IN THE SUPREME COURT OF THE STATE OF MONTANA

Case No. DA 14-0113

MASTERS GROUP INTERNATIONAL, INC.,

Third-Party Plaintiff, Appellee, and Cross-Appellant,

v.

COMERICA BANK,

Third-Party Defendant, Appellant, and Cross-Appellee.

BRIEF OF *AMICI CURIAE* THE MOTOR CARRIERS OF MONTANA AND MONTANA HOSPITAL ASSOCIATION, AN ASSOCIATION OF MONTANA HEALTH CARE PROVIDERS

On Appeal from the Montana Second Judicial District Court,
Silver Bow County District Court Cause No. DV-2011-372
The Honorable Kurt Krueger, Presiding

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QUESTION PRESENTED

Whether Mont. Code Ann. § 27-1-220(3), which allows punitive damages up to the lesser of $10 million or 3% of a defendant's net worth, is constitutional.

STATEMENT OF INTEREST

The Motor Carriers of Montana ("MCM") has served as the voice for Montana's trucking industry since 1939. MCM is a trade association dedicated to the furtherance of the trucking industry's goals and interests in Montana and the United States.

MHA, an Association of Montana Health Care Providers ("MHA"), has 83 institutional members, including all but one acute care hospital in the State, from the smallest critical access hospitals providing primary care services in Montana's rural communities to the largest tertiary care hospitals. MHA members are all nonprofit entities and offer communities an integrated and coordinated continuum of high quality, affordable and innovative health care, housing, and community-based services. MHA works to ensure that Montana healthcare providers are able to continue to thrive and provide outstanding statewide service.

MCM and MHA have a substantial interest in ensuring that Montana's civil litigation environment is fair and balanced, predictable, and reflects sound policy. MCM and MHA also have a substantial interest in ensuring that Montana's legal climate allows Montana businesses to be competitive. Additionally, MCM and

MHA members have been targeted for punitive damages in recent years; without a statutory cap, they are at significant risk of serious financial exposure. MCM and MHA have an interest in preventing excessive civil punishment of the type that could threaten Montana businesses and the livelihoods of workers, pensioners, and others in affected communities.

These goals are furthered by Mont. Code Ann. § 27-1-220(3), which permits plaintiffs to obtain substantial, but not unlimited, punitive damages in civil cases. MCM and MHA actively supported passage of Mont. Code Ann. § 27-1-220(3). Thus, MCM and MHA have a significant interest in the constitutionality of the statute and would be adversely impacted if it is struck down.

STATEMENT OF THE CASE

Amici adopt Appellant Comerica Bank's Statement of the Case as relevant to the argument presented.

INTRODUCTION AND SUMMARY OF ARGUMENT

Mont. Code Ann. § 27-1-220(3) does not violate the jury trial right in the Montana Constitution because the jury's fact-finding function is preserved. The jury continues to resolve disputed facts with respect to liability and assessment of legally available remedies. Once the jury has decided these issues, the constitutional mandate is met. Mont. Code Ann. § 27-1-220(3) does nothing more than establish, as a matter of law, the outer limits of a remedy. The jury right does

not allow a jury to award extra-legal remedies. "There is no constitutional right to punitive damages." *Romero v. J & J Tire, JMH, Inc.*, 238 Mont. 146, 150, 777 P.2d 292, 295 (1989).

Furthermore, the Legislature's decision to impose a reasonable limit on punitive damages is plainly rationally related to the valid governmental interest of encouraging a strong economy and a fair civil justice system. Under well-settled constitutional principles, such economic policy decisions are the province of the Legislature and warrant deference from this Court.

Mont. Code Ann. § 27-1-220(3) is particularly beyond reproach given that there is no historical tradition of juries awarding extraordinary punitive damages awards. Rather, the statutory cap is a legislative response to a recent trend of punitive damages being awarded in amounts that exceed historical experience.

For these reasons, the Court should reverse the decision below and hold that Mont. Code Ann. § 27-1-220(3) is constitutional.

ARGUMENT

I. MONT. CODE ANN. § 27-1-220(3) SATISFIES THE MONTANA CONSTITUTION'S JURY TRIAL RIGHT BECAUSE THE JURY'S FACT-FINDING FUNCTION IS PRESERVED; THE PUNITIVE DAMAGES CAP MERELY ESTABLISHES THE LIMIT OF A REMEDY, WHICH IS A MATTER OF LAW, NOT OF FACT

The Montana Constitution provides that "[t]he right of trial by jury is secured to all and shall remain inviolate." Mont. Const., Art. II, § 26. "This Court

has held that the right to trial by jury in this state is the same as that guaranteed by the Seventh Amendment [of the United States Constitution]." *Romero*, 238 Mont. at 151, 777 P. 2d at 2956 (quoting *Linder v. Smith*, 193 Mont. 20, 23, 629 P. 2d 1187, 1189 (1981)).

The constitutional guarantee to a civil jury trial "was designed to preserve the basic institution of jury trial in only its most fundamental elements." *Galloway* v. *United States,* 319 U.S. 372, 392 (1943). "The purpose of the jury in civil cases is to assure a fair and equitable resolution of *factual* issues." *Linder*, 193 Mont. at 23, 629 P. 2d at 1189 (citing *Colgrove v. Battin*, 413 U.S. 149, 155-156 (1973)) (emphasis added).

However, it is well-established that the Legislature has the power to determine the legal remedies available for a particular cause of action *as a matter of law.* As this Court has explained in rejecting a constitutional challenge to a limit on punitive damages under the Wrongful Discharge From Employment Act:

> Our cases have clearly established that "[a] person has no property, no vested interest, in any rule of the common law." The "Constitution does not forbid the creation of new rights, or the abolition of old ones recognized by the common law, to attain a permissible state object," despite the fact that "otherwise settled expectations" may be upset thereby.

Meech v. Hillhaven West, Inc., 238 Mont. 21, 45, 776 P.2d 488, 503 (1989) (quoting *Duke Power Co. v. Carolina Envtl. Study Group*, 438 U.S. 59, 88 n. 32 (1978)).

Likewise, in *White v. State*, 203 Mont. 363, 370, 661 P.2d 1272, 1275 (1983), *overruled on other grounds* by *Meech*, *supra*, this Court upheld a statute providing the State with immunity from punitive damage, because plaintiffs do "not have a constitutional right to recover punitive damages." *See also Moran v. Shotgun Willies, Inc.*, 270 Mont. 47, 53, 889 P.2d 1185, 1188 (1995) ("There is no constitutional right to an award of punitive damages.").

Simply put, "[t]here is no vested right to exemplary damages and the legislature may, at its will, restrict or deny the allowance of such damages." *Id.* at 504 (quoting 22 Am.Jur.2d Damages § 239, at 326 (2d ed. 1965)); *see also Romero*, 238 Mont. at 150, 777 P.2d at 295 ("A plaintiff is never entitled to exemplary damages as a matter of right.") (citing *Spackman v. Ralph M. Parsons Co.*, 147 Mont. 500, 511, 414 P.2d 918, 924 (1966)).

Since, the Montana Legislature is free to restrict the scope of available punitive damages as a matter of law, it necessarily follows that Mont. Code Ann. § 27-1-220(3) cannot violate the right to jury trial. The statute does not impinge on the jury's fundamental fact-finding function. The jury remains free to decide disputed material facts regarding liability, as well as the appropriateness of *legally available* remedies. *See State ex rel. Indus. Indem. Co. v. District Court for the Fourth Judicial Dist.*, 169 Mont. 10, 14, 544 P.2d 438, 440 (1975); Mont. Code

Ann. § 27-1-221(6). Once the jury has decided these issues, the constitutional mandate is met.

The jury may not mandate extra-legal remedies. For instance, a jury could not order emotional or mental distress damages in an ordinary contract action, *see* MCA § 27-1-310 (prohibiting such damages), or award civil penalties where no such penalties are available at law, *Tull v. United States*, 481 U.S. 412, 425-26 (1987). By the same token, a jury cannot award punitive damages that are not legally available. Determining available legal remedies is a matter for the legislature, just as with the setting of criminal penalties.[1]

The above principles have been adopted by the overwhelming weight of authority. Nationally, "both state and federal courts consistently have upheld the constitutionality of [punitive damages caps]." Janet V. Hallahan, *Social Interests Versus Plaintiffs' Rights: The Constitutional Battle Over Statutory Limitations on Punitive Damages*, 26 Loy. U. Chi. L.J. 405, 407 (1995).

For example, the Virginia Supreme Court in *Pulliam v. Coastal Emergency Services of Richmond, Inc.,* 509 S.E.2d 307 (Va. 1999), upheld a total cap on medical malpractice damages – compensatory and punitive – finding that the statute did not violate the right to a jury trial. The court reaffirmed *Etheridge v.*

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[1] *See Rhyne v. K-Mart Corp.,* 594 S.E.2d 1, 9 (N.C. 2004) ("the legislative branch is . . . the only branch of government which, within constitutional limits, defines and determines the range of punishment for crimes.").

Med. Ctr. Hosps., 376 S.E.2d 525 (Va. 1989), which held that "[o]nce the jury has ascertained the facts and assessed the damages, . . the constitutional mandate is satisfied [and thereafter], it is the duty of the court to apply the law to the facts." *Id.* at 529. The total damages cap, the court said, "does nothing more than establish the outer limits of a remedy; remedy is a matter of law and not of fact; and a trial court applies the remedy's limitation only after the jury has fulfilled its fact-finding function." *Pulliam,* 509 S.E.2d at 312 (citing *Etheridge*).

Concerning the right of trial by jury under the Seventh Amendment, the Fourth Circuit followed the Virginia Supreme Court's reasoning in *Pulliam* and *Etheridge* that it is not the role of the jury but of the legislature to determine the legal consequences of the jury's factual findings. The Fourth Circuit in *Boyd v. Bulala*, 877 F.2d 1191, 1196 (4th Cir. 1989), gave an additional reason for upholding the damages cap against an argument that it violated the jury trial right:

> It is by now axiomatic that the Constitution does not forbid the creation of new rights, or the abolition of old ones recognized by the common law, to attain a permissible legislative object. . . . If a legislature may completely abolish a cause of action without violating the right of trial by jury, we think it permissibly may limit damages recoverable for a cause of action as well.

See also Davis v. Omitowoju, 883 F.2d 1155 (3d Cir. 1989) (Virgin Islands' damages cap did not violate right to jury trial).

The Alaska Supreme Court in *Evans ex rel. Kutch v. State*, 56 P.3d 1046, 1051 (Alaska 2002), upheld a comprehensive civil justice reform law including caps on noneconomic and punitive damages. The court said, "We agree with *Davis, Pulliam*, and the other decisions that have held that damages caps do not violate the constitutional right to a trial by jury." The court noted the distinction between the jury's exclusive province of fact-finding, and the legislature's power to alter the legal remedies available to the jury. *See also Central Bering Sea Fishermen's Ass'n v. Anderson*, 54 P.3d 271, 281 (Alaska 2002) (following *Evans*); *Reust v. Alaska Petroleum Contractors, Inc.*, 127 P.3d 807 (Alaska 2005) (reaffirming *Evans* that punitive damages cap is a policy choice and does not violate the right to a jury trial in the Alaska Constitution).

The Ohio and North Carolina Supreme Courts found punitive damages caps to be constitutional, including with respect to the right to jury trial, in *Arbino v. Johnson & Johnson*, 880 N.E.2d 420 (Ohio 2007) (punitive damages cap satisfied right to jury trial and numerous other provisions of the Ohio Constitution), and *Rhyne v. K-Mart Corp.*, 594 S.E.2d 1 (N.C. 2004) (punitive damages cap did not violate right to jury trial or other provisions of the North Carolina Constitution).

The Kansas Supreme Court in *Smith v. Printup*, 866 P.2d 985 (Kan. 1993), upheld a law requiring the court to determine the amount of punitive damages to be awarded. The court said that "[a]lthough the amount of punitive damages may be

regarded as a fact question, punitive damages are different from compensatory damages," because "there is no right to punitive damages." *Id.* at 994. The court added:

> Because a plaintiff does not have a right to punitive damages, the legislature could, without infringing upon a plaintiff's basic constitutional rights, abolish punitive damages. If the legislature may abolish punitive damages, then it also may, without impinging upon the right to trial by jury, accomplish anything short of that, such as requiring the court to determine the amount of punitive damages or capping the amount of the punitive damages.

Id.

A Texas appellate court in *Seminole Pipeline Co. v. Broad Leaf Partners, Inc.*, 979 S.W.2d 730, 758 (Tex. Ct. App.-Hous. 1998), said that while plaintiffs "may be motived to pursue this public purpose [of punishment and deterrence] in the hope of securing punitive damages, such proceeds are a windfall and not a matter of right." The court held that "[b]ecause the statutory cap on punitive damages affects only public punishment interests, it does not infringe upon any constitutional right..." *Id.*; *see also Waste Disposal Ctr., Inc. v. Larson*, 74 S.W.3d 578 (Tex. Ct. App.-Corpus Christi 2002, reh'g overruled, review denied) (punitive damages cap did not violate open courts or separation of powers provisions of Texas Constitution); *Hall v. Diamond Shamrock Refining Co., L.P.*, 82 S.W.3d 5 (Tex. Ct. App.-San Antonio 2001, review granted) (cap did not

violate open courts provision of Texas Constitution), *rev'd on other grounds*, 168 S.W.3d 164 (Tex. 2005).[2]

Indeed, the absence of relevant case law to the contrary is striking. Although the court in *Henderson v. Alabama Power Co.*, 627 So. 2d 878 (Ala. 1993), held that a punitive damages cap violated the right to a jury trial under the Alabama Constitution, that decision was properly overruled by *Ex Parte Apicella*, 809 So. 2d 865, 874 (Ala. 2001), to the extent that *Henderson* restricted the legislature from removing from the jury the unbridled right to punish. In *Oliver v. Towns*, 738 So. 2d 798, 804 n.17 (Ala. 1999), the Alabama Supreme Court added that "[g]iven the post-*Henderson* developments in the concept of due-process law [from the United States Supreme Court] and the forceful rationale of the dissents in

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[2] *See also Gilbert v. Security Fin. Corp. of Okla., Inc.*, 152 P.3d 165 (Okla. 2006) (statutory cap on punitive damages did not violate due process); *Wackenhut Applied Tech. Center, Inc. v. Sygnetron Prot. Sys., Inc.*, 979 F.2d 980 (4th Cir. 1992) (Virginia's punitive damages cap satisfied Virginia and U.S. Constitutions); *Mack Trucks, Inc. v. Conkle*, 436 S.E.2d 635 (Ga. 1993) (upholding law providing for only a single punitive damages award against a products liability defendant); *Hipp v. Liberty Nat'l Life Ins. Co.*, 39 F. Supp. 2d 1359 (M.D. Fla. 1999) (upholding cap on Florida Civil Rights Act claims); *Peters v. Saft*, 597 A.2d 50 (Me. 1991) (upholding limit on nonmedical damages recoverable against servers of liquor); *Reimer v. Delisio*, 442 A.2d 731 (Pa. Super. 1982) (upholding No-Fault Motor Vehicle Insurance Act abolishing punitive damages for reckless or grossly negligent conduct); *Bernier v. Burris*, 497 N.E.2d 763 (Ill. 1986) (upholding ban on punitive damages in healing art or legal malpractice cases); *Siegall v. Solomon*, 166 N.E.2d 5 (Ill. 1960) (upholding ban on punitive damages in actions for alienation of affections); *Smith v. Hill*, 147 N.E.2d 321 (Ill. 1958) (upholding ban on punitive damages for breach of promise to marry).

Henderson, we question whether *Henderson* remains good law.") (internal citations omitted). The Arkansas Supreme Court invalidated a punitive damages limit in *Bayer CropScience LP v. Schafer*, 385 S.W.3d 822 (Ark. 2011), but that decision turned on a unique provision of the Arkansas Constitution barring limits on recovery outside of the employment context.[3]

II. THIS COURT SHOULD DEFER TO THE LEGISLATURE'S POLICY DECISION

A. The Statutory Cap is Sound Policy

Statutory caps such as Mont. Code Ann. § 27-1-220(3) are enacted for a host of valid policy reasons including "promoting public confidence in and bringing more certainty to out system of civil redress, shielding [Montana] from problems encountered in other states, and encouraging businesses to bring much needed employment and other economic resources to this state." *Rhyne,* 594 S.E.2d at 17 (explaining policy behind similar law in North Carolina).

In addition, Mont. Code Ann. § 27-1-220(3) helps safeguard defendants' due process rights, including the right not to be subjected to arbitrary and excessive punishment, and the right to have "fair notice" of the severity of punishment that may be meted out. *BMW of North Am., Inc. v. Gore*, 517 U.S. 559, 574 (1996). "The high stakes and high variability of punitive damages are of substantial

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[3] *Finstad v. W.R. Grace & Co.*, 2000 MT 228, 301 Mont. 240, 8 P.3d 778, likewise provides no support for overturning the statutory cap because that case involved a statute requiring an award of punitive damages to be unanimous, and the Montana Constitution expressly allows two-thirds of a jury to render a civil verdict.

concern to companies, as punitive damages may pose a catastrophic threat of corporate insolvency," particularly for smaller businesses and individuals. W. Kip Viscusi, *The Social Costs of Punitive Damages Against Corporations in Environmental and Safety Torts*, 87 Geo. L.J. 285, 285 (1998).

The cap also promotes Montana's interest in fostering a legal environment that is fair and attractive to existing and potential employers/taxpayers. Montana is not isolated in the economy; it must compete with nearby states (most of which have punitive damages caps) and other countries (many of which prohibit or strictly limit punitive damages) to attract jobs. If the state's legal climate is not competitive, job-creators and service providers will go elsewhere.

These policies are obviously rationally related to the important governmental interest of promoting a strong, predictable, and fair economy. "What a court may think as to the wisdom or expediency of the legislation is beside the question and does not go to the constitutionality of the statute." *Meech*, 776 P. 2d at 504. It bears emphasis, however, that the Legislature's policy judgment was not only rational, but also carefully balanced.

Montana's interest in deterring misconduct is preserved because defendants remain subject to reasonable punishment in individual cases. Furthermore, the Legislature's decision to set a reasonable limit on punitive damages does not impede the ability of plaintiffs to recover full damages for their alleged harm

through compensatory damages. In fact, implementing caps is likely to speed up such recoveries and promote judicial economy by fostering settlements as a result of greater predictability in the law and by avoiding reviews on excessiveness grounds by trial and appellate courts.

The cap also helps to preserve assets for sick claimants who may otherwise see their compensatory recoveries limited if defendants' resources are depleted by earlier-filing plaintiffs that obtain "windfall" awards. This has happened, for example, in the asbestos litigation. *See, e.g.*, Mark A. Behrens & Cary Silverman, *Punitive Damages in Asbestos Personal Injury Litigation: The Basis for Deferral Remains Sound*, 8 Rutgers J.L. & Pub. Pol'y 50 (2011); Mark A. Behrens & Barry M. Parsons, *Responsible Public Policy Demands an End to the Hemorrhaging Effect of Punitive Damages in Asbestos Cases*, 6 Tex. Rev. L. & Pol. 137 (2001).

The Legislature made a policy decision that balanced all of these considerations. The cap not only promotes legitimate state objectives, but does so in a manner which is sensible. Indeed, the cap (1) is in line with punishments typical at common law; (2) is similar to other civil penalties for comparable wrongdoing; (3) is similar to caps enacted in other states; (4) fosters due process safeguards; (5) fosters settlements and reduces costly and time consuming litigation; (6) is supported by recommendations made by influential groups including the ABA Special Committee on Punitive Damages, *Punitive Damages: A*

Constructive Examination 62 (1986) (recommending 3:1 ratio); American College of Trial Lawyers, *Report on Punitive Damages of the Committee on Special Problems in the Administration of Justice* 15 (Mar. 3, 1989) (recommending greater of 2:1 ratio or $250,000), and a study commissioned by the American Law Institute, *see* 2 Am. Law Inst., *Reporters' Study on Enterprise Responsibility for Personal Injury: Approaches to Legal and Institutional Change* 257 (Apr. 15, 1991) (recommending adoption of a ratio); and (7) finds support in the United States Supreme Court as a matter of federal constitutional law and sound policy. *See Cooper Indus., Inc. v. Leatherman Tool Group, Inc.*, 532 U.S. 424, 433 (2002) ("As in the criminal sentencing context, legislatures enjoy broad discretion in authorizing and limiting permissible punitive damages awards.) (citing *Gore*, 517 U.S. at 568 ("State necessarily have considerable flexibility in determining the level of punitive damages that they will allow in different classes of cases and in any particular case.")).[4]

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[4] *See also Pac. Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1, 39 (1991) (Scalia, J., dissenting) ("State legislatures . . . have the power to restrict or abolish the common-law practice of punitive damages, and in recent years have increasingly done so."); *TXO Prod. Corp. v. Alliance Res. Corp.*, 509 U.S. 443, 472 (1993) (Scalia, J., dissenting) ("State legislatures . . . have amply authority to eliminate any perceived 'unfairness' in the common-law punitive damages regime. . . ."); *Gore,* 517 U.S. at 595 (Breyer, J., concurring) (commented favorably on "legislative enactments . . . that . . . impose quantitative limits that would significantly cabin the fairly unbounded discretion created by the absence of constraining legal standards."); *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 431, 438 (2003) (Ginsburg, J., dissenting) (stating "damages-capping legislation may be altogether fitting and proper," and noting that "the handiwork in setting a single-digit and 1-to-1 benchmarks could hardly be questioned.").

In contrast, a decision striking down the law would usurp the role of the Legislature to set economic policy. *See* Victor E. Schwartz *et al.*, *Fostering Mutual Respect and Cooperation Between State Courts and State Legislatures: A Sound Alternative to a Tort Tug of War*, 103 W. Va. L. Rev. 1 (2000).

B. The Statutory Cap Responds to a Trend of Punitive Damages Being Awarded in Amounts That Exceed Historical Experience

Punitive damages are not normal civil or tort law damages. They are not awarded to compensate for harm; that purpose is accomplished by compensatory damages, which provide compensation for both economic and noneconomic losses. This Court "consistently has emphasized the primary purpose for assessing punitive damages is to punish the wrongdoer and through that punishment to deter further unlawful conduct of the tortfeasor and others." *Safeco Ins. Co. v. Ellinghouse*, 223 Mont. 239, 254, 725 P.2d 217, 227 (1986); *see also* Mont. Code Ann. § 27-1-220(1) ("a judge or jury may award, in addition to compensatory damages, punitive damages for the sake of example and for the purpose of punishing a defendant."). "Punitive damages award[s] operate as 'private fines levied by civil juries . . .'; they have been described as 'quasi-criminal' punishment...." *Seltzer v. Morton*, 2007 MT 62, 148 ¶ 148, 336 Mont. 225, 278, n.18, 154 P.3d 561, 600 n.18 (citation omitted).

For example, to be liable for punitive damages in Montana, the defendant must be "found guilty of actual fraud or actual malice," Mont. Code Ann. § 27-1-

221(1), and liability must be proven by the quasi-criminal standard of "clear and convincing evidence," Mont. Code Ann. § 27-1-221(5), rather than the normal civil "preponderance of the evidence" standard. As this Court explained in *Ellinghouse*, 223 Mont. 239, 725 P.2d 217 (1986), "[p]unitive damages are an extraordinary remedy, outside the field of usual redressful remedies, and should be applied with caution, lest gendered by passion and prejudice because of the defendant's wrongdoing, the award becomes unrealistic or unreasonable." 223 Mont. at 254, 725 P.2d at 226-27 (quoted in *Dees v. Am. Nat'l Life Ins. Co.*, 260 Mont. 431, 448, 861 P.2d 141, 151 (1993)).

The Anglo-American doctrine of punitive damages has its origins in two English cases, *Huckle v. Money*, 95 Eng. Rep. 768 (C.P. 1763), and *Wilkes v. Wood*, 98 Eng. Rep. 489 (C.P. 1763), which first used the term "exemplary damages" and expressed that "the punitive and deterrent purposes of damages awards could be separated from their compensatory function." D. Dorsey Ellis, Jr., *Fairness and Efficiency in the Law of Punitive Damages*, 56 S. Cal. Rev. 1, 14 (1982); *see also* James B. Sales & Kenneth B. Cole, Jr., *Punitive Damages: A Relic That Has Outlived Its Origins*, 37 Vand. L. Rev. 1117 (1984). However, punitive damages were awarded rarely and were limited to a narrow category of quasi-criminal torts involving conscious and intentional harm inflicted by one person on another, such as assault and battery, false imprisonment, and trespass.

Punitive damages were allowed in these cases to supplement the criminal law system, which in eighteenth century England "punished more severely for infractions involving property damage than for invasions of personal rights." James B. Sales, *The Emergence of Punitive Damages in Product Liability Actions: A Further Assault on The Citadel*, 14 St. Mary's L.J. 351, 355 (1983).

As in England, punitive damages in early America were limited to quasi-criminal tort cases. In general, punitive damages "merited scant attention," because they "were rarely assessed and likely to be small in amount." Ellis, 56 S. Cal. L. Rev. at 2. Typically, punitive damages only slightly exceeded compensatory damages awards, if at all.

Beginning in the late 1960s, courts began to allow punitive damages in unintentional tort cases, such as in product liability actions. *See Toole v. Richardson-Merrell, Inc.*, 251 Cal. App. 2d 689 (1967) (holding for the first time that punitive damages were recoverable in a strict product liability action). As recently as 1976, however, there were only three reported appellate court decisions upholding awards of punitive damages in product liability cases– and in each case the award was relatively modest. *See Gillham v. Admiral Corp.*, 523 F.2d 102 (6th Cir. 1975), *cert. denied*, 424 U.S. 913 (1976) ($125,000 compensatory, $100,000 punitive); *Toole, supra* ($175,000 compensatory, $250,000 punitive); *Moore v.*

Jewel Tea Co., 253 N.E.2d 636 (Ill. App. 1969) ($920,000 compensatory, $10,000 punitive), *aff'd*, 263 N.E.2d 103 (Ill 1970).

It was not until the late 1970s and 1980s that the size of punitive damages awards "increased dramatically." George L. Priest, *Punitive Damages and Enterprise Liability*, 56 S. Cal. L. Rev. 123, 123 (1982); *see also* E. Donald Elliott, *Why Punitive Damages Don't Deter Corporate Misconduct Efficiently*, 40 Ala. L. Rev. 1053, 1061 (1989) (noting a "general trend toward awarding punitive damages more frequently and in larger amounts in recent years.").

By 1991, the United States Supreme Court in *Pacific Mutual Life Insurance Co. v. Haslip*, 499 U.S. 1, 18 (1991), expressed concern that punitive damages had "run wild." *See also TXO Prod. Corp. v. Alliance Res. Corp.*, 509 U.S. 443, 500 (1993) (O'Connor, J., dissenting) ("Recently, . . . the frequency and size of such awards have been skyrocketing" and "it appears that the upward trajectory continues unabated."); Victor E. Schwartz *et al.*, *Reining In Punitive Damages "Run Wild": Proposals for Reform By Courts And Legislatures*, 65 Brook. L. Rev. 1003 (2000). Between 1996 and 2001, the annual number of punitive damages awards exceeding $100 million doubled. *See* John Y. Gotanda, *Punitive Damages: A Comparative Analysis*, 42 Colum. J. Transnat'l L. 391, 392 (2004).

This recent trend led most states to limit[5] or bar punitive damages.[6] Mont. Code Ann. § 27-1-220(3) was Montana's response, and brought punitive damages awards more in line with the historical experience.

CONCLUSION

This Court should reverse the decision below and hold that Mont. Code Ann. § 27-1-220(3) is constitutional.

Respectfully Submitted this 6th day of June, 2014.

BROWNING, KALECZYC, BERRY & HOVEN, P.C.

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5 *See* Ala. Code § 6-11-21; Alaska Stat. § 9.17.020; Colo. Rev. Stat. § 13-21-102; Conn. Gen. Stat. § 52-240b; Fla. Stat. § 768.73, Ga. Code § 51-12-5.1; Idaho Code § 6-1604; Ind. Code § 34-51-3-4; Kan. Stat. § 60-3702; Me. Rev. Stat. tit.28-A § 2-804(b) (wrongful death); Miss. Code § 11-1-65; Mo. Rev. Stat. § 510.265.1; Mont. Code Ann. § 27-1-220(3); Nev. Rev. Stat. § 42.005; N.J. Stat. § 2A:15-5.14; N.C. Gen. Stat. § 1D-25; N.D. Cent. Code § 32.03.2-11(4); Ohio Rev. Code § 2315.21; Okla. Stat. tit. 23, § 9.1; S.C. Code § 15-32-530; Tenn. Code § 29-39-104; Tex. Civ. Prac. & Rem. Code § 41.008; Va. Code § 8.01-38.1.

6 Nebraska bars punitive damages on state constitutional grounds. Louisiana, Massachusetts, and Washington, and New Hampshire permit punitive damages only when authorized by statute. Michigan recognizes exemplary damages as compensatory, rather than truly punitive. Connecticut has limited what they call punitive recovery to the expenses of bringing the action. *See Exxon Shipping Co. v. Baker*, 554 U.S. 471, 495 (2008).

CERTIFICATE OF COMPLIANCE

Pursuant to Montana Rules of Appellate Procedure 11(4)(e), I certify that this Brief has been prepared in a proportionally-spaced typeface, Times New Roman style, 14 point font. This Brief is double spaced, except for footnotes and quoted or indented material, and the word count calculated by Microsoft Word satisfies the 5,000 word count limit for *amicus* briefs under Rule 11(4)(a).

DATED this 6th day of June, 2014.

Patricia Collins

BROWNING, KALECZYC, BERRY & HOVEN, P.C.

CERTIFICATE OF SERVICE

I certify that a copy of the foregoing Brief was served by e-mail and U.S. First Class mail, postage prepaid, this 6th day of June, 2014, addressed to:

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