IN THE SUPREME COURT OF IOWA

NO. 15-1032

TOBY THORNTON,

Plaintiff-Appellee,

v.

AMERICAN INTERSTATE INSURANCE COMPANY.

Defendant-Appellant.

On Appeal from the District Court for Pottawattamie County
The Honorable Jeffrey L. Larson

Brief of *Amici Curiae* the Chamber of Commerce of the United States and the Iowa Association of Business and Industry in Support of the Appellant

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IDENTITY AND INTEREST OF *AMICI CURIAE*

The Chamber of Commerce of the United States of America is the world's largest business federation. It represents 300,000 direct members and indirectly represents the interests of more than three million companies and professional organizations of every size, in every industry sector, and from every region of the country.

One of the Chamber's most important responsibilities is to represent the interests of its members in matters before the courts, Congress, and the Executive Branch. To that end, the Chamber regularly files *amicus curiae* briefs in cases that raise issues of vital concern to the nation's business community.

Few issues are of more concern to American business than those pertaining to the fair administration of punitive damages. The Chamber regularly files *amicus* briefs in significant punitive damages cases, including every case in which the United States Supreme Court has addressed such issues during the past two decades.

The Iowa Association of Business and Industry is the largest business network in the State of Iowa, representing over 1,400 business members that employ over 300,000 Iowans. It frequently represents its members' interests before the Iowa Supreme Court.

INTRODUCTION AND SUMMARY OF THE ARGUMENT

Punitive damages are, by definition, punitive—meaning that their purpose is to punish, not compensate. Thus, as with other forms of punishment, courts cannot impose punitive damages without applying standards that bring some level of notice, predictability, and rationality. Those "standards need not be precise," to be sure, but "they must offer some kind of constraint upon a jury or court's discretion, and thus protection against purely arbitrary behavior." *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 588 (1996) (Breyer, J., concurring).

Over the last two decades, the United States Supreme Court has been setting (*see Gore*, 517 U.S. 559) and refining those standards, with its most specific pronouncement coming twelve years ago in *State Farm Mutual Automobile Insurance Company v. Campbell*, 538 U.S. 408, 426, 429 (2003). There, the Court

further elaborated on the three "guideposts" that lower courts must look to when assessing whether a punitive award is excessive: "(1) the degree of reprehensibility of the defendant's misconduct; (2) the disparity between the actual or potential harm suffered by the plaintiff and the punitive damages award; and (3) the difference between the punitive damages awarded by the jury and the civil penalties authorized or imposed in comparable cases." *Id.* at 418.

These guideposts do not set a strict mathematical formula that determines what the "right" punitive award should be in any given case. But "in practice," the Court has explained, the guideposts place a very real limit on a judge's or jury's ability to punish a tortfeaser. *Campbell*, 538 U.S. at 425. Specifically, there will be "few awards exceeding a single-digit ratio between punitive and compensatory damages" that will "satisfy due process." *Id.* And "[w]hen compensatory damages are substantial," that constitutional threshold shrinks to "a lesser ratio, perhaps only equal to compensatory damages." *Id.*

When measured against the Supreme Court's guideposts, the $25 million punitive damage award in this case is unconstitutional.

To begin, the compensatory award ($284,000) is substantial, and the ratio of punitive-to-compensatory damages (88:1) is off the charts. Thus, the Supreme Court's ratio guidepost, by itself, dictates that the district court's decision be reversed.

Moreover, the district court's application of the other two factors—reprehensibility and comparability—was flawed, because the court failed to recognize that, ultimately, this is a proportionality review. The district court concluded that American Interstate's conduct was "egregious" and thus decided that the extremely large punitive damage award was constitutionally acceptable. But there's a critical step missing in that methodology: The imposition of *any* amount of punitive damages inherently assumes that the defendant acted egregiously, but when determining whether the amount of that award is proportional to the wrong, the question must be whether

the conduct in question is particularly egregious *as compared to other conduct that has been subject to punitive damages.*

The district court didn't ask that question, and thus it did little to determine what other courts have awarded for similar types of conduct. Had the court done so, it would have discovered that the award in this case is unprecedented.

In sum, American Interstate did not have fair notice that its conduct would produce a $25 million fine. Such an award accordingly violates due process. To the extent this Court does not overturn the jury's verdict on other grounds argued by American Interstate, the Court should reduce the punitive award to a constitutionally permissible level.

ARGUMENT

I. A punitive damages award that is 88 times a substantial compensatory award is unconstitutional on its face.

In *Campbell*, the Supreme Court stopped short of creating a bright-line limit on the ratio of punitive damages to compensatory damages, but the Court did give very specific instruction on what the outer constitutional bounds look like. So while the edges of

the constitutional line might be somewhat fuzzy, a line certainly exists. And this award is well over it.

Taking the Supreme Court's framework one step at time:

First, the Court explained that ratios over 9:1 are presumptively unconstitutional since, "in practice, few awards exceeding" that amount will comply with due process. *Id.* at 425.

Second, the punitive-to-compensatory ratio *might* constitutionally exceed the single digits *if* the compensatory award is small and the act is "particularly egregious," and if the injury is hard to detect (making it less likely that the defendant will be caught) or the "monetary value of noneconomic harm [is] difficult to determine" (making it less likely that, without punitive damages, the defendant would have to pay for the full extent of the harm he caused). *Id.*

Third, ratios that exceed 4:1 "might be close to the line of constitutional impropriety," as there are statutory benchmarks with "a long legislative history, dating back over 700 years and going forward to today, providing for sanctions of double, treble, or quadruple damages to deter and punish." *Id.* (citing *Pacific Mut.*

Life Ins. Co. v. Haslip, 499 U.S. 1, 23-24 (1991) and *Gore*, 517 U.S. at 581, and n.33).

And *fourth*, "[w]hen compensatory damages are substantial, then a lesser ratio, perhaps only equal to compensatory damages, can reach the outermost limit of the due process guarantee." *Id.*

Of these four categories, it is clear that the punitive damages award in this case does not fall within the second one (awards that can exceed the compensatory award by double digits). The $284,000 compensatory award is not "small" (not under any standard) and this is not a case in which the wrongful conduct—denying that an insured is permanently disabled—can go easily undetected, or where the harm was left out of a compensatory award due to difficulty of proof.

Indeed, the opposite is true: While the jury's $27,000 award for loss of home equity was based upon scant evidence (if any evidence at all), the district court refused to overturn the award, saying that recovery of compensatory damages "will not be denied merely because the amount of damages is difficult to ascertain." Post-trial Order 8 (internal quotation omitted). The same is true

for the jury's award of $125,000 for pain and suffering: The only physical pain that Thornton attributed to American Interstate was an injury to his elbows, but no witness could say, with any real certainty, what caused Thornton's elbow injury and thus who was to blame. Yet the district court allowed the $125,000 compensatory award to stand. Post-trial Order 7-8.

So this is a case, like *Campbell*, where the "compensatory damages for the injury suffered" was "based on a component which was duplicated in the punitive award." *Campbell*, 538 U.S. at 426. And since that compensatory award was not "small," there is simply no justification for making this award one of the "few" that exceeds double digits, let alone one that so dramatically exceeds the 9:1 threshold.

In fact, controlling precedent indicates that the ratio in this case should not have exceeded 4:1 or perhaps even 1:1. While the Supreme Court has not put a hard number on what constitutes a "substantial" compensatory award, as Justice Souter explained in *Exxon Shipping Co. v. Baker*, 554 U.S. 471 (2008), the "criterion of 'substantial' takes into account the role of punitive damages to

induce legal action when pure compensation may not be enough to encourage suit." *Id.* at 515 n.28. *Baker* was, of course, focused on the Court's common-law power over punitive damages, not the requirements of the Due Process Clause, but the Court has given no indication that its definition of "substantial" has varying meanings in the punitive-damages context. And there is no doubt that the compensatory award in this case fits that definition: As this Court well knows, parties do not hesitate to fight over $284,000 in an individual insurance-coverage case. And other courts have already recognized that such a figure is substantial: one court described a $200,000 compensatory award as "undeniably substantial,"[1] another labeled a $280,000 award as "very substantial,"[2] and another determined that a compensatory award as low as $35,000 fits into the "substantial" category.[3]

Acknowledging that the ratio in this case falls well outside the Supreme Court's guidelines, the district court concluded that

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[1] *Allam v. Meyers*, 906 F. Supp. 2d 274, 293 (S.D.N.Y. 2012).

[2] *Thomas v. iStar Fin., Inc.*, 508 F. Supp. 2d 252, 263 (S.D.N.Y. 2007).

[3] *Mendez-Matos v. Guaynabo*, 557 F.3d 36, 54-55 (1st Cir. 2009).

the punitive award was constitutionally justified because the compensatory award does "not encompass all of the 'potential harm'" that would occur *if* American Interstate engaged in similar practices against *other* Iowa insureds. Post-trial Order 18. American Interstate is a "high-risk worker's compensation insurer," and thus, according the district court, "the jury here would have been reasonable in presuming that the damages for which it compensated plaintiff did not capture all of the potential harm" to other Iowans. Post-trial Order 18.

That analysis is flawed for two reasons:

First, whether the punitive damage award comports with due process is a legal issue that is reviewed *de novo*,[4] not a factual issue to which the district court must consider "all reasonable inferences the jury *may have* made."[5] Thus, it was wrong for the district court to rationalize the award by claiming that the jury

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[4] *Cooper Indus., Inc. v. Leatherman Tool Grp., Inc.*, 532 U.S. 424, 432, 437 (2001) (holding that the when a post-trial review of the constitutionality of a punitive damages award is de novo).

[5] *City of Cedar Falls v. Cedar Falls Cmty. Sch. Dist.*, 617 N.W.2d 11, 16 (Iowa 2000) (holding that a court reviews the factual sufficiency of the verdict, the court must view the facts in the light most favorable to the verdict).

could reasonably have "presume[ed] that the damages for which it compensated Plaintiff did not capture all of the potential harm." Post-trial Order 18. The district should have used its own, independent judgment to make that legal determination; the Supreme Court's guideposts do not depend upon what the jury might have believed.[6]

Second, and independently dispositive, the Supreme Court has already ruled that harm to others (or potential harm to others) cannot justify an otherwise excessive punitive damages award. *See Philip Morris USA v. Williams*, 549 U.S. 346, 354 (2007). To be sure, the plurality opinion in *TXO Production Corp. v. Alliance Resources Corp.*, 509 U.S. 443, 460 (1993) contains a stray remark to the contrary, but the Court was clear in *Williams*: in certain circumstances it "may be appropriate" to consider "the

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[6] *See Simon v. San Paolo U.S. Holding Co.*, 113 P.3d 63, 70 (Cal. 2005) (concluding that while "findings of historical fact made in the trial court are still entitled to the ordinary measure of appellate deference, "reviewing courts may not "presume[e] simply from the size of the punitive damages award" that the jury made any particular finding of fact, because "to infer [such a finding] from the size of the award would be inconsistent with de novo review, for the award's size would thereby indirectly justify itself").

potential harm the defendant's conduct could have caused," but "the potential harm at issue [is] harm potentially caused *the plaintiff*." *Williams*, 549 U.S. at 354. Thus, any reliance by the district court on potential harm to others was error. *See also Campbell*, 538 U.S. at 423 ("Due process does not permit courts, in the calculation of punitive damages, to adjudicate the merits of other parties' hypothetical claims.").

* * *

There is no constitutional justification for a punitive award that is 88 times a $284,000 compensatory award. The Supreme Court has said that such disproportionate amounts will be allowed only under very limited circumstances, and none of those circumstances is present here. Thus, like *Campbell*, "this case is neither close nor difficult." *Campbell*, 538 U.S. at 418. The Court should therefore reduce the punitive award to an amount that is close to compensatory damages.

II. Even when a defendant's conduct is "egregious," the punitive damages award must be proportional to the wrong committed.

When gauging the reprehensibility of the defendant's conduct, the Supreme Court has instructed lower courts to consider five factors.[7] The presence of those factors (or lack thereof) is important to reviewing the constitutionality of a punitive damages award, but that importance is largely limited to whether *any* punitive award satisfies due process: "The existence of any one of these factors weighing in favor of a plaintiff may not be sufficient to sustain a punitive damages award," the Court has explained, and "the absence of all of them renders any award suspect." *Campbell*, 538 U.S. at 419. So the reprehensibility factors, while helpful in determining whether an award should be made at all, are not that helpful in determining how much that award should be.

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[7] Whether "[1]the harm caused was physical as opposed to economic; [2] the tortious conduct evinced an indifference to or a reckless disregard of the health or safety of others; [3] the target of the conduct had financial vulnerability; [4] the conduct involved repeated actions or was an isolated incident; and [5] the harm was the result of intentional malice, trickery, or deceit, or mere accident." *Campbell*, 538 U.S. at 419.

That's where the comparability and ratio guideposts come in. As explained above, the ratio of punitive-to-compensatory damages in this case, by itself, dictates that this award is unconstitutional. But the district court's failure to engage in any meaningful comparative analysis is also problematic. The court concluded, after checking off each of the reprehensibility factors, that American Interstate's conduct was egregious. Post-trial Order 10-13. American Interstate is challenging those conclusions on appeal, but even if the district court was right—even if this case does touch on each one of those factors—that should not have been the end of the district court's analysis. The very purpose of reviewing punitive damage awards is to "ensure that the measure of punishment is both reasonable and proportionate to the amount of harm to the plaintiff and to the general damages recovered" (*Campbell*, 538 U.S. at 426), but a court cannot gauge proportionality unless it does a comparative analysis.

When that's done—when the actions in this case are compared to the universe of actions (and corresponding harms) that are subject to punitive damages—it's clear that $25 million is

not proportional. Indeed, if denying that a worker is completely and permanently disabled (while, all along, still paying monthly benefits) is so reprehensible that it justifies one of the highest post-*Campbell* ratios on record when the compensatory award is substantial, then where do we go from here? Surely this Court can imagine (indeed, has likely seen) cases with more egregious facts. If 88:1 is constitutionally acceptable in this case, what ratio would apply in those cases? 150:1? 200:1?

That, of course, would be inconsistent with the framework set forth in *Campbell*, but that is the ultimate conclusion of the district court's reasoning. The court determined that Interstate's conduct was reprehensible, but it didn't ask the key question: How reprehensible was the conduct *as compared to the universe of conduct that could warrant an award of punitive damages?* If the court had asked that question, it would have seen that the award in this case is an extreme outlier.

In June 2015, Dean N. William Hines (long-time dean of the University of Iowa College of Law) and Professor Laura J. Hines published a study in the *Hastings Law Journal* in which they

reviewed 507 post-*Campbell* punitive-damage decisions, coded them into one of fifteen case-categories, and then conducted a statistical analysis of the punitive awards (pre- and post-review). Laura J. Hines & N. William Hines, *Constitutional Constraints on Punitive Damages: Clarity, Consistency, and the Outlier Dilemma*, 66 Hastings L.J. 1257 (2015) ("Hines"). [8] They found that that "lower courts have largely understood the standards reflected in the [Supreme Court's] guideposts," which means that "average ratios [are] hovering well within a range the Court has suggested is constitutionally acceptable." *Id.* at 1272.

Of most importance to this case, Dean Hines and Professor Hines identified 44 "insurance" cases involving punitive damages. *Id.* at 1275. In those cases, the median amount of punitive damages awarded by the jury was $3 million, and the post-judicial-review median (that is, the median award after the district courts and courts of appeals made constitutional

[8] The categories are: (1) fraud, (2) civil rights, (3) employment, (4) business tort, (5) Title VII, (6) insurance, (7) gross negligence, (8) property, (9) wrongful death, (10), product liability, (11), assault and battery, (12) breach of fiduciary duty, (13) creditor abuse, (14) defamation, and (15) other. *Id.* at 1288.

adjustments) was $1.3 million. *Id.* at 1285. That statistic suggests that when insurance companies are the defendant, juries often overshoot the constitutional mark. It also suggests that the award in this case is *way* off the mark.

The numbers become even starker when considering the median ratios between punitive and compensatory damages: The average amount of punitive damages awarded by the jury in insurance cases post-*Campbell* is 10.04 times the compensatory damages, but upon judicial review the ratio shrinks to 4:1. *Id.* at 1288. And even that number has to be put into context, because it's skewed by cases in which the compensatory award was truly "small."[9] In *Myers v. Workmen's Auto Insurance Co.*, 95 P.3d 977, 982-83 (Idaho 2004), for instance, the ratio was 408:1, but the plaintiff received just $735.00 in nominal damages. Similarly, in *Haberman v. Hartford Insurance Group*, 443 F.3d 1257, 1263

[9] The list of cases is attached to another article on punitive damages that Dean Hines published in 2013. *See* N. William Hines, *Marching to a Different Drummer: Are Lower Courts Faithfully Implementing the Evolving Due Process Guideposts to Catch and Correct Excessive Punitive Damages Awards?*, 62 Cath. U. L. Rev. 371, Appendix A (2013).

(10th Cir. 2006), the ratio was 20:1, but the compensatory award was just $5,000.

Notably, Dean Hines and Professor Hines did not identify *any* insurance case where the compensatory award was substantial and the ratio of compensatory-to-punitive damages was anywhere near 88:1. The punitive-to-compensatory ratio in this case is exponentially greater than any other insurance case post-*Campbell*, and yet there is no indication that American Interstate's conduct was exponentially more egregious than any other recorded case. So while the company's conduct, as described by the district court, might be characterized as reprehensible, the $25 million award is not proportional when compared to similar cases (or any case, for that matter). As a result, the award is unconstitutional. *See Ondrisek v. Hoffman*, 698 F.3d 1020, 1030 (8th Cir. 2012) (surveying other Eighth Circuit decisions and concluding that, "[d]espite the exceptionally reprehensible nature of [the defendant's] conduct, it would be unconstitutional to let the punitive damages—and their 10:1 ratio to compensatory damages—stand").

CONCLUSION

Assuming the Court does not reverse on one of the other grounds raised by American Interstate, the Court should reduce the punitive award to a constitutionally permissible level. Such outlier punitive awards like this one "drive[] up the cost of insurance premiums, deter[] both individuals and enterprises from undertaking socially desirable activities and risks, and encourage[] overspending on 'socially excessive precautions' that 'cost more than the reduction of harm produced by them.'" *Payne v. Jones*, 711 F.3d 85, 94 (2d Cir. 2013) (alteration omitted) (quoting A. Mitchell Polinsky & Steven Shavell, *Punitive Damages: An Economic Analysis*, 111 Harv. L. Rev. 869, 879 (1998)).

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME LIMITATION, TYPEFACE REQUIREMENTS, AND TYPE-STYLE REQUIREMENTS

1. This brief complies with the type-volume limitation of Iowa R. App. P. 6.903(1)(g)(1) or (2) because it contains 3,393 words, excluding the parts of the brief exempted by Iowa R. App. P. 6.903(1)(g)(1).

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/s/ Ryan G. Koopmans AT0009366

PROOF OF SERVICE AND CERTIFICATE OF FILING

I hereby certify that on November 12, 2015, I electronically filed the foregoing with the Clerk of the Supreme Court of Iowa using the Iowa Electronic Document Management System, which will send notification to the parties of record.

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