must be "aggravated" in order to warrant punitive damages. *Ray Dodge, Inc. v. Moore*, 479 S.W.2d

518, 522 (Ark. 1972). And a similar standard of aggravation applies in the malicious prosecution context. The Arkansas Supreme Court does not automatically uphold punitive liability simply because the element of "malice" was sufficiently inferable to support compensatory liability. Rather, the plaintiff must prove that the "wrongful act was willfully done, in a wanton and oppressive manner, and in conscious disregard of * * * civil obligations and [the plaintiff's] rights." *Gordon v. McLearn*, 185 S.W. 803, 805 (Ark. 1916); see *Harold McLaughlin Brokers*, 922 S.W.2d at 334. See *Lewis v. Burdine*, 402 S.W.2d 398, 399-400 (Ark. 1966) ("malice" means something more than an improper purpose "on the issue of punitive damages"). "[N]egligence, however gross, cannot support" a punitive award. *J.B. Hunt Transport, Inc. v. Doss*, 899 S.W.2d 464, 469 (Ark. 1995). And mere "reckless disregard" does not warrant punishment unless there is some "evidence of malicious or wanton conduct." *Feibelman v. Worthen Nat'l Bank*, 20 F.3d 835, 837 (8th Cir. 1994) (applying Arkansas law).

Hambrice presented nothing to support the inference that State Farm filed the subrogation action "for the purpose of causing harm." *Robertson*, 14 F.3d at 381. Indeed, in closing Hambrice disclaimed the suggestion that State Farm "went out to purposefully hurt him." App. 279. The claim of "malice" ultimately rested on the contention that State Farm was just interested in getting reimbursed for some of the loss at the Western Sizzlin' as well in the possibility that Hambrice might be induced to identify additional responsible parties who might also be found liable for contribution. Neither of these purposes is sinister enough to satisfy the strictures of Arkansas law described above.

All actions for civil damages are brought with the intent to make the defendant pay and, in counsel's words, with knowledge that the action is "going to cause a problem for" him. App. 279. The parties may not be the best of friends, but the bringing of a lawsuit for pecuniary purposes is simply not considered an act of "malice."

As for the hope that Hambrice would identify additional responsible parties, that desire was expressed, not by State Farm, but by Mike Huckabee, the counsel to whom State Farm submitted its file for review — counsel whom Hambrice did not make a defendant in this case. And Huckabee's letter expressed no doubts about Hambrice's liability, but was concerned only with the extent of its liability insurance. In any event, it is scarcely unusual — much less evil or malicious — for a party to sue the responsible party with which he is in privity, and let the party in privity seek contribution or indemnity on its own.

Hambrice also advanced the theory that Tucker was so angry at Hambrice for Hambrice's 11-minute telephone call *in October* that Tucker resolved *in December* to sue Hambrice baselessly. But Tucker denied any such hostility (App. 186), and there was no evidence that Tucker ever displayed the slightest animus toward Hambrice. To the contrary, Hambrice and Tucker agreed that, on the October phone call, Tucker let Hambrice vent without protest or argument. App. 179, 183, 228-229. No reasonable jury could find, based on this evidence, that for months Tucker harbored such a deep grudge that he was willing to risk his career promoting a lawsuit on a matter that otherwise would not have even been submitted to outside counsel for evaluation. Much less could the jury reasonably infer that any such grudge *caused* the lawsuit to be brought: Tucker simply transmitted the file to Huckabee.

There surely was no evidence that State Farm pursued its action against Hambrice "with unnecessary harshness or severity as by misuse or use of authority or power." *Harold McLaughlin Brokers*, 922 S.W.2d at 333. To the contrary, State Farm *dropped* its case after the first round of depositions showed, *not* that Hambrice had no responsibility for the fire, but that Daugherty might be *more* responsible because it appeared that Daugherty's staff had not heeded *Arrington's* warnings

about the dangers caused by the shoddy work that general contractor/master electrician Hambrice had inspected and approved.

Hambrice's case amounts at most to a showing that State Farm should have taken more steps in its investigation and should have learned that Daugherty's comparative fault likely was more extensive than State Farm originally had reason to suspect. And that's what Hambrice stressed in his closing appeal for a windfall: "No statement was taken" (App. 271), and "John Jennings [wa]s not watching what's going on" (App. 272). But assuming State Farm had some duty to conduct a more extensive investigation before suing an apparently liable party, even "[g]ross dereliction of duty does not warrant punitive damages." *Orsini*, 833 S.W.2d at 368. See also *Doss*, 899 S.W.2d at 469.

For example, this Court recently held that an Arkansas plaintiff was not entitled to recover punitive damages against her insurer for bad-faith failure to settle a claim against her for the \$50,000 policy limit, which exposed her to what turned out to be a million-dollar excess verdict. The insurer had declined to settle even though the insured had been drunk well past the point of legal presumption when she backed her car out of a saloon parking lot, killing a 14-year-old boy. *Carpenter v. Automobile Club Interinsurance Exchange*, 58 F.3d 1296 (8th Cir. 1995). This Court acknowledged that the insurer "possessed a very slim reed on which to act as it did," but held that such tenuous support for resisting settlement as the insured's denial of impairment despite her high blood alcohol level sufficed to bring the case out of the punishable class and into the realm of mere bad judgment. *Id.* at 1305. See also *Alpha Zeta Chapter of Pi Kappa Alpha Fraternity v. Sullivan*, 740 S.W.2d 127, 132 (Ark. 1987) (that defendant "might have made a better choice" did "not translate into wantonness" that would support punitive damages).

State Farm's conduct in this case falls far below the reckless indifference displayed by the insurer in *Carpenter*. Still more than in that case, therefore, State Farm's conduct fell short of the "strict

Arkansas standards" for submitting a punitive damages claim to the jury. 58 F.3d at 1305. Because Hambrice's evidence did not cross the threshold that would permit the imposition of punitive liability under Arkansas law, the punitive damages should be vacated in full.

B. There is a more fundamental reason why State Farm cannot be subjected to punitive damages in this case. In *BMW of North America, Inc. v. Gore*, 116 S. Ct. 1589, 1598 & n.22 (1996), the Supreme Court reaffirmed that "[e]lementary notions of fairness enshrined in * * * constitutional jurisprudence dictate that a person receive fair notice * * * of the conduct that will subject him to punishment." State Farm did not have fair notice that it could be punished for bringing an allegedly baseless lawsuit even if it voluntarily dismissed the action upon learning of its infirmity. Accordingly, the imposition of punitive damages in this case is unsustainable under the Due Process Clause as well as under Arkansas law.

Section 16-22-309 of the Arkansas Code provides for the award of attorney's fees to the prevailing party in an action in which "there was a complete absence of a justiciable issue of either law or fact raised by the losing party or his attorney." Ark. Code Ann. § 16-22-309(a)(1). An action is "lacking a justiciable issue" under this statute only if the action was brought or "continued in bad faith *solely* for the purpose of harassing or maliciously injuring another" or if the losing party or attorney "knew, or should have known, that the action * * * was *without any reasonable basis in law or equity* and could not be supported by a good faith argument for an extension, modification, or reversal of existing law." *Id.* § 16-22-309(b) (emphasis added). Yet the statute further specifies that *no* relief at all is available so long as "a voluntary dismissal is filed * * * within a reasonable time after the attorney or party filing the dismissal * * * knew, or reasonably should have known, that he would not prevail." *Id.* § 16-22-309(a)(2).

In view of this provision, State Farm had no warning that the filing of its subrogation action — which was indisputably based on evidence that Hambrice was the general contractor and had approved the removal of the neon lights — could subject it to punishment under Arkansas law. To the contrary, the Code provision gave State Farm every reason to believe that it would *not* be punished for bringing a lawsuit that it did not know to be baseless at the time of filing, so long as it promptly dismissed the action if it learned facts that made the lawsuit arguably untenable. And State Farm *did* dismiss the subrogation action only one month after the Arrington deposition and Bass interview that changed the likelihood that the case would succeed. The punitive judgment therefore should be vacated.

V. THE PUNITIVE DAMAGES WERE EXCESSIVE AS A MATTER OF ARKANSAS LAW AND DUE PROCESS

Even if the imposition of punitive damages were sustainable, the amount imposed here far exceeded the bounds permitted under the circumstances by either Arkansas law or the Due Process Clause. We explain below why the punitive exaction in this case — which is *75 times* the largest such award ever upheld in Arkansas and *24 times* the exorbitant compensatory damages — cannot be sustained under the relevant standards. In addition, if this Court reduces or remands the compensatory award, but does not vacate the punitive damages in full, the punitive damages also must be remanded for a new trial because "the two verdicts are interwoven and an error with respect to one requires a retrial of the whole case." *Shepherd v. Looper*, 732 S.W.2d 150, 152 (Ark. 1987); *Ogilvie v. Fotomat Corp.*, 641 F.2d 581, 586 (8th Cir. 1981).

A. The Punitive Damages Were Excessive Under Arkansas Law

A punitive judgment cannot stand if it is "so large as to shock the conscience of the court, or if it is clear that the jury was influenced by passion and prejudice." *Harold McLaughlin Brokers*, 922 S.W.2d at 334 (emphasis added). The punitive damages in this case suffer from both defects.

1. The \$7.5 Million Punitive Exaction Shocks The Conscience

a. The massive punitive windfall in this case must shock any conscience familiar with the treatment of similar claims in Arkansas. To begin with, the \$7.5 million in punitive damages awarded here for what was, at worst, an arguably ill-considered subrogation claim are **75 times** the largest punitive damages for malicious prosecution ever upheld by the Arkansas Supreme Court. And that \$100,000 punitive award rested on evidence that the defendant had caused the plaintiff to be arrested for felony fraud based on facts that the defendant mischaracterized to a public prosecutor for the manifestly improper purpose of intimidating the plaintiff into abandoning a contractual claim. *Harold McLaughlin Brokers*, 922 S.W.2d at 333-334. The Arkansas courts have affirmed a punitive award exceeding \$20,000 in only one other reported malicious prosecution matter, a case in which the defendant proceeded with a criminal complaint after "having been advised against it by one deputy prosecutor," failing to disclose several material and exculpatory facts to a second prosecutor, and "persist[ing] in the case even after its dismissal by the municipal court." *First Commercial Bank v. Kremer*, 728 S.W.2d 172, 177 (Ark. 1987) (\$75,000 punitive damages). Moreover, the \$7.5 million punitive award is **over 200 times** the largest punitive damages that *this* Court has ever affirmed in a malicious prosecution case. *Stoughton v. Colla*, 634 F.2d 1075 (8th Cir. 1980).

b. In reviewing punitive awards for excessiveness, the Arkansas Supreme Court considers "the extent and enormity of the wrong, the intent of the party committing the wrong, all the circumstances, and the financial and social condition and standing of the erring party." *Harold*

McLaughlin Brokers, 922 S.W. 2d at 334. Application of these factors confirms the shocking nature of the punishment.

First, by no stretch of the imagination can the "enormity" of the conduct in this case compare even with the other reported malicious prosecution cases in which punitive damages have been sustained in Arkansas. No one lied to a prosecutor in order to have someone arrested; no one went to jail or was forced to undergo a criminal trial. Cf. *Harold McLaughlin Brokers*, 922 S.W.2d 327.

Second, there was no evidence that State Farm's intent in filing suit was other than to recover from Hambrice, a solvent party that was responsible at least in part for the fire, some of the several hundred thousand dollars that State Farm had paid promptly to Daugherty. Hambrice's argument that State Farm acted "for the motive of profit" (Tr. 849) proves too much; if motivation to win a damage award makes filing a lawsuit a punishable offense, then every subrogation plaintiff — indeed, every plaintiff who seeks civil damages — potentially could be punished as well.

Third, the circumstances of the case speak for themselves: Hambrice appeared to be the general contractor responsible for causing the unsafe condition of the disconnected wires, and indeed may have been responsible for much (if less than 51%) of the cause of the fire under a proper application of the law to the undisputed facts. State Farm had no history of dealings or disputes with Hambrice Inc., and no reason to seek to harass either the company or Mr. Hambrice himself.

Finally, although the financial condition of a defendant can provide a reason to reduce a punitive damages award, e.g., *Hollins v. Powell*, 773 F.2d 191, 198 (8th Cir. 1985); *Bankers Life & Casualty Co. v. Kirtley*, 307 F.2d 418, 425 (8th Cir. 1962), the financial status of a corporate defendant cannot

justify an award that is otherwise excessive. A corporate defendant's financial position simply is not relevant to accomplishing state or federal interests in punishment and rational deterrence.¹⁰

Pegging the size of punitive damages to the reserves of an insurance company that belongs to a mutual company is particularly senseless. The burden of punitive damages "ultimately come[s] to rest not on the insurance companies but on the public, since the added liability to the insurance companies would be passed along to the premium payers." *Peterson v. Superior Court*, 642 P.2d 1305, 1311 n.4 (Cal. 1982).

Most fundamentally, a defendant's substantial financial resources provide no basis for deviating from the bedrock principle that a defendant's "punishment should fit the crime" (*BMW*, 116 S. Ct. at 1599 n.4). Punitive damages should be proportionate to the severity of the misdeed rather than to the financial strength of the defendant. *Id.* at 1599; see also *id.* at 1604.

In short, the \$7.5 million exaction in this case is shockingly excessive. State Farm must receive an unconditional new trial or, at a minimum, a substantial remittitur.

2. *The Punitive Damage Award Plainly Is The Product Of Passion And Prejudice*

In addition to being excessive, the \$7.5 million exaction manifestly is the product of "passion, prejudice, improper sympathy, [and] improper remarks and conduct of the plaintiff's counsel." *Holmes v. Hollingsworth*, 352 S.W.2d 96, 99 (Ark. 1961). From the childhood friend attesting to his improbable power to guarantee Hambrice unprecedented work (at a lavish profit) at the Entergy plant to the closing exhortation to the jury to "have the courage to do good by [your] neighbor" and to "feel good about bringing in a verdict of punishment" because State Farm is "worth \$3.3 billion" (App.

¹⁰ To the extent that earlier cases may suggest a contrary view, e.g., *Viking Insurance Co. v. Jester*, 836 S.W.2d 371, 379 (Ark. 1992), those cases must yield before the constitutional constraints on the use of wealth recognized in *BMW*, 116 S. Ct. at 1604, and *Pulla v. Amoco Oil Co.*, 72 F.3d 648, 659 n.16 (8th Cir. 1995).

281), Hambrice's case was designed to incite the jury to substitute passion for reasoned assessment of the facts. And, regrettably, that approach succeeded.

The Supreme Court has repeatedly decried the use of defendants' wealth and out-of-state status to goad juries into returning excessive punitive awards. The Court emphasized that "the presentation of evidence of a defendant's net worth creates the potential that juries will use their verdicts to express biases against big businesses, particularly those without strong local presences." *Honda Motor Co. v. Oberg*, 114 S. Ct. 2331, 2340-2341 (1994). A year earlier, the Court had similarly observed that "emphasis on the wealth of the wrongdoer increase[s] the risk that the award may [be] influenced by prejudice against large corporations, a risk that is of special concern when the defendant is a nonresident." *TXO Production Corp. v. Alliance Resources Corp.*, 509 U.S. 443, 464 (1993). See also *id.* at 489-495 (O'Connor, J., dissenting).

Hambrice's counsel paid no heed to the Supreme Court's admonitions. To the contrary, he did everything possible to ensure that the verdict reflected any available prejudices against large, out-of-state corporations. For example, he attempted to inflame the jury by suggesting through a "question" to State Farm's attorney that he and State Farm "perceived that the residents and citizens that vote and thus become part of a jury panel in Columbia County aren't * * * smart enough to figure out that you've got yourself a good lawsuit against Milton Hambrice." App. 191. See also *id.* at 466-467. In another "question," counsel loosely connected "the over work of the insurance claims departments" to "today's, we want more out of you in a given day, and we want to * * * downsize and this * * * corporate mentality that's taking * * * over America." App. 195.

Hambrice fanned the flames of regional prejudice with his own testimony. He brought the lawsuit, he declared, because "I feel it is my moral obligation to make sure that State Farm knows that people in South Arkansas are not going to lay down." App. 234.

Unsurprisingly, Hambrice's counsel used his closing argument to foster prejudice against out-of-state corporations. He attacked "[t]he corporate society, which is driven not as in South Arkansas by work, honesty, what is basically right and wrong. It's driven by profits." Tr. 812. He later urged the jury to return a large verdict by suggesting that State Farm thought the jurors were too ignorant to do so (App. 275-276):

Folks, in Bloomington, Illinois they looked at the socio-economic situation of you and you and you, about your family, what kind of education do you have. What do they think about? I think we'll just go with this one.

You go to that jury form, and you let your consci[ence] be your guide.

As Hambrice's counsel confided to the jury, "State Farm is not one of us." App. 278.

Counsel likewise did not leave the jury's focus on State Farm's wealth to chance. He closed his argument, and provided his only suggestions for an amount of punitive damages, by focusing on the wealth of State Farm, "as if having a large net worth were the wrong to be deterred." *Zazu Designs v. L'Oreal, S.A.*, 979 F.2d 499, 508 (7th Cir. 1992). He told the jury that it should punish the "monster created by this \$3 billion company" (App. 275) and argued that State Farm should be punished because it was a "three billion dollar liability company" that knew that the subrogation action "was going to cause a problem for Milton Hambrice" (App. 279).

Nor was Hambrice's counsel satisfied with presenting State Farm's wealth and identifying its Illinois headquarters: he connected the dots. He told the jurors that if they would "stand up against them just like Milton Hambrice has," they would have "gone to the lions with another one of yours," a "resident of Columbia County named Milton Hambrice who * * * stood up to them." App. 279-280. "This is an opportunity that you've got," he told the jury, if it had "courage to do good by [its] neighbor." App. 281. Counsel encouraged the jurors to "feel good about bringing in a verdict of punish-

ment, a levy" from the out-of-state corporate defendant to the pockets of their "neighbor," Hambrice, because "[w]e've given you the evidence you need. * * * They're worth \$3.3 billion." App. 281.

Hambrice's naked appeal to xenophobia and anti-corporate prejudice, combined with the startling verdict, lead to one conclusion. The verdict was animated by passion and prejudice, requiring a new trial on all issues. See *Minneapolis, St. Paul & Sault Ste. Marie Ry. v. Moquin*, 283 U.S. 520, 521-522 (1931) (when a verdict is product of passion and prejudice, it can be cured only by a new trial, not a remittitur).

B. The Punitive Damages Award Is Inconsistent With Due Process

In *BMW*, the Supreme Court explained that the Due Process Clause requires that "a person receive fair notice not only of the conduct that will subject him to punishment but also of the severity of the penalty." 116 S.Ct. at 1598. The Court identified three "guideposts" for determining whether the defendant had fair notice of the extent to which it could be punished: (1) the degree of reprehensibility of the conduct, (2) the disparity between the punitive damages and the harm or potential harm sustained by the plaintiffs, and (3) the difference between the punitive damages and the statutory penalties for comparable misconduct. *Id.* at 1598-1603. Significantly, one frequent element of pre-*BMW* review of punitive damages was completely absent from the Supreme Court's analysis: although urged by the plaintiff to do so (Resp. Br. 39, *BMW v. Gore*, No. 94-896 (U.S.)), the Court did not consider the defendant's financial resources to provide a justification for the otherwise excessive punishment in that case. See *id.* at 1604. Under *BMW*, the punitive damages awarded in this case cannot stand.

1. State Farm's Conduct Was Insufficiently Reprehensible To Warrant A \$7.5 Million Penalty

Not every tort legitimately carries with it the possibility of multimillion-dollar punitive damages atop compensatory remedies. As the Court explained in *BMW*, the fact "[t]hat conduct is sufficiently

reprehensible to give rise to * * * liability, and even a modest award of exemplary damages, does not establish the high degree of culpability that warrants a substantial punitive damages award." 116 S. Ct. at 1601. See also *Pulla v. Amoco Oil Co.*, 72 F.3d 648, 659-660 (8th Cir. 1995). This is especially true where, as here, the conduct involved "no indifference to or reckless disregard for the health and safety of others," and there was no showing that State Farm had "repeatedly engaged in prohibited conduct" — *i.e.*, malicious prosecution — "while knowing or suspecting that it was unlawful." *BMW*, 116 S. Ct. at 1599.

If State Farm's decision to litigate the extent of Hambrice's responsibility for the electrical fault can be said to cross the threshold for imposing liability for punitive damages *at all*, it barely nudges over the line, particularly in light of the voluntary dismissal. There was no suggestion that State Farm's "top-level executives engaged in a deliberate plan of trickery and deception" (*Pulla*, 72 F.3d at 660); at most, State Farm's pre-filing investigation appeared inadequate in the hindsight afforded by discovery. And there certainly was "no evidence or indication that" the level of investigation or any other allegedly deficient conduct of Tucker "reflected a company policy or practice." *Ibid.* To the contrary, at trial Hambrice argued that Tucker's investigation *violated* State Farm policy (*e.g.*, App. 273) and introduced the company's Operation Guides in support of that contention. App. 62. Hambrice's theory of malice is that "this case grew out of the resentment" or mere negligence "of a single" low-level "employee," Tucker. *Pulla*, 72 F.3d at 660. In short, the record does not hint at, much less establish, the level of "egregiously improper conduct" necessary to justify a \$7.5 million-dollar punitive award. *BMW*, 116 S. Ct. at 1601. To the contrary, this case presents at most "a one-time occurrence justifying a limited award of punitive damages." *Pulla*, 72 F.3d at 660.

State Farm's timely voluntary dismissal may have gotten short shrift in the district court, but the Arkansas Legislature has taken a different view on the ability of a mistaken litigant to redeem itself.

See pp. 34-35, *supra*. State Farm had no warning that conduct that is not punishable at all under a narrowly drawn statute addressing *more* culpable behavior nonetheless can support an award of \$7.5 million. Punishment on this scale for conduct that is identified and singled out for *no* punishment in the statute-book deprives State Farm of "fair notice not only of the conduct that will subject [it] to punishment but also of the severity of the penalty that a State may impose." *BMW*, 116 S. Ct. at 1598. The punitive damages therefore should be vacated or remitted.

2. *The 24:1 Ratio Between Punitive Damages And Compensatory Damages Is Excessive*

In assessing the limits that the Due Process Clause places upon state-law punitive damages, the Court in *BMW* also examined the relationship between punitive damages and compensatory damages. 116 S. Ct. at 1601-1603. The Court equated the requirement that punitive damages bear a reasonable relationship to compensatory damages with the double, treble, and quadruple damages remedies that prevailed under early English law and remain a hallmark of federal remedial statutes. *Id.* at 1601 & n.33. Nothing beyond this range can possibly be justified. Although it eschewed a "simple mathematical formula" for all cases, the Court identified only a few circumstances as grounds for departure from low multiples: (1) when "a particularly egregious act has resulted in only a small amount of economic damages," as in the case of a failed attempt; (2) when "the injury is hard to detect," as when misconduct or its effects are subtle or concealed; and (3) when "the monetary value of noneconomic harm might have been difficult to determine," prompting concern that the plaintiff will not be made whole. *Id.* at 1602.

This case presents none of the circumstances that might justify a ratio beyond the normal range recognized in *BMW*. First, the \$312,000 compensatory award is not a "small amount of economic damages," nor was State Farm's subrogation litigation "a particularly egregious act" on the spectrum of punishable conduct. And, as in *BMW*, the potential harm from defendants' actions is the same as

the actual harm: the additional potential loss for a judgment from a baseless lawsuit must be zero, while the economic damages that were awarded were highly speculative in any event. See also *Pulla*, 72 F.3d at 659 (only cognizable "potential harm" is that which "would have likely resulted from the dangerousness inherent in defendant's actual conduct"). Second, neither State Farm's alleged act — filing the subrogation suit — nor any injury arising out of that tort is "hard to detect." Third, because a corporation, not an individual, is the plaintiff here, concerns about "noneconomic damages" have no place in this case.

As several federal courts have recognized in the wake of *BMW*, under such circumstances the imposition of punitive damages that are many times larger than the compensatory damages cannot be justified. See, e.g., *Patterson v. PHP Healthcare Corp.*, 90 F.3d 927 (5th Cir. 1996) (finding a 6.5:1 ratio of punitive to compensatory damages excessive); *Utah Foam Products Co. v. Upjohn Co.*, 930 F.Supp. 513 (D. Utah 1996) (18:1 punitive/compensatory ratio reduced to 2:1); *Rush v. Scott Specialty Gases, Inc.*, 930 F.Supp. 194 (E.D. Pa. 1996) (3:1 ratio reduced to 1:1); *Schimizzi v. Illinois Farmers Insurance Co.*, 928 F.Supp. 760 (N.D. Ind. 1996) (13:1 ratio reduced to 3:1); *Iannone v. Harris*, ___ F. Supp. ___, 1996 WL 544241 (S.D.N.Y. Sept. 25, 1996) (10:1 ratio reduced to 2:1); *Florez v. Delbovo*, ___ F. Supp. ___, 1996 WL 529410 (N.D. Ill. Sept. 12, 1996) (15:1 ratio reduced to 5:1).

The ratios referred to in *BMW* are consistent with prior experience in malicious prosecution cases in Arkansas and the Eighth Circuit practice in malicious prosecution cases. The fact that neither this Court nor the Arkansas Supreme Court has sustained a punitive damage award of more than \$100,000 in a malicious prosecution case by definition means that in no case involving actual

damages of more than \$100,000 has the ratio of punitive to compensatory damages exceeded *1:1*. Indeed, at least since the Second World War in Arkansas, and throughout the history of this Circuit,¹¹ where compensatory damages have exceeded \$20,000, the punitive damages ratio in malicious prosecution cases has been 3:1 or less.¹²

3. *The \$7.5 Million Penalty Greatly Exceeds The Prescribed Punishment For Comparable Conduct*

The Court held in *BMW* that "[c]omparing the punitive damages award and the civil or criminal penalties that could be imposed for comparable misconduct provides a third indicium of excessiveness." 116 S.Ct. at 1603. The Court added that "a reviewing court engaged in determining whether an award of punitive damages is excessive should accord substantial deference to legislative judgments concerning appropriate sanctions for the conduct at issue." *Ibid.* (internal quotation marks omitted).

The closest statutory analogues to the malicious prosecution tort are Section 16-22-309 of the Arkansas Code of 1987, and Rule 11 of the Arkansas Rules of Civil Procedure, which is almost identical to the federal rule. Although Rule 11 provides courts with substantial discretion, under either provision one would rarely (never, under Section 16-22-309) be punished by more than the costs of responding to an unsustainable lawsuit (claimed by Hambrice to have been \$12,000 (App. 234).

¹¹ Although we have reviewed Arkansas cases dating back to the early days of statehood, we do not rely on the comprehensiveness of the search of Arkansas cases before 1944, which are not contained on the leading databases.

¹² The \$100,000 punitive damages case preceded *BMW*; because the compensatory damages in that case were only \$18,000, the 5.6:1 ratio in that case might well come under one of the exceptions to the low-ratio rule set forth in *BMW*.

Significantly, Section 16-22-309 provides attorney's fees of no more than \$5,000 to a party against whom "there was a complete lack of a justiciable issue of either law or fact." The punitive damages in this case are *1,500 times* that limit. Moreover, as we pointed out above, this leading expression of the legislature on the punishment of baseless litigation provides for no penalty at all if "a voluntary dismissal is filed * * * within a reasonable time after the attorney or party * * * knew, or reasonably should have known," that the cause was hopeless. Ark. 1987 Code § 16-22-309(a).

Arkansas Rule 11, like its federal counterpart, addresses a variety of attorney misconduct. Rarely (at least in reported cases) in Arkansas or in this Circuit has a lawyer been sanctioned under the rule for failure to perform enough investigation or legal research before filing an action (or a document). And the punishment in such cases does not appear to have exceeded \$30,000. *Bryant v. Brooklyn Barbecue Corp.*, 932 F.2d 697 (8th Cir. 1991) (\$18,000); *In re Bratton*, 119 B.R. 166 (Bankr. W.D. Ark. 1990) (\$28,000) (Bankruptcy Rule 9011).

This factor of the *BMW* analysis, therefore, also indicates that State Farm had no notice that it could be socked with a \$7.5 million penalty.

4. *State Farm's Wealth Cannot Salvage The Excessive Award*

Not one word of *BMW* implied that the punitive damages award in that case might be sustained because the defendant, BMW, could easily have afforded to pay the \$2 million punishment. Nevertheless, the Court gave that factor no consideration whatever in striking down the punitive award. Instead, the Court warned: "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." 116 S.Ct. at 1604. Given this admonition, as well as the Court's implicit rejection of Dr. Gore's specific suggestion that it should take BMW's finances into account (Resp. Br. 39, *BMW v. Gore*, No. 94-896 (U.S.)), the conclusion inescapably follows that the

defendant's "wealth" is not a proper basis for sustaining a punishment that otherwise would be unconstitutionally excessive. Before *BMW* was decided, this Court, speaking through Justice White, had reached the same conclusion: "a defendant's wealth alone cannot alone justify a large punitive damages award." *Pulla*, 72 F.3d at 659 n.16.

Indeed, the idea that a multimillion dollar punishment properly can be based on the defendant's resources conflicts with the well-established, constitutionally based principle that the punishment should fit the crime. As the *BMW* Court put it, "exemplary damages imposed on a defendant should reflect 'the enormity of his *offense*,'" not the depth of his pockets. 116 S. Ct. at 1599 (emphasis added) (quoting *Day v. Woodworth*, 54 U.S. (13 How.) 362, 371 (1852)).

State Farm's financial resources have nothing to do with the "enormity" of the tort at issue here. It is also beyond dispute (and uncontradicted by the record in this case) that State Farm, a subsidiary of a mutual company that is owned by its policyholders, obtained the great bulk of those resources in an entirely lawful manner in Arkansas and other States. To base its punishment, even in part, on the size of those lawful revenues would contradict the holding in *BMW* that a State "does not have the power * * * to punish [a defendant] for conduct that was lawful where it occurred," particularly conduct that had no in-State impact. 116 S. Ct. at 1597. Accordingly, because the \$7.5 million exaction in this case is grossly excessive under the three *BMW* guideposts, the net worth of State Farm cannot save it.

CONCLUSION

For the foregoing reasons, the judgment of the district court should be reversed.

Respectfully submitted.

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