# 13 WAP 2022 & 14 WAP 2022

# IN THE SUPREME COURT OF PENNSYLVANIA

THE BERT COMPANY D/B/A NORTHWEST INSURANCE SERVICES,

v.

MATTHEW TURK, WILLIAM COLLINS, JAMIE HEYNES, DAVID MCDONNELL, FIRST NATIONAL INSURANCE AGENCY, LLC, FIRST NATIONAL BANK, AND FNB CORPORATION,

APPEAL OF: MATTHEW TURK, FIRST NATIONAL INSURANCE AGENCY, LLC, FIRST NATIONAL BANK, AND FNB CORPORATION.

Appeal from the Superior Court Order Entered May 5, 2021 at Nos. 817 & 975 WDA 2021 Affirming the Judgment of the Court of Common Pleas of Warren County Entered June 3, 2019 at No. AD 260 of 2017

## BRIEF OF WASHINGTON LEGAL FOUNDATION AS *AMICUS CURIAE* SUPPORTING APPELLANTS AND VACATUR

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## INTEREST OF *AMICUS CURIAE*

Washington Legal Foundation is a nonprofit, public-interest law firm and policy center with supporters nationwide, including many in Pennsylvania. WLF promotes free enterprise, individual rights, limited government, and the rule of law. It regularly appears as *amicus curiae* to emphasize the limits due process imposes on arbitrary deprivations of property. *See, e.g.*, *Philip Morris USA v. Williams*, 549 U.S. 346 (2007); *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408 (2003); *BMW of N. Am. v. Gore*, 517 U.S. 559 (1996).

WLF's publishing arm, its Legal Studies Division, has produced many works by outside experts on punitive damages. *See, e.g.*, Victor E. Schwartz, *Punitive Damages Awards: The Rest of the Story*, WLF LEGAL BACKGROUNDER (Nov. 4, 2011); Curt Cutting, *An Emerging Trend?: Federal Appeals Court Limited Punitive Damages to 1:1 Ratio*, WLF LEGAL OPINION LETTER (Feb. 27, 2009). No one, apart from WLF and its counsel, paid, in whole or in part, for this brief's preparation and submission. Nor did anyone but WLF's counsel author any part of this brief.

## STATEMENT OF QUESTIONS INVOLVED

The Court granted allocatur on three questions:

> 1. Whether, in cases where the compensatory damages award is substantial, a punitive-to-compensatory damages ratio exceeding 9:1 is presumptively unconstitutional under U.S. Supreme Court precedent?
>
> 2. Whether in cases involving joint and several liability—where compensatory damages are awarded, cumulatively, against all defendants and not on an individualized basis—the constitutionally permissible ratio of punitive-to-compensatory damages is calculated on a per-judgment basis and not a per-defendant basis?
>
> 3. Whether, in reviewing the constitutionality of a punitive damages award, a court cannot consider the speculative potential harm that the plaintiff could have suffered and introduce it as a *post hoc* justification for the award, especially when the plaintiff did not present evidence of potential harm to the jury?

*Bert Co. v. Turk*, 2022 WL 908445, *1 (Pa. Mar. 29, 2022) (*per curiam*).

## STATEMENT OF THE CASE

After several Northwest employees left for First National, Northwest sued its former employees and First National for breaching the ex-employees' non-solicitation agreements. The Court of Common Pleas of Warren County preliminarily enjoyed, without a hearing, First National and former Northwest employees from soliciting Northwest's customers. Then Northwest amended its complaint by adding breach of

contract, breach of fiduciary duty, unfair competition, misappropriation of trade secrets, tortious interference with contractual relations, and civil conspiracy claims.

A jury eventually found First National and a former Northwest employee liable. It awarded Northwest $250,000 in compensatory damages and $2,800,000 in punitive damages—over eleven times the compensatory-damages award. The trial court also awarded Northwest $361,093.74 in attorney fees. A sharply divided Superior Court panel affirmed and this Court granted allocatur.

## SUMMARY OF ARGUMENT

**I.A.** Almost twenty years ago, the Supreme Court said that the maximum permissible ratio of punitive damages to substantial compensatory damages may be 1:1. After that pronouncement, it capped punitive damages under maritime law to the amount of compensatory damages when the award is substantial. Many federal courts of appeals have interpreted this precedent as imposing a similar limit on punitive damages in all cases. This Court should follow these courts' leads and limit punitive damages to the amount of substantial compensatory damages.

**B.** The Superior Court's analysis started off on the wrong track and only continued to veer further off course. If anything, the pre-revolutionary era precedent cited by the Superior Court supports a 1:1 limit on the ratio of punitive damages to substantial compensatory damages. The Superior Court then relied on Supreme Court precedent that is no longer good law. It failed to address more recent Supreme Court precedent. And when addressing *State Farm*, the Superior Court failed to analyze the most relevant part of the opinion. In short, the Superior Court's opinion ignored relevant legal authorities and relied on inapposite authorities.

**II.** The Superior Court erred by holding that the ratio of punitive damages to substantial compensatory damages could exceed 1:1 because of potential harm that never materialized. This was a misreading of *State Farm*, which suggests that a 1:1 ratio always satisfies due process. Even if potential harm may be considered by the jury when awarding punitive damages, the potential harm can only inform the jury as to where between 0:1 and 1:1 the ratio should be in a particular case.

## ARGUMENT

### I. THE FOURTEENTH AMENDMENT'S DUE PROCESS CLAUSE LIMITS PUNITIVE DAMAGES TO THE AMOUNT OF COMPENSATORY DAMAGES WHEN THE COMPENSATORY-DAMAGES AWARD IS SUBSTANTIAL.

#### A. Supreme Court Precedent Requires This Holding.

**1.** "The point of due process—of the law in general—is to allow citizens to order their behavior." *State Farm*, 538 U.S. at 418 (quoting *Pac. Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1, 59 (1991) (O'Connor, J., dissenting)). Thus, "a person [should] receive fair notice" of both "the conduct that will subject him to punishment" and "the severity of the penalty that a State may impose." *BMW*, 517 U.S. at 574. Arbitrary—and thus unpredictable—awards of punitive damages violate due process. *State Farm*, 538 U.S. at 416.

While States enjoy broad discretion to impose punitive damages in egregious cases, that discretion is limited. The Supreme Court has repeatedly struck down excessive punitive-damages awards by state courts as "arbitrary deprivation[s] of property without due process of law." *BMW*, 517 U.S. at 586 (Breyer, J., concurring); *Philip Morris*, 549 U.S. at 346; *State Farm*, 538 U.S. at 429. "[T]he most commonly cited

indicium of an unreasonable or excessive punitive damages award is its ratio to the actual harm inflicted on the plaintiff." *BMW*, 517 U.S. at 580.

The question presented here is what ratio between compensatory and punitive damages is so unreasonable that it violates the Fourteenth Amendment's Due Process Clause. The Supreme Court's punitive-damages precedent answers this question. In *State Farm*, the Supreme Court explained that "[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." 538 U.S. at 425 (emphasis added). In other words, the maximum ratio of punitive damages to compensatory damages is 1:1 when compensatory damages are substantial.

**2.** True, some courts have disregarded this guidance as nonbinding "dicta." *E.g.*, *Cote v. Philip Morris USA, Inc.*, 985 F.3d 840, 849 (11th Cir. 2021) (citation omitted). But this Court should follow the Supreme Court's guidance and hold that the 1:1 ratio is the outermost limit of the Due Process Clause. This Court often decides to follow the Supreme Court's dicta because "it reflects a seriously considered conclusion of our

highest court and not a merely chance observation." *Dole v. City of Philadelphia*, 11 A.2d 163, 166 (Pa. 1940).

One reason that the Supreme Court's dicta is "entitled to great consideration" is that this Court holds the Supreme Court in "high standing." *Staller v. Staller*, 21 A.2d 16, 17 (Pa. 1941) (citing *Welsch v. Pittsburgh Terminal Coal Corp.*, 154 A. 716, 717 (Pa. 1931); *Hill v. Houpt*, 141 A. 159, 160 (Pa. 1928)). An example proves the point. When considering the constitutionality of Pennsylvania's insanity statute, the Court adopted the Supreme Court's dicta on the Fourteenth Amendment due to the high esteem the Court holds the Supreme Court. *See Commonwealth v. Reilly*, 549 A.2d 503, 505 (Pa. 1988).

The case for following the Supreme Court's dicta here is stronger than in most cases. Soon after the Supreme Court said that the 1:1 ratio may be the outermost limit of the Due Process Clause, it applied that rule. Five years after *State Farm*, the Supreme Court was presented with a maritime case in which the judge awarded $500 million in compensatory damages.

Because it was a maritime case, federal common law, not state law, applied. The Supreme Court held that a 1:1 ratio was the maximum

permissible punitive-damages award after a substantial compensatory-damages award. *Exxon Shipping Co. v. Baker*, 554 U.S. 471, 514-15 (2008) (citing *State Farm*, 538 U.S. at 425).

In limiting the punitive-damages award, the Supreme Court was concerned about predictability and fairness. *See* Jill Wieber Lens, *Procedural Due Process and Predictable Punitive Damage Awards*, 2012 B.Y.U. L. Rev. 1, 25 (2012) (citing *Exxon*, 538 U.S. at 499). *Exxon*'s concerns about predictability and fairness apply equally in non-maritime cases. *See id.* In fact, some concerns are magnified in the non-maritime context.

There is no right to a jury trial in maritime cases. Fed. R. Civ. P. 38(e). But parties have the right to a jury trial for other common-law claims available in 1791 and many statutory claims. *See* Fed. R. Civ. P. 38(a). Juries are much less predictable than a judge. They are also more likely to be swayed by emotion, rather than facts. That happened in this case. Most judges would not award $2,800,000 in punitive damages against a basic tortfeasor that caused only $250,000 in damages. Yet that is what the jury did here.

Again, "[t]he real problem" is "the stark unpredictability of punitive damage awards," which "leads to inconsistency because two cases involving very similar facts can produce dramatically different punitive awards." Lens, 2012 B.Y.U. L. Rev. at 4, 7 (cleaned up). The verdict here highlights these concerns. There was no way for First National and the former Northwest employee to know that they'd face punitive damages more than eleven times the substantial compensatory damages.

A 1:1 ratio solves the problem of unpredictable punitive damages. *Exxon*, 554 U.S. at 514-15. After all, the 1:1 ratio used in *Exxon* was not based on unique aspects of maritime law. Rather, it was based on the median ratio of state-court awards. *See id.* at 512-13. This shows that the 1:1 ratio that the Supreme Court adopted for maritime cases in *Exxon* is also appropriate in other cases. It is also why the ratio of compensatory-to-punitive damages should be calculated on a per-judgment basis.

**3.** *Exxon*'s reliance on state law is why many federal courts of appeals have taken the Supreme Court at its word and limited punitive-damages awards to the amount of a substantial compensatory-damages award. *E.g.*, *Saccameno v. U.S. Bank Nat'l Ass'n*, 943 F.3d 1071, 1090 (7th Cir. 2019); *Jones v. United Parcel Serv., Inc.*, 674 F.3d 1187, 1208

(10th Cir. 2012); *Méndez-Matos v. Mun. of Guaynabo*, 557 F.3d 36, 55-56 (1st Cir. 2009); *Bach v. First Union Nat. Bank*, 486 F.3d 150, 156 (6th Cir. 2007); *Boerner v. Brown & Williamson Tobacco Co.*, 394 F.3d 594, 602-03 (8th Cir. 2005) (collecting cases).

Besides circuits outside of Pennsylvania, the Third Circuit has also held that *State Farm* strongly suggests that a 1:1 ratio is the maximum permitted by the Fourteenth Amendment. *See Jurinko v. Med. Protective Co.*, 305 F. App'x 13, 27 n.15 (3d Cir. 2008) (citing *Exxon*, 554 U.S. at 515 n.28). This Court may reject the Third Circuit's interpretation of federal law. *See Commonwealth v. Daniels*, 104 A.3d 267, 294 (Pa. 2014). But doing so causes serious problems for litigants in the Commonwealth.

The same substantive law should apply in both federal and state courts. That is why 1Ls fear the *Erie* doctrine. But if the Court does not adopt the 1:1 limit, the amount of punitive damages available to plaintiffs will vary based on whether a case is decided in federal or state court. This will encourage both plaintiffs and defendants to forum shop and use procedural gamesmanship. Because the Third Circuit's decision tracks Supreme Court precedent and that of many of its sister circuits, this

Court should not create a situation in which the substantive law depends on whether the plaintiff sues in state or federal court.

Unsurprisingly, state courts of last resort have also joined the federal courts of appeal and limited punitive-damages awards to the amount of substantial compensatory-damages awards. *See, e.g.*, *Roby v. McKesson Corp.*, 219 P.3d 749, 770 (Cal. 2009); *Roth v. Farner-Bocken Co.*, 667 N.W.2d 651, 671 (S.D. 2003). These courts were persuaded by the Supreme Court's dicta in *State Farm*.

**4.** Here, the $250,000 compensatory damages award is more than 'substantial' enough to warrant imposing a 1:1 ratio, particularly given the jury verdict's failure to establish First National's reprehensibility. *See, e.g.*, *Méndez-Matos*, 557 F.3d at 56 (affirming reduction of a $350,000 punitive award to $35,000, the amount of compensatory damages). Anything greater than a 1:1 ratio would exceed the amount necessary to accomplish Pennsylvania's interest in punishing and deterring companies and employees from violating non-solicitation agreements.

The Superior Court's opinion is out of step with the Supreme Court's due-process guideposts. As this case highlights, Pennsylvania courts continue to gloss over the Due Process Clause's limits on punitive-

damage awards—limits already "well established" twenty years ago. *State Farm*, 538 U.S. at 416. Defendants in Pennsylvania are thus at risk of punishment without "fair notice . . . of the severity of the penalty that" they face. *BMW*, 517 U.S. at 574. Although the Supreme Court has not explicitly imposed a bright-line ratio in all cases, its precedent suggests that the 1:1 ratio is the maximum permitted by the Due Process Clause.

### B. The Superior Court Used Outdated Rationales In Affirming The Punitive-Damages Award.

The Superior Court's opinion affirming the punitive-damages award might have been correct thirty years ago. But the law has changed substantially over time. The Supreme Court has slowly moved to limit punitive-damages awards to the amount of substantial compensatory-damages awards. This Court should reject the Superior Court's outdated rationales and follow the more recent Supreme Court precedent—and decisions from federal courts of appeal and state courts of last resort—to limit punitive damages to the amount of compensatory damages when the compensatory-damages award is substantial.

**1.** The first part of the Superior Court's analysis shows how far afield it reached to affirm. Rather than focusing on recent decisions discussing punitive damages, the Superior Court relied on Wikipedia—a

very unreliable source—to support its argument about punitive damages in Ancient Rome. *See Bert Co. v. Turk*, 257 A.3d 93, 120 & n.9 (Pa. Super. 2021). But even this history does not support the Superior Court's holding.

In fact, the Superior Court's citations support limiting punitive damages. Under Ancient Roman law, there was generally a set penalty for every tort—no matter the damage caused. *See* Cristina Carmody Tilley, *Rescuing Dignitary Torts from the Constitution*, 78 Brook. L. Rev. 65, 91 (2012). What the Superior Court cited was the change that allowed damages awards to vary based on the nature of the harm. The change also recognized that sometimes damages were nominal. In those cases, punitive damages may be necessary to deter wrongful behavior.

In the Superior Court's example, a rich man assaulting people for fun was not deterred by the nominal damages he had to pay. Here, however, the jury awarded substantial compensatory damages. That is why this Court, unlike the Superior Court's opinion, should focus on case law addressing what the appropriate limit is for punitive damages when there is a substantial compensatory-damages award.

But even if the Court finds the history instructive, a source that the Superior Court cited states that exemplary damages under the English common-law system began only by allowing damages equal to the compensatory damages. *See* Jason Taliadoros, *The Roots of Punitive Damages at Common Law: A Longer History*, 64 Clev. St. L. Rev. 251, 273 (2016) (citing Statute of Merton, 20 Hen. 3 c. 6, in 1 Statutes of the Realm 1, 3 (reprt. ed. 1963)). Punitive damages more than eleven times a substantial compensatory-damages award were unknown until recent times. History therefore shows that punitive damages traditionally were limited to the amount of substantial compensatory-damages awards.

**2.** The second part of the Superior Court's analysis fares even worse. Relying on *TXO Prod. Corp. v. All. Res. Corp.*, 509 U.S. 443 (1993), the Superior Court held that the Due Process Clause permits large ratios of punitive damages to compensatory damages. The problem is that *TXO Production* came ten years before *State Farm*, which clarified the constitutional limits on punitive damages. Thus, the citation of *TXO Production* is not only misplaced, it is irrelevant.

When the panel discussed *State Farm*, it ignored the most salient part of that decision to this case. There is no mention that "[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." *State Farm*, 538 U.S. at 425. At best, this was a major oversight by the Superior Court panel. As described above, this Court gives great deference to the Supreme Court's dicta. The Superior Court should do the same. Yet here it pretended that highly relevant dicta did not exist.

Appropriate discussion of *State Farm* is not the only thing missing from the Superior Court's analysis. The panel did not cite *Exxon* once. This is telling. *Exxon* may be the most important post-*State Farm* case addressing punitive damages. Yet the Superior Court found it unnecessary to explain why the Supreme Court's adoption there of a 1:1 cap for the ratio of punitive damages to substantial compensatory damages does not mandate the same result here under the Due Process Clause. Again, nothing in logic suggests that the Supreme Court's due process concerns in *Exxon* are limited to the maritime context. The analysis is not so limited. Rather, this Court should learn from the *Exxon* analysis and hold that it applies with equal force when determining the due-process limit for punitive damages.

In short, the Superior Court's analysis is unmoored from the Supreme Court's recent decisions and history. It did not engage any authority from federal courts of appeals and state courts of last resort interpreting *State Farm* and *Exxon*. That suggests that the Superior Court was not attempting to decide a legal question based on precedent and legal principles. Rather, it was trying to act as a policymaker by allowing punitive damages well beyond what the Supreme Court permits. This Court should not allow two intermediate state appeals court judges to overrule the reasoned analysis of the Supreme Court. It should follow other appellate courts and limit punitive damages to the amount of compensatory damages when the compensatory-damages award is substantial.

## II. THE MAXIMUM RATIO OF PUNITIVE TO COMPENSATORY DAMAGES DOES NOT DEPEND ON POTENTIAL HARM.

The "precise award" of punitive damages must be based on "the facts and circumstances of the defendant's conduct and the harm to the plaintiff." *State Farm*, 538 U.S. at 424. True, the facts of the defendant's conduct include "potential harm suffered by the plaintiff." *Id.* at 418. But that does not change the maximum permitted ratio of punitive damages to compensatory damages.

Again, the Superior Court's biggest error when addressing the punitive-damages question was to ignore the Supreme Court's statement that "[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." *State Farm*, 538 U.S. at 425. This statement came in the same opinion in which the Supreme Court said that potential harm could be considered when determining the amount of punitive damages. Yet the statement about the outermost limit of the Due Process Clause contained only one qualifier—that the compensatory-damages award is substantial.

This means at least two things. First, courts may consider potential harm when the compensatory-damages award is insubstantial. For example, an assault that leads to only $100 in damages may warrant a $5,000 punitive-damages award given the potential harm the assault victim faced. This dovetails with *State Farm* because the 1:1 ratio as the outermost limit of the Due Process Clause was qualified as applying only when compensatory damages are substantial. Second, *State Farm* allows juries to consider the potential harm when deciding whether to award

zero punitive damages, award punitive damages equal to the compensatory-damages award, or something between those figures.

What juries—and courts—cannot do is use merely potential harm to increase the ratio of punitive damages to substantial compensatory damages to more than 1:1. That would cause the type of unpredictability that the Supreme Court rejected in *State Farm* and *Exxon*. But that is what the Superior Court did here. It affirmed a punitive to substantial compensatory damages ratio of over 11:1. This it could not do.

*Exxon* is once again instructive on this inquiry. No doubt the potential harm caused by the grounding of an oil supertanker in Alaska was far greater than the $500 million compensatory-damages award. Still, the Supreme Court rejected the District Court's $4.5 billion punitive-damages award and the Ninth Circuit's reduced punitive-damages judgment of $2.5 billion. Rather, the Supreme Court limited the punitive-damages award to the $500 million compensatory-damages award. *Exxon*, 554 U.S. at 514-15. So the Supreme Court allowed the potential harm to influence the ratio of punitive damages to substantial compensatory damages. But the maximum ratio remained 1:1.

Again, the Supreme Court's *Exxon* analysis was not unique to maritime or admiralty law. The Supreme Court looked to state law when determining what the appropriate limit was for punitive damages. That is why federal courts of appeals have applied *Exxon*'s analysis when determining whether a punitive-damages award violates the Due Process Clause. The Superior Court, however, ignored these decisions and focused on parts of Supreme Court decisions without considering their context. For this reason alone, the Court should hold that the Superior Court erred by relying on potential harm when affirming the outsized punitive-damages award.

## CONCLUSION

This Court should vacate the Superior Court's order and remand to the Court of Common Pleas with instructions to enter an amended judgment with a $250,000 punitive-damages award. *Cf.* 42 Pa. C.S. § 706 (permitting such a judgment).

Respectfully submitted,

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June 10, 2022

## CERTIFICATE OF COMPLIANCE

I certify that this brief complies with the type-volume limits of Pennsylvania Rule of Appellate Procedure 531(b)(3) because it contains 3,587 words, excluding the parts exempted by Pennsylvania Rule of Appellate Procedure 2135(b). This brief also complies with the typeface and type-style requirements of Pennsylvania Rule of Appellate Procedure 124(a)(4) because it uses 14-point Century Schoolbook font.

Finally, I certify that this brief complies with the provisions of the Case Records Public Access Policy of the Unified Judicial System of Pennsylvania that require filing confidential information and documents differently than non-confidential information and documents.

/s/ John M. Masslon II
John M. Masslon II

June 10, 2022

## CERTIFICATE OF SERVICE

I certify that, on June 10, 2022, I served all counsel of record with a copy of this brief via PACFile.

/s/ John M. Masslon II
John M. Masslon II

June 10, 2022