File Copy

Nos. 06-11311-DD, 06-11312-DD

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

ACTION MARINE, INC., et al.,

Plaintiffs-Appellees,

v.

CONTINENTAL CARBON INC., et al.,

Defendants-Appellants.

On Appeal From The United States District Court
For The Middle District Of Alabama
Case No. 3:01-CV-994-MEF
Hon. Mark E. Fuller, Chief United States District Judge

BRIEF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AS *AMICUS CURIAE* IN SUPPORT OF DEFENDANTS-APPELLANTS URGING REVERSAL

Robin S. Conrad
Amar D. Sarwal
NATIONAL CHAMBER LITIGATION CENTER, INC.
1615 H Street, N.W.
Washington, D.C. 20062
(202) 463-5337

Theodore J. Boutrous, Jr.
Thomas H. Dupree, Jr.
Amir C. Tayrani
GIBSON, DUNN & CRUTCHER LLP
1050 Connecticut Avenue, N.W.
Washington, D.C. 20036
(202) 955-8500

Counsel for Amicus Curiae

Action Marine, Inc. v. Continental Carbon Inc.,
Nos. 06-11311-DD, 06-11312-DD

CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

In addition to the persons identified in Appellants' Opening Brief, the following persons and entities have an interest in the outcome of this case:

1. Theodore J. Boutrous, Jr.
2. The Chamber of Commerce of the United States of America
3. Robin S. Conrad
4. Thomas H. Dupree, Jr.
5. Gibson, Dunn & Crutcher LLP
6. National Chamber Litigation Center, Inc.
7. Amar D. Sarwal
8. Amir C. Tayrani

Thomas H. Dupree, Jr. /ACT
Thomas H. Dupree, Jr.
An Attorney for *Amicus Curiae*
The Chamber of Commerce
of the United States of America

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

Other Authorities

INTEREST OF *AMICUS CURIAE*

One of the issues presented in this appeal is whether a $17.5 million punitive damages award contravenes Georgia's statutory punitive damages cap, which limits awards to $250,000 unless the defendants "acted . . . with the ***specific intent*** to cause harm," O.C.G.A. § 51-12-5.1(f) (emphasis added), where there is no evidence that the defendants acted with the deliberate purpose of harming others. The Chamber of Commerce of the United States of America ("Chamber") has a substantial interest in the correct resolution of this question because it has thousands of members who do business in Georgia, and in other States with similar statutory caps. *See, e.g.*, Fla. Stat. § 768.73(c); Okla. Stat. tit. 23, § 9.1. If the district court's ruling is left undisturbed, these companies could be exposed to multimillion-dollar punitive damages awards for negligent or reckless conduct, in contravention of state legislatures' clearly expressed intentions to impose strict limits upon such awards.

The Chamber is the nation's largest business federation. With a substantial number of members in each of the fifty States, the Chamber has an underlying membership of more than three million businesses and business organizations of every size and in every industry sector. One of the Chamber's associational purposes is to protect its members from oppressive and unlawful punitive damages awards, and the Chamber has frequently participated as an *amicus curiae* in

litigation concerning the validity of such awards. *See State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 123 S. Ct. 1513 (2003); *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 116 S. Ct. 1589 (1996). In this case, the Chamber is concerned that the district court's conclusion that Georgia law authorizes multimillion-dollar punitive damages awards against defendants who do not act with the purpose of causing harm to others will significantly increase the cost of doing business in Georgia—to the detriment of the Chamber's members and Georgia consumers.

ISSUE

Whether a $17.5 million punitive damages award contravenes Georgia's statutory cap on punitive damages, which limits awards to $250,000 unless the defendants "acted, or failed to act, with the specific intent to cause harm," O.C.G.A. § 51-12-5.1(f), where there is no evidence that the defendants acted with the deliberate purpose of harming others.

STATEMENT OF FACTS

1. Defendant Continental Carbon Company owns and operates a plant in Phenix City, Alabama, where it manufactures carbon black, a material used in

tires, rubber and plastic items, inks, and other products.[1] R 52, 534; Dkt. 38, at 3. Although Continental Carbon constructed its plant using the best available pollution control technology to prevent the release of carbon black into the atmosphere, some carbon black is released during the manufacturing process. R 221-22, 347, 563.

Plaintiffs own properties in neighboring Columbus, Georgia, which is located across the Chattahoochee River from Continental Carbon's plant. R 1221. Plaintiffs contend that the carbon black that the plant emits during the manufacturing process is regularly deposited on their property, causing property damage and emotional distress.

2. Plaintiffs brought this diversity action against Continental Carbon in the United States District Court for the Middle District of Alabama, alleging eight claims under Georgia law, including negligence, nuisance, trespass, and wantonness. At trial, Plaintiffs did not introduce any evidence suggesting that Continental Carbon allows carbon black to be emitted from its plant for the purpose of causing harm to neighboring residents and their property. Plaintiffs

---

[1] Defendant China Synthetic Rubber Corporation owns part of the stock of Continental Carbon's parent company. Defendants are collectively referred to as Continental Carbon.

instead argued that Continental Carbon's decision not to implement additional pollution control measures was motivated by a desire to cut costs. Dkt. 290, at 27.

The jury returned a verdict in favor of Plaintiffs, awarding them $1,915,000 in compensatory damages, which encompassed lost business value, remediation costs, and emotional distress, and an additional $1,294,000 in attorneys' fees. In response to a special interrogatory, the jury found that Continental Carbon acted with the "specific intent to cause harm" and that Plaintiffs were entitled to a punitive damages award of $17.5 million.

3. Continental Carbon moved for a reduction of the punitive damages award on the ground that the $250,000 cap on punitive damages established by O.C.G.A. § 51-12-5.1(f) can only be exceeded where the defendant acts with the "specific intent to cause harm" and there was no evidence suggesting that Continental Carbon had forgone additional pollution control measures for the purpose of harming Plaintiffs. The district court denied the request for a reduction of punitive damages, explaining that it did "not agree that Plaintiffs failed to adduce sufficient evidence that Defendants acted with specific intent to harm Plaintiffs." Ord. at 10.

This timely appeal followed.

SUMMARY OF ARGUMENT

The $17.5 million punitive damages award against Continental Carbon violates the statutory cap established by O.C.G.A. § 51-12-5.1(f) and the "fair

notice" requirements of the United States Constitution. If this Court does not reverse the district court's judgment in its entirety, it should therefore reduce the punitive damages award to the statutorily prescribed limit of $250,000 per plaintiff.

Georgia decisions construing Section 51-12-5.1(f) and analogous precedent from both this Court and the United States Supreme Court establish that a "specific intent to cause harm" is present only where a defendant acts with the deliberate purpose of harming others—mere negligence, recklessness, or substantial certainty about the consequences of one's actions is not sufficient. The $17.5 million punitive damages award is improper under Georgia law because there is no evidence even remotely suggesting that Continental Carbon allowed carbon black to be emitted from its plant for the purpose of causing harm to Plaintiffs. Indeed, it is simply implausible that Continental Carbon's decision not to implement additional pollution control measures was motivated by a pernicious desire to harm neighboring residents or their property—and Plaintiffs did not even suggest as much at trial. The district court's decision upholding the punitive damages award thus conflicts with binding Georgia and federal precedent, and runs afoul of well-established *Erie* principles "preclud[ing] a recovery in federal court significantly larger than the recovery that would have been tolerated in state court." *Gasperini v. Ctr. for Humanities*, 518 U.S. 415, 431, 116 S. Ct. 2211, 2221 (1996).

Moreover, even if the district court's interpretation of Section 51-12-5.1(f) were not squarely foreclosed by precedent, the award could not stand as a matter of federal constitutional law because Continental Carbon lacked "fair notice" of the size of the award to which it could be subjected. The district court's conclusion that the "specific intent to cause harm" standard can be satisfied—and the Georgia statutory cap lifted—in the absence of evidence that the defendant acted with the purpose of causing harm was a novel and wholly unforeseeable construction of statutory language that, until the decision below, had been universally understood to require proof that the defendant's conduct was motivated by a deliberate, harmful purpose. *See Gore*, 517 U.S. at 574, 116 S. Ct. at 1598 ("Elementary notions of fairness enshrined in our constitutional jurisprudence dictate that a person receive fair notice . . . of the severity of the penalty that a State may impose."). Continental Carbon therefore did not receive "fair notice" that its pollution control decisions, which Plaintiffs characterized as financially motivated, could result in a punitive damages award greater than $250,000 per plaintiff.

ARGUMENT

I. A FINDING OF "SPECIFIC INTENT TO CAUSE HARM" REQUIRES EVIDENCE THAT THE DEFENDANT ACTED WITH THE DELIBERATE PURPOSE OF CAUSING HARM.

Like many other States, Georgia has recognized the inequity and social cost of imposing substantial punitive damages awards upon defendants. Georgia law

therefore places a $250,000 statutory cap on punitive damages awards in non-products-liability tort cases, unless "it is found that the defendant acted, or failed to act, with the specific intent to cause harm." O.C.G.A. § 51-12-5.1(f); *see also id.* § 51-12-5.1(g). Under this provision, punitive damages awards in excess of $250,000 are reserved for tortfeasors that act with the deliberate purpose of causing harm to others. Because there is ***absolutely no evidence*** suggesting that Continental Carbon allowed carbon black to be emitted from its plant for the purpose of causing harm to Plaintiffs or their property, this Court should reduce the $17.5 million punitive damages award to the statutorily prescribed limit of $250,000 per plaintiff. *See Johansen v. Combustion Eng'g, Inc.*, 170 F.3d 1320, 1330 (11th Cir. 1999) ("where a portion of a verdict is for an identifiable amount that is not permitted by law, the court may simply modify the jury's verdict to that extent and enter judgment for the correct amount").[2]

A. Negligence, Recklessness, And Substantial Certainty Are Insufficient Grounds For A Specific Intent Finding.

Georgia decisions construing O.C.G.A. § 51-12-5.1(f) establish that a finding of "specific intent to cause harm" is appropriate only where the defendant acted with the ***deliberate purpose*** of causing harm to others, and cannot be

---

[2] Where a reasonable jury could reach only one conclusion based on the evidence presented to it, the court may decide the question as a matter of law. *See Pickett v. Tyson Fresh Meats, Inc.*, 420 F.3d 1272, 1278 (11th Cir. 2005); Fed. R. Civ. P. 50.

premised on a defendant's negligence, recklessness, or substantial certainty that harm would result from its conduct. A finding of specific intent thus "may ***not*** be based on the rebuttable presumption that a person of sound mind and discretion is presumed to intend the natural and probable consequences of his acts." *Wal-Mart Stores, Inc. v. Johnson*, 547 S.E.2d 320, 325 (Ga. Ct. App. 2001) (emphasis in original).

In *Bonard v. Lowe's Home Centers, Inc.*, 479 S.E.2d 784 (Ga. Ct. App. 1996), for example, the Georgia Court of Appeals held that a plaintiff had not established "specific intent to cause harm"—and therefore was not entitled to recover more than $250,000 in punitive damages—where she alleged that a hardware store "knew or should have known" that the board she purchased was unstable and that—in light of this knowledge—the defendant "exhibited a conscious indifference to [the] consequences" of tying the board to the roof of the plaintiff's vehicle. *Id.* at 786; *see also Viau v. Fred Dean, Inc.*, 418 S.E.2d 604, 608 (Ga. Ct. App. 1992) (holding that the $250,000 punitive damages cap applied in a suit against a drunk driver who caused a traffic accident because, even though the driver intended to drink and intended to drive drunk, he did not specifically intend to cause harm to the plaintiffs); *Johnson*, 547 S.E.2d at 325 (reducing a punitive damages award to $250,000 because the trial court had erroneously instructed the jury that it could infer specific intent if the "defendant has exhibited

. . . a wilful and wanton and reckless disregard for human life and safety"). Indeed, allowing the statutory cap to be lifted in cases where the defendant did not act with the deliberate purpose of causing harm, but instead exhibited negligence, recklessness, or substantial certainty that harm would result from its conduct, would collapse the distinction between the general standard for awarding punitive damages under Georgia law—which requires a showing that the defendant's actions manifested "willful misconduct, malice, fraud, wantonness, oppression, or [an] entire want of care" (O.C.G.A. § 51-12-5.1(b))—and the "specific intent to cause harm" standard for exceeding the $250,000 statutory cap (*id.* § 51-12-5.1(f)).

Moreover, when interpreting criminal statutes with analogous "specific intent" requirements, both the United States Supreme Court and this Court have repeatedly equated the concept of "specific intent" with a deliberate purpose underlying a person's actions. *See United States v. Bailey*, 444 U.S. 394, 405, 100 S. Ct. 624, 632 (1980) (explaining that "purpose" corresponds with the concept of "specific intent"); *Arthur Pew Constr. Co. v. Lipscomb*, 965 F.2d 1559, 1576 (11th Cir. 1992) (explaining that 18 U.S.C. § 1001, which prohibits making false statements to federal officials, "requires proof of specific intent," and that the

misrepresentation must therefore have been "deliberate," "willful," or done with a "conscious purpose to avoid telling the truth").[3]

A person acts with the deliberate purpose of causing a certain result—and therefore has the specific intent to bring about the desired consequence—when that result is the person's "conscious objective." *Bray v. Alexandria Women's Health Clinic*, 506 U.S. 263, 275, 113 S. Ct. 753, 763 (1993). The Supreme Court has further explained that "purpose . . . implies more than intent as volition or intent as awareness of consequences. It implies that the decisionmaker . . . selected or reaffirmed a particular course of action at least in part '***because of***,' not merely '***in spite of***,' its adverse effect." *Id.* at 271-72, 113 S. Ct. at 760 (second ellipses in original; emphases added).

Plaintiffs never claimed at trial that Continental Carbon acted with the deliberate purpose of causing harm to Plaintiffs or their property. Rather, they argued only that Continental Carbon knew that harm was substantially certain to result from its failure to implement additional pollution controls. R 1510-11. But,

---

[3] Because criminal sanctions and punitive damages serve the same purpose, decisions construing criminal statutes are instructive in interpreting punitive damages provisions. *See State Farm*, 538 U.S. at 416-17, 123 S. Ct. at 1519-20 ("punitive damages . . . are aimed at deterrence and retribution," which are the "same purposes as criminal penalties"); *see also Pac. Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1, 19, 111 S. Ct. 1032, 1044 (1991) (describing punitive damages as "quasi-criminal").

even substantial certainty that harm is likely to result from one's actions is insufficient to establish that a person acted with specific intent because a person who is substantially certain that harm will result does not necessarily have the conscious objective of causing that outcome, and it is the purpose to cause harm—rather than mere knowledge of the consequences of one's actions—that is the *sine qua non* of specific intent. *See Bailey*, 444 U.S. at 405, 100 S. Ct. at 632; *see also Vallandigham v. Clover Park Sch. Dist. No. 400*, 109 P.3d 805, 810 (Wash. 2005) ("an act that had only substantial certainty of producing injury . . . does not constitute specific intent to injure"). Indeed, it is a well-established criminal law principle that purpose and substantial certainty are two different mental states that denote two different levels of culpability. *Compare* Model Penal Code § 2.02(2)(a) ("A person acts purposely with respect to a material element of an offense when . . . it is his ***conscious object*** to engage in conduct of that nature or to cause such a result" (emphasis added)), *with id.* § 2.02(b) ("A person acts knowingly with respect to a material element of an offense when . . . he is ***aware*** that it is ***practically certain*** that his conduct will cause such a result." (emphases added)).[4]

---

[4] Thus, although knowledge that harm will likely result from one's actions may be sufficient to establish a general intent to cause harm, it is not adequate to demonstrate specific intent. *See Bailey*, 444 U.S. at 405, 100 S. Ct. at 632

[Footnote continued on next page]

The contours of the specific intent requirement are illustrated by *United States v. Guest*, 383 U.S. 745, 86 S. Ct. 1170 (1966), where the Supreme Court explained that 18 U.S.C. § 241, which prohibits conspiracies to deprive a person of rights secured by federal law, requires proof of "specific intent to interfere with the Federal right." *Id.* at 760, 86 S. Ct. at 1179. The Court distinguished between a conspiracy to rob an interstate traveler—which, without more, would not fall within Section 241's ambit—and a conspiracy with "the ***predominant purpose*** of . . . imped[ing] or prevent[ing] the exercise of the right of interstate travel," which would satisfy Section 241's specific intent requirement. *Id.* (emphasis added); *see also Tran v. Gonzales*, 414 F.3d 464, 471 (3d Cir. 2005) ("The idea of purposeful action, of actively employing a means to achieve an end, is an essential component of . . . 'intent' and is absent from the concept of 'recklessness.'").

In light of the distinction between negligence, recklessness, and substantial certainty, on the one hand, and deliberate purpose, on the other, the $17.5 million punitive damages award against Continental Carbon cannot stand. There is absolutely no evidence that Continental Carbon allowed carbon black to be

---

[Footnote continued from previous page]

(equating "knowledge" with the concept of "general intent"); *United States v. Ramirez-Martinez*, 273 F.3d 903, 914 (9th Cir. 2001) ("specific intent corresponds to 'purpose,' while general intent corresponds to 'knowledge'").

released from its plant for the purpose of causing harm to Plaintiffs or their property. At most, the evidence presented to the jury suggested that, in an effort to save money, Continental Carbon did not take all possible steps to control emissions. But even if Continental Carbon ***knew*** with substantial certainty that its alleged failure to implement all available pollution control measures would result in harm to surrounding property, the $250,000 cap imposed by O.C.G.A. § 51-12-5.1(f) would remain applicable because Continental Carbon did not act with the ***deliberate purpose*** of causing property damage.[5]

B. The $17.5 Million Punitive Damages Award Conflicts With *Erie* Principles And The Doctrine Of Lenity.

The district court refused to disturb the $17.5 million punitive damages award because the jury "answered a specific interrogatory . . . affirming that they have found the specific intent to cause harm." Ord. at 9-10. The district court's decision allowing the award to stand in the face of a complete lack of evidence that Continental Carbon acted with the deliberate purpose of causing harm is not only contrary to the plain meaning and binding judicial interpretations of O.C.G.A.

---

[5] In *Johansen*, this Court suggested that "[s]pecific intent to cause harm may properly be inferred from deliberate indifference." 170 F.3d at 1336. That statement was dicta because the only issue before the Court was whether the punitive damages award was unconstitutionally excessive in light of the Supreme Court's then-recent *Gore* decision. Moreover, *Johansen*'s definition of specific intent conflicts with the Georgia Court of Appeals' later decision in *Johnson*, which made clear that specific intent may not be inferred from indifference to the likely consequences of one's actions. 547 S.E.2d at 325.

§ 51-12-5.1(f), but also is inconsistent with the district court's obligation under *Erie* to apply state law in the same manner as a state court would. *See Erie R.R. Co. v. Tompkins*, 304 U.S. 64, 58 S. Ct. 817 (1938).

In light of the Georgia Court of Appeals' decisions in *Bonard* and other cases construing Section 51-12-5.1(f), there can be no doubt that a Georgia state court would have limited the punitive damages recovery to $250,000 per plaintiff.[6] When the district court affirmed a multimillion-dollar punitive damages award in the absence of any evidence of specific intent, it ran afoul of the fundamental *Erie* principle that a plaintiff may not obtain "a recovery in federal court significantly larger than the recovery that would have been tolerated in state court." *Gasperini*, 518 U.S. at 431, 116 S. Ct. at 2221. In contravention of *Erie*'s objectives, this divergence between state and federal courts' applications of Section 51-12-5.1(f) will inevitably foster forum-shopping, with plaintiffs typically electing to file tort actions in federal court in the hope of obtaining multimillion-dollar punitive damages awards unavailable in a Georgia state court. *See Klaxon Co. v. Stentor Elec. Mfg. Co.*, 313 U.S. 487, 496, 61 S. Ct. 1020, 1021 (1941) ("the accident of

---

[6] Moreover, Georgia state courts routinely consider federal case law as persuasive authority when construing state statutes, *see, e.g.*, *Dee v. Sweet*, 489 S.E.2d 823, 826 (Ga. 1997), and it is therefore likely that a Georgia court interpreting the "specific intent" requirement of Section 51-12-5.1(f) would be receptive to arguments based upon federal decisions, such as *Bray* and *Guest*, construing analogous federal statutes.

diversity of citizenship [must not] disturb equal administration of justice in coordinate state and federal courts sitting side by side").

Moreover, the district court showed insufficient regard for the Georgia Legislature's intent to place limits on punitive damages awards. Like similar statutory caps adopted in other States, O.C.G.A. § 51-12-5.1(f) embodies the Georgia Legislature's determination that, in most circumstances, multimillion-dollar punitive damages awards are unwarranted and that punitive damages should therefore be firmly capped except in those rare cases where the defendant acted with the deliberate purpose of harming others. *See Gore*, 517 U.S. at 614, 123 S. Ct. at 1618 (app. to opinion of Ginsburg, J.) (cataloguing state efforts to limit punitive damages awards). The district court was required to implement faithfully the Georgia Legislature's policy determinations when presiding over this diversity action. *See Lexington Ins. Co. v. Rugg & Knopp, Inc.*, 165 F.3d 1087, 1093 (7th Cir. 1999) ("Lacking any inherent power to make state law . . . , a federal court must be careful to avoid the temptation to impose upon a state what it, or other jurisdictions, might consider to be wise policy."). But, by allowing the $17.5 million punitive damages award to stand in the absence of any evidence that Continental Carbon possessed the specific intent to cause harm, the district court impermissibly substituted its own policy determination for the considered judgment of the Georgia Legislature embodied in Section 51-12-5.1(f). The

district court's failure to abide by the Georgia Legislature's policy judgment is flatly inconsistent with the principles of federalism upon which *Erie* is predicated. *See Dimmitt v. City of Clearwater*, 985 F.2d 1565, 1572 (11th Cir. 1993) ("[A]s a federal court, we must be particularly reluctant to rewrite the terms of a state statute." (emphasis omitted)); Wright, Miller & Cooper, *Federal Practice and Procedure* § 4507, at 200 (2d ed. 1996) ("[T]he federal court must keep in mind that its function when divining the content of forum state law is not to choose the rule of law that it believes is 'better' in some sense or the rule of law that it would adopt for itself.").[7]

Erie principles further counsel that "when given a choice between an interpretation of state law which reasonably restricts liability, and one which greatly expands liability, [federal courts] should choose the narrower and more reasonable path." *Combs v. Int'l Ins. Co.*, 354 F.3d 568, 577 (6th Cir. 2004)

---

[7] Moreover, the statutory cap established by Section 51-12-5.1(f) makes good policy sense. A business that breaches a duty out of a desire to save money is simply not as culpable as one motivated by the purpose of causing harm. Indeed, businesses are regularly confronted with the difficult task of undertaking cost-benefit analyses. The Georgia Legislature made the rational decision that a business that decides not to implement a pollution control or safety measure on the basis of cost-benefit analysis should not be subject to the same punitive sanctions as a company that acted with the deliberate purpose of injuring someone. If the Legislature determines in the future that the distinction it drew in Section 51-12-5.1(f) is insufficient to motivate businesses to implement adequate pollution controls or safety measures, then it can amend the statute accordingly.

(internal quotation marks and alterations omitted); *see also Insolia v. Philip Morris Inc.*, 216 F.3d 596, 607 (7th Cir. 2000) ("When confronted with a state law question that could go either way, the federal courts usually choose the narrower interpretation that restricts liability."). Thus, to the extent that there is any ambiguity about the meaning of the specific intent requirement of Section 51-12-5.1(f), *Erie* requires this Court to apply the interpretation limiting awards in excess of $250,000 to cases in which the defendant acted with the deliberate purpose of harming others, rather than the broader construction allowing the cap to be lifted whenever the defendant was negligent, reckless, or substantially certain that harm would result from its conduct.

This Court's obligation to adopt the liability-limiting interpretation of Section 51-12-5.1(f) is confirmed by the principle of lenity, which "requires that actual ambiguities in criminal statutes, including sentencing provisions, be resolved in favor of criminal defendants." *United States v. Lazo-Ortiz*, 136 F.3d 1282, 1286 (11th Cir. 1998); *see also United States v. Bass*, 404 U.S. 336, 348, 92 S. Ct. 515, 523 (1971) ("where there is ambiguity in a criminal statute, doubts are resolved in favor of the defendant"). Because punitive damages serve the same deterrent and retributive purposes as criminal laws—but are imposed without according the tortfeasor the extensive procedural safeguards that a criminal defendant receives—the principle of lenity applies with at least equal force in the

punitive damages setting. *See State Farm*, 538 U.S. at 417, 123 S. Ct. at 1520 ("defendants subjected to punitive damages in civil cases have not been accorded the protections applicable in a criminal proceeding," which "increases our concerns over the imprecise manner in which punitive damages systems are administered"). This Court should therefore resolve any ambiguity concerning the scope of Section 51-12-5.1(f) in favor of applying the $250,000 punitive damages cap in this case.

II. THE DISTRICT COURT'S NOVEL CONSTRUCTION OF THE GEORGIA STATUTORY CAP DENIED CONTINENTAL CARBON "FAIR NOTICE" OF THE SIZE OF THE PUNITIVE DAMAGES AWARD THAT COULD BE IMPOSED.

Even if this case were not controlled by prior Georgia state court decisions construing O.C.G.A. § 51-12-5.1(f) and federal precedent defining the contours of "specific intent," it would still be necessary to reduce the $17.5 million punitive damages award to $250,000 per plaintiff because Continental Carbon lacked constitutionally mandated "fair notice" of the district court's novel—and textually insupportable—interpretation of Section 51-12-5.1(f).

A. The Federal Constitution Requires That A Defendant Receive "Fair Notice" Of The Severity Of The Penalty A Court May Impose.

"Elementary notions of fairness enshrined in our constitutional jurisprudence dictate that a person receive fair notice not only of the conduct that will subject him to punishment, ***but also of the severity of the penalty that a State may impose.***" *Gore*, 517 U.S. at 574, 116 S. Ct. at 1598 (emphasis added) (citing

Miller v. Florida, 482 U.S. 423, 107 S. Ct. 2446 (1987), and *Bouie v. City of Columbia*, 378 U.S. 347, 84 S. Ct. 1697 (1964)); *see also Arthur Andersen LLP v. United States*, 544 U.S. 696, 703, 125 S. Ct. 2129, 2134 (2005) ("a fair warning should be given to the world in language that the common world will understand, of what the law intends to do if a certain line is passed" (internal quotation marks omitted)). This "fair notice" requirement is implicated where a court construes vague statutory language in a manner that increases the severity of a penalty or unexpectedly interprets unambiguous language that, on its face, calls for the imposition of a specific sanction as providing for a different, more severe, penalty. *Bouie*, 378 U.S. at 352, 84 S. Ct. at 1702. The Constitution therefore protects civil defendants against the imposition of punitive damages awards in amounts that could not have been reasonably anticipated on the basis of the statutory language or prior judicial interpretations. *See Gore*, 517 U.S. at 574 n.22, 116 S. Ct. at 1598 n.22 ("the basic protection against judgments without notice afforded by the Due Process Clause is implicated by civil penalties" (internal quotation marks, citation, and emphasis omitted)).[8]

---

[8] This Court has "assume[d], without deciding," that the Constitution guarantees "fair notice" concerning both the conduct that may expose a person to punishment and the severity of the punishment that the defendant may receive. *Metheny v. Hammonds*, 216 F.3d 1307, 1311 n.13 (11th Cir. 2000). In light of the Supreme Court's unambiguous statement in *Gore*—which was repeated in

[Footnote continued on next page]

In *Gore*, for example, the Supreme Court held that a multimillion-dollar punitive damages award assessed upon an automobile manufacturer that failed to disclose that it had repainted a customer's car before purchase was unconstitutionally excessive, in part because neither state statutory law nor judicial decisions afforded the defendant any notice that its conduct could result in a punitive damages award that was five hundred times greater than the actual damage it caused. *See* 517 U.S. at 584, 116 S. Ct. at 1603 ("None of these statutes would provide an out-of-state distributor with fair notice that the first violation . . . of its provisions might subject an offender to a multimillion dollar penalty.").

Cases decided under the Ex Post Facto Clause, which places restraints upon legislatures that are analogous to those that the Due Process Clause imposes upon courts, are similarly instructive. In *Miller v. Florida*, for example, the Supreme Court held that it was unconstitutional to sentence a criminal defendant under recently enacted sentencing guidelines that prescribed a longer prison term than the defendant would have received under the guidelines in effect at the time he committed his offense. 482 U.S. at 435, 107 S. Ct. at 2454. The Court explained

---

[Footnote continued from previous page]

State Farm, 538 U.S. at 417, 123 S. Ct. at 1520, a case decided ***after*** *Metheny*—there can no longer be any doubt that the Constitution indeed requires that both criminal defendants and tortfeasors receive fair notice of the severity of the punishment they face.

that the defendant's sentence ran afoul of constitutional safeguards because the guidelines under which the sentence was calculated "ma[de] more onerous the punishment for crimes committed before [their] enactment." *Id.* (internal quotation marks omitted). The defendant therefore lacked notice of the severity of the punishment that he faced at the time he committed his offense. *Id.* at 430, 107 S. Ct. at 2451 ("central to the *ex post facto* prohibition is a concern for the lack of fair notice and governmental restraint when the legislature increases punishment beyond what was prescribed when the crime was consummated" (internal quotation marks omitted)); *see also Akins v. Snow*, 922 F.2d 1558, 1561 (11th Cir. 1991) ("every law that changes the punishment, and inflicts a greater punishment than the law annexed to the crime when committed, violates the *ex post facto* provision" (internal quotation marks omitted)).[9]

---

[9] Although *Miller* addressed the limitations that the Ex Post Facto Clause imposes upon state legislatures, its teachings apply with equal force to unforeseen judicial constructions of a statute that increase the severity of a sanction. *See Bouie*, 378 U.S. at 353-54, 84 S. Ct. at 1702 ("If a state legislature is barred by the *Ex Post Facto* Clause from passing a law [that aggravates a crime, or makes it greater than it was, when committed], it must follow that a State Supreme Court is barred by the Due Process Clause from achieving precisely the same result by judicial construction.").

B. Continental Carbon Did Not Receive "Fair Notice" Of The District Court's Unprecedented Interpretation Of The Georgia Statutory Cap.

Continental Carbon did not receive fair notice that its decision not to implement additional pollution control measures could subject it to a $17.5 million punitive damages award under Georgia law, or, for that matter, to any punishment in excess of $250,000 per plaintiff. In light of the Georgia decisions construing O.C.G.A. § 51-12-5.1(f) to require that a defendant act with the purpose of harming others—and the federal court cases confirming this interpretation of the specific intent requirement—there was no doubt prior to this case that what Plaintiffs described as financially motivated pollution control decisions by Continental Carbon could not provide a basis for lifting the damages cap. *See, e.g.*, *Bonard*, 479 S.E.2d at 786 (holding that conscious indifference to the consequences of one's actions is not a basis for awarding more than $250,000 in punitive damages); *Arthur Pew Constr. Co.*, 965 F.2d at 1576 (explaining that specific intent requires a conscious purpose to commit wrongdoing). Indeed, a business reading the text of Section 51-12-5.1(f) and the case law interpreting that provision would have concluded that a financially motivated decision to forgo additional pollution controls could not possibly expose it to more than $250,000 in punitive damages because, even if the conduct was tortious, it was not undertaken for the purpose of harming others. The district court's contrary interpretation of

Section 51-12-5.1(f) was therefore wholly unforeseeable and deprived Continental Carbon of the "fair notice" to which it was entitled as a matter of federal constitutional law. *See Landgraf v. USI Film Prods.*, 511 U.S. 244, 265, 114 S. Ct. 1483, 1497 (1994) ("Elementary considerations of fairness dictate that individuals should have an opportunity to know what the law is and to conform their conduct accordingly."). Any award of punitive damages in excess of $250,000 per plaintiff is therefore unconstitutional.

CONCLUSION

In the event that this Court does not reverse the district court's judgment in its entirety, the Court should reduce the punitive damages award to $250,000 per plaintiff.

Dated: June 8, 2006

By Thomas H. Dupree Jr./acr

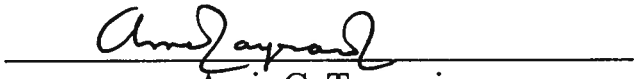
Robin S. Conrad
Amar D. Sarwal
NATIONAL CHAMBER LITIGATION CENTER, INC.
1615 H Street, N.W.
Washington, D.C. 20062
(202) 463-5337

Theodore J. Boutrous, Jr.
Thomas H. Dupree, Jr.
Amir C. Tayrani
GIBSON, DUNN & CRUTCHER LLP
1050 Connecticut Avenue, N.W.
Washington, D.C. 20036
(202) 955-8500

Counsel for Amicus Curiae

CERTIFICATION OF COMPLIANCE WITH TYPE-VOLUME LIMITATION

The undersigned, one of the attorneys for *Amicus Curiae*, hereby certifies pursuant to Rule 32(a)(7)(C) of the Federal Rules of Appellate Procedure that the foregoing brief complies with the type-volume limitation set forth in Rule 29(d). The brief is set in 14-point Times New Roman type and, according to the word processing system used to prepare the brief, contains 5,457 words, not including the matter expressly excluded by Rule 32(a)(7)(B)(iii).



Amir C. Tayrani

Dated: June 8, 2006

CERTIFICATE OF SERVICE

Pursuant to Fed. R. App. P. 25, I certify that on this day I sent from Washington, D.C., via UPS next-day delivery, the original and six copies of this Brief of the Chamber of Commerce of the United States of America as *Amicus Curiae* to the Clerk of the United States Court of Appeals for the Eleventh Circuit, and one copy to:

Counsel for Appellants:

Clifford C. Brady
Brady, Radcliff & Brown
61 St. Joseph Street
Mobile, Alabama 36602
(251) 405-0045

Evan M. Tager
Nickolai G. Levin
Mayer, Brown, Rowe & Maw LLP
1909 K Street, N.W.
Washington, D.C. 20006
(202) 263-3000

H. Thomas Wells, Jr.
Peter S. Fruin
Maynard, Cooper & Gale, P.C.
1901 Sixth Avenue North
2400 AmSouth/Harbert Plaza
Birmingham, Alabama 35203
(205) 254-1000

J. Brett Busby
Mayer, Brown, Rowe & Maw LLP
700 Louisiana Street, Ste. 3400
Houston, Texas 77002
(713) 238-2606

Counsel for Appellees:

Jere L. Beasley
Rhon E. Jones
David B. Byrne III
Beasley, Allen, Crow, Methvin, Portis & Miles, P.C.
P.O. Box 4160
Montgomery, AL 36103-4160

Jeff Friedman
Friedman, Leak & Bloom, P.C.
P.O. Box 43219
Birmingham, AL 35243-3219

Edward R. Jackson
Tweedy, Jackson & Beech
P.O. Box 748
Jasper, AL 35502-0748

DATED this 8th day of June, 2006.

By _____
Amir C. Tayrani