

No. 05-15655

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

GINNY V. WHITE and JIMMIE D. WHITE,

Plaintiffs-Appellees,

v.

FORD MOTOR COMPANY, a Delaware Corporation,

Defendant-Appellant.

On Appeal from the United States District Court
for the District of Nevada
No. CV-95-00279-DWH

**BRIEF OF THE CHAMBER OF COMMERCE
OF THE UNITED STATES OF AMERICA AS *AMICUS CURIAE*
SUPPORTING APPELLANT AND REVERSAL**

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INTEREST OF *AMICUS CURIAE*

The Chamber of Commerce of the United States of America (“the Chamber”) is the nation’s largest federation of business companies and associations, with an underlying membership of more than 3,000,000 businesses and professional organizations of every size and in every sector and geographic region of the country. An important function of the Chamber is to represent the interests of its members by filing *amicus curiae* briefs involving issues of national concern to American business.

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 each of the cases in which the United States Supreme Court has addressed such issues during the past 15 years.

The Chamber and its members have a substantial interest in the procedures courts employ in punitive damages cases and, in particular, the instructions courts give to juries tasked with determining whether to impose punitive damages. The Chamber believes that its familiarity with the law of punitive damages can be of assistance to the Court not just in resolving the issues raised in Ford Motor Company’s appeal, but also in more broadly addressing the requirements imposed by due process on jury instructions.

INTRODUCTION

Although the guarantee of procedural due process is a basic tenet of our constitutional system, this fundamental principle is too often undermined or even ignored when it comes to jury-imposed punitive damages. Despite the Supreme Court's admonition nearly 15 years ago that "unlimited jury discretion . . . in the fixing of punitive damages may invite extreme results that jar one's constitutional sensibilities," *Pac. Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1, 18 (1991), lower courts have not consistently recognized the importance of providing juries with meaningful instructions for determining punitive damages awards. As a consequence, juries – like the jury in this case – continue to return punitive damages awards that are grossly excessive and thus constitutionally impermissible.

Quite apart from the substantive limits on the size of punitive damages awards, however, *procedural* due process requires a trial court's instructions to provide the jury with "adequate guidance" concerning punitive damages. *Haslip*, 499 U.S. at 18. At an irreducible minimum, such "adequate guidance" requires that jurors be given the information necessary to render a valid judgment. In *State Farm Mutual Automobile Insurance Co. v. Campbell*, the Supreme Court reaffirmed the recognized criteria that a punitive damages award must satisfy due process to be constitutionally valid. 538 U.S. 408, 425 (2003). But the Court also recognized that the criteria can be truly meaningful only if the jury's instructions

provide jurors with sufficient information to apply them in a principled fashion. *Id.* at 418-19. Anything less opens the door to arbitrary decision-making. Because the district court here failed in numerous ways to satisfy this basic standard, the punitive damage award does not comport with procedural due process, and the judgment must be overturned.

ARGUMENT

I. INSTRUCTIONS THAT FAIL TO PROVIDE THE JURY WITH SUFFICIENT GUIDANCE TO APPLY THE *STATE FARM* FRAMEWORK CONTRAVENE DUE PROCESS REGARDLESS OF THE SIZE OF THE PUNITIVE DAMAGES AWARD

“[P]roper jury instruction is a well-established and, of course, important check against excessive [punitive damage] awards.” *Honda Motor Co., Ltd. v. Oberg*, 512 U.S. 415, 433 (1994). Absent sufficient guidance on how to calculate punitive damages, juries can do “little more than . . . what they think is best,” and are “left largely to themselves in making this important, and potentially devastating, decision.” *Browning-Ferris Indus., Inc. v. Kelco Disposal, Inc.*, 492 U.S. 257, 281 (1989) (Brennan, J., concurring). “Vague instructions . . . do little to aid the decisionmaker in its task of assigning appropriate weight to evidence that is relevant and evidence that is tangential or only inflammatory.” *State Farm*, 538 U.S. at 418. And when instructions leave juries with “wide discretion in choosing amounts,” there is a grave risk – especially where, as here, evidence of wealth is considered – “that juries will use their verdicts to express biases against big busi-

nesses, particularly those without strong local presences.” *Oberg*, 512 U.S. at 432. For these reasons, due process “demands that [courts] articulate objective standards for the imposition of punitive damages that can be communicated to the jury in the form of instructions and against which the imposition of the punitive award can be weighed in the process of judicial review.” *Farmers Ins. Exch. v. Shirley*, 958 P.2d 1040, 1045 (Wyo. 1998); see *Bankers Life & Cas. Co. v. Crenshaw*, 486 U.S. 71, 88 (1988) (O’Connor, J., concurring) (court’s failure to give meaningful instructions guiding jury’s punitive damages determination is “inconsistent with due process”).

Recent academic studies on jury behavior confirm that, when left largely to their own devices, jurors award punitive damages in an arbitrary fashion. See generally Cass R. Sunstein et al., *Punitive Damages: How Juries Decide* (2002) (collecting research). Notably, individual jurors select unpredictable punitive damages awards even when dealing with identical scenarios involving identical harm and identical defendants, see Cass R. Sunstein et al., *Assessing Punitive Damages (with Notes on Cognition and Valuation in Law)*, 107 *Yale L.J.* 2071, 2100-03 (1998), and even when individual jurors show remarkable consistency in ranking the outrageousness of misconduct on a “bounded scale” (of, say, “0” to “10”), *id.* at 2100-03, 2146. Moreover, far from alleviating this unpredictability, the process of jury

deliberation exacerbates it. See David Schkade et al., *Deliberating About Dollars: The Severity Shift*, 100 Colum. L. Rev. 1139, 1155-60 (2000).

Indeed, these studies suggest that, even assuming that jurors are intelligent and acting in good faith, juries will nonetheless arrive at erratic and unpredictable punitive damages awards because of natural features of human cognition. One reason that jurors – both individually and through the process of deliberation – are unlikely to reach predictable punitive damages awards on their own is that they lack reference points for translating shared beliefs about the severity of misconduct into punishment that is meted out in dollars. *Assessing Punitive Damages, supra* at 2106-07. Unlike compensatory damages, which are generally subject to some form of record-based computation within the ken of jurors, punitive damages are more ethereal in nature. As a result, punitive damages awards can be heavily affected by arbitrary “anchoring effects.” W. Kip Viscusi, *The Challenge of Punitive Damages Mathematics*, 30 J. Legal Stud. 313, 329 (2001).¹ Behavioral research has demonstrated that the value selected as the anchor has a disproportionate effect on the value ultimately selected. See John W. Payne et al., *Behavioral Decision Research: An Overview* 303-59 (1997). To take one obvious example, research shows that, given the same factual scenarios, punitive damages verdicts will vary

¹ Anchoring refers to the natural cognitive process in which a person selects an initial value (the “anchor”) and then adjusts from that number to conform the circumstances of a particular decision.

tremendously based simply upon the amount of damages requested by plaintiffs' counsel in closing. See Reid Hastie et al., *Juror Judgments in Civil Cases: Effects of Plaintiff's Request and Plaintiff's Identity on Punitive Damages Awards*, 23 Law & Human Behav. 445, 449, 463, 466 (1999).

Another problem identified by these studies is “hindsight bias” – the tendency of individuals to overestimate the *ex ante* foreseeability of accidents in the *ex post* world. See Reid Hastie et al., *Juror Judgments in Civil Cases: Hindsight Effects on Judgments of Liability for Punitive Damages*, 23 Law & Human Behav. 597, 605-07, 609 (1999). In other words, research demonstrates that jurors post-accident will seek to punish defendants for failing to take precautions that the jurors would have considered unnecessary pre-accident. *Id.*; see also *Carroll v. Otis Elevator Co.*, 896 F.2d 210, 215-16 (7th Cir. 1990) (Easterbrook, J., concurring) (“The *ex post* perspective of litigation exerts a hydraulic force that distorts judgment. . . . [N]o matter how conscientious jurors may be, there is a bias in the system. *Ex post* claims are overvalued and technical arguments discounted in the process of litigation.”). Hindsight bias therefore skews jury determinations regarding the reprehensibility of a defendant’s conduct, potentially distorting both the determination of liability for punitive damages and the decision as to their amount.

Adequate jury instructions – i.e., instructions that distinguish meaningful anchors from the irrelevant or prejudicial – are thus critical to ensure that juries reach

fair and reliable punitive damages verdicts. Nevertheless, perhaps out of a belief that any flaws can be cured through post-verdict appellate review, trial courts do not always recognize the need to provide detailed jury instructions. *See State Farm*, 538 U.S. at 417 (expressing concern over “the imprecise manner in which punitive damages systems are administered” through vague instructions). But an approach relying exclusively on post-trial appellate review of the size of punitive damages awards to cure the problems associated with their imposition cannot be squared with the demands of due process. Although post-verdict appellate review of punitive damages awards is of course a well-established and important component of procedural due process, *see Cooper Indus., Inc. v. Leatherman Tool Group, Inc.*, 532 U.S. 424, 437 (2001); *Oberg*, 512 U.S. at 430 (1994), even the most rigorous appellate review cannot “cure” a decision made by a jury lacking adequate instruction as to how punitive damages may be determined. The problem is obvious: post hoc appellate review is typically limited to reducing a punitive damages award to the constitutionally permissible *maximum* amount, rather than determining the “proper” amount within the range up that maximum. But if the jury has been inadequately instructed, then merely reducing an excessive award to the constitutional maximum makes no sense, because there is no reason to assume that a properly instructed jury would have issued that maximum amount, as opposed to some lower amount within its discretion. Juries are not always “one-way ratchets,”

pushing punitive damage awards to their outermost limits in all cases (if they did function so capriciously, they could not be part of the system at all). Rather, our system presumes that juries are capable of acting rationally and awarding punitive damages *within* a permissible range of reasonableness *when they are properly instructed*. Because post hoc review for excessiveness will sanction only the most extreme permissible outcome – rather than the outcome a properly instructed rational jury might actually prefer – it does not cure the due process violation inherent in inadequate punitive-damage instructions.

It bears emphasis that the fundamental, constitutional importance of adequate punitive-damage jury instructions *is not even disputed by the institutional plaintiffs' bar*. As the Association of Trial Lawyers of America (“ATLA”) has argued, the “root cause” of excessive punitive damages awards is “woefully unguided juries.” *Amicus Curiae* Brief of the Ass’n of Trial Lawyers in America, at 20, *State Farm Mut. Auto. Ins. Co. v. Campbell*, No. 01-1289 (Oct. 17, 2002) (“ATLA *State Farm Br.*”). ATLA believes – and the Chamber fully concurs – that “proper jury instructions are crucial to ensure that jury verdicts are consistent with constitutional limits on state authority.” *Id.* at 21 (internal quotation marks omitted); *see id.* at 25 (“clear and precise jury instructions are needed for fair and reasonable jury awards of punitive damages”).

Careful jury instructions tethering the award of punitive damages to their permissible purposes are also required because punitive damages are, at their core, akin to criminal penalties. *See Cooper Indus.*, 532 U.S. at 432 (noting that punitive damages are “quasi-criminal” and “operate as ‘private fines’ intended to punish the defendant and to deter future wrongdoing”); *Landgraf v. USI Film Prods.*, 511 U.S. 244, 281 (1994) (“The very labels given ‘punitive’ or ‘exemplary’ damages, as well as the rationales that support them, demonstrate that they share key characteristics of criminal sanctions.”). The decision to award punitive damages is therefore analogous to the decision to convict a defendant, and the decision how *much* to award is likewise analogous to the decision how much to fine a convicted criminal defendant. *Cooper Indus.*, 532 U.S. at 433 (“Despite the broad discretion that States possess with respect to the imposition of criminal penalties and punitive damages, the Due Process Clause of the Fourteenth Amendment to the Federal Constitution imposes substantive limits on that discretion.”); *see also State Farm*, 538 U.S. at 417-18 (noting that punitive damages and criminal penalties serve the same purpose and indicating that they therefore should be subject to similar procedural protections). It is therefore no more appropriate to assign punitive damages on the basis of a bias against large, out-of-state corporations than it would be to determine the sentence for a criminal defendant on the basis of personal animosity. And this holds true regardless of whether the proper application of law might result

in the same outcome and regardless of whether an erroneous determination could be corrected on appeal.

It should be obvious that subjecting an individual to criminal penalties on the basis of unbounded discretion rather than the application of controlling law is barred by due process. Assessing punitive damages on a similar basis should be similarly prohibited. A punitive damages award returned by a jury operating without adequate guidance from the court must be deemed to violate due process even if it otherwise comports with *State Farm's* substantive limitations. Although what constitutes “adequate guidance” has not yet been precisely defined, it must mean, at the very least, that a jury is given sufficient information to permit a meaningful and principled application of the relevant law. *Pac. Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1, 19-20 (1991). Accordingly, because *State Farm* sets forth the due-process-based substantive standard for the award of punitive damages, any jury considering punitive damages must be instructed on the nature of the *State Farm* framework and be given the information necessary to properly apply *State Farm's* principles. As ATLA has put it, “procedural safeguards, most especially clear and specific instructions to the jury regarding the proper evaluation of the evidence and *application of the factors relevant to the amount of punitive damages*, are the most effective means of protecting against arbitrary awards.” *ATLA State Farm Br.*, at 19 (emphasis added). Quite so. Such thorough and precise instructions are the

only sensible way to implement *State Farm*'s "procedural and substantive constitutional limitations" on the award of punitive damages. 538 U.S. at 416.

II. THE DISTRICT COURT'S INSTRUCTIONS FAILED TO PROVIDE THE JURY WITH SUFFICIENT INFORMATION TO PERMIT A MEANINGFUL APPLICATION OF *STATE FARM*'S PRINCIPLES

This case provides a vivid demonstration of what happens when jurors are deprived of the legal and factual information necessary to jury to apply *State Farm* properly – and, even worse, are explicitly directed to inappropriate or irrelevant "anchors" to guide their determination.

Among the court's most glaring errors was its refusal to instruct the jury that "[a]ny punitive damages you award must bear a reasonable relationship to the harm that the defendant's wrongful conduct caused the plaintiffs in this case." (ER356.) Closely related to this error was the court's rejection of a supplemental instruction that the jury "consider the deterrent and punishing force and effect of the compensatory damages paid by the defendant." (ER355.) The court's failure to provide these instructions denied Ford its right to due process in the determination of an appropriate punitive damages award.

State Farm requires courts to consider "the disparity between the actual or potential harm suffered by the plaintiff and the punitive damages award" and mandates that "the measure of punishment [be] both reasonable and proportionate to the amount of harm to the plaintiff and to the general damages recovered." 538

U.S. at 418, 426 (emphasis added). As *State Farm* makes clear, the ratio of punitive to compensatory damages is a critical guidepost for determining the maximum punitive damages award that will satisfy the state’s legitimate interests in punishment and deterrence. *See id.* at 425. But the ratio is more than just a number – a genuine appraisal of the relationship between compensatory damages and any potential extra-compensatory punishment is important because significant compensatory awards, particularly awards of non-economic damages, can have a substantial deterrent effect in and of themselves. *Id.* at 426; *see also Smith v. Wade*, 461 U.S. 30, 94 (1983) (O’Connor, J., dissenting) (noting that “awards of compensatory damages and attorney’s fees already provide significant deterrence” in regards to propriety of punitive damages awards for § 1983 actions). Because the purpose of imposing punitive damages is “to further a State’s legitimate interests in punishing unlawful conduct and deterring its repetition,” any punitive damages award must take into account the extent to which a plaintiff’s compensatory award already achieves the State’s deterrence goal. *See BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 568 (1996).

For the reasons explained in Part I, *supra*, these considerations cannot be left to post-trial judicial review of punitive damages awards – due process requires that juries consider these critical issues in determining how much in monetary damages, over and above the compensatory award, is rationally necessary to fulfill the

state’s punishment and deterrence.² The court’s instructions in this case, however, flatly precluded the jury from considering the compensatory damages award for *any* purpose – either for determining what punitive to compensatory ratio would be appropriate under the circumstances or the extent to which the compensatory damages award already advanced the state’s legitimate deterrence interests.³ Indeed, not only did the court refuse to give a “reasonable relationship” instruction, it even refused to admit evidence of the actual amount of the Whites’ compensatory damages. A jury, however, must be given more than just legally accurate instructions – it must also be provided with the information necessary to apply those instructions. Informing a juror of a duty that he or she cannot perform is little better than not informing the juror at all.

The refusal to instruct – or even allow – a jury considering punitive damages to take into account the compensatory damages award would be wrong in any case,

² In fact, many states incorporate a “reasonable relationship” instruction into their model jury instructions. *See, e.g.*, 6A Wash. Pattern Jury Instr. Civ. WPI 348.02 (Wash. Practice Series, 5th ed. 2005); N.J. Model Civ. Charges 6.20A (2005).

³ Instead, the district court simply instructed the jury that the punitive damages award “must not exceed the amount that you find . . . is reasonably required to vindicate Nevada’s legitimate interest in punishment and deterrence, if any.” (Tr. at 1411.) But in the absence of specific instruction on the need to consider the deterrent effect of compensatory damages, there is a distinct risk that the jury awarded punitive damages for the purpose of deterring conduct already being deterred by the compensatory damages award – a situation plainly at odds with the ruling in *State Farm*. *State Farm*, 538 U.S. at 426.

but it is especially indefensible here, given other instructional errors the court committed. Whereas the compensatory damages amount is indisputably a valid anchor for the jury's punitive damage determination, the court's other instructional errors directed the jury toward plainly invalid anchors, all but ensuring that the jury would reach an excessive verdict. First, the court explicitly required the jury to consider Ford's wealth. (Tr. at 1410 (requiring jury to consider "the amount of punitive damages which will have a deterrent effect on the defendant in light of the defendant's financial condition").) As the Supreme Court has made clear, however, a defendant's wealth bears "no relation[ship] to the [punitive damage] award's reasonableness or proportionality to the harm," and the "wealth of a defendant" therefore "cannot justify an otherwise unconstitutional punitive damages award." *State Farm*, 538 U.S. at 427. Moreover, "emphasis on the wealth of the wrongdoer increase[s] the risk that the award may have been influenced by prejudice against large corporations, a risk that is of special concern when the defendant is a nonresident." *TXO Prod. Corp. v. Alliance Res. Corp.*, 509 U.S. 443, 464 (1993); see *Honda Motor Corp., Ltd. v. Oberg*, 512 U.S. 415, 432 (1994). If evidence concerning wealth is irrelevant and prejudicial, an *instruction* requiring the jury to render a verdict based on such evidence violates due process *a fortiori* – and all the more so where, as here, it is the sole anchor singled out by the court for the jury's consideration.

Second, the court also failed to instruct the jury *not* to consider harm to others in deciding how much punitive damages to award for harm suffered by the Whites. In *State Farm*, the Supreme Court held that, in evaluating the degree of reprehensibility of a defendant's conduct, a fact-finder is prohibited from taking into account conduct by the defendant unrelated to *the plaintiff's* harm. See 538 U.S. at 422-23 ("For a more fundamental reason . . . the Utah courts erred in relying upon this and other evidence: The courts awarded punitive damages to punish and deter conduct that bore no relation to the Campbells' harm. . . . A defendant should be punished for the conduct that harmed the plaintiff, not for being an unsavory individual or business."). The Court noted that "[d]ue process does not permit courts, in the calculation of punitive damages, to adjudicate the merits of other parties' hypothetical claims against a defendant under the guise of the reprehensibility analysis," because providing damages "on these bases creates the possibility of multiple punitive damages awards for the same conduct; for in the usual case nonparties are not bound by the judgment some other plaintiff obtains." *Id.* at 423.

Despite these admonitions, the court below refused to give a supplemental jury instruction that would have made clear to the jury that it could return an award only for harm done to the Whites. Instead the court told the jury merely that it "may not add damages to protect people or to punish harm to people outside Nevada." (Tr. at 1411.) But that instruction, while properly informing the jury that it

could not consider extraterritorial harm, failed to advise the jury that it could not punish Ford for conduct and harm occurring in Nevada that was independent of the harm suffered by the Whites. The jury's award thus likely reflects punishment of Ford for unadjudicated conduct affecting other parties, rather than a rational measure of punishment for *the conduct at issue in this case* – the only conduct adjudicated to be unlawful and thus the only conduct properly subject to punishment by the jury.

* * * *

If lay jurors are to have a role in the government's system for punishing civil wrongs, they must be given the tools necessary to fulfill that role, i.e., to make a rational and fair judgment as to the appropriate measure of punishment for a given unlawful act. Basic behavioral psychology – and our common experience – tells us that there are inherent limitations on the ability of human beings to make those kind of judgments rationally. It may be impossible to overcome those limitations entirely, but they can at least be mitigated by clear and complete instructions that both inform the jury as to factors that should matter and steer the jury away from factors that should not. Absent such guidance, jurors are literally unequipped to perform the critically important task designated for them, and civil punishment becomes a matter of arbitrary whim rather than rational judgment. That result is inconsistent not only with due process, but with the concept of law itself.

CONCLUSION

For the foregoing reasons, Ford should be granted a new trial on punitive damages before a jury properly instructed as to the factors that may legitimately inform its judgment.

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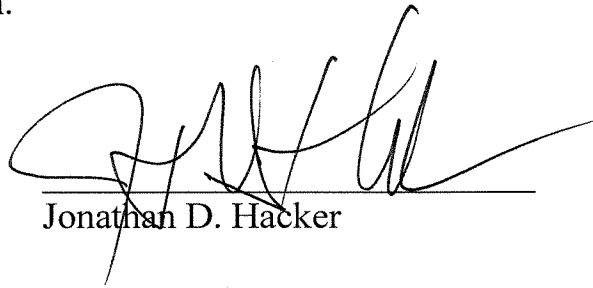
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CERTIFICATE OF COMPLIANCE

I hereby certify that:

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 3,722 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2003 in 14-point Times New Roman.



Jonathan D. Hacker

Dated: October 10, 2005

CERTIFICATE OF SERVICE

I hereby certify that two copies of the attached Brief Of The Chamber Of Commerce Of The United States Of America As *Amicus Curiae* Supporting Appellant And Reversal were served by priority overnight mail, on October 10, 2005, on the following counsel:

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