How Does Cooper Industries v. Leatherman Affect the Alabama Practitioner?

by David G. Wirtes, Jr. and George M. Dent, III

On May 14, 2001, the United States Supreme Court announced its decision in Cooper Indus., Inc. v. Leatherman Tool Group, Inc., 532 U.S. ___, 121 S.Ct. 1678 (2001). In that opinion, the Court announced that "courts of appeals should apply a *de novo* standard of review when passing on district courts' determinations of the constitutionality of punitive damages awards." *Id.*, 532 U.S. at ___, 121 S.Ct. at ___, (footnote omitted). On its face, this holding applies only in federal court. However, in Horton Homes, Inc. v. Brooks, ___ So.2d [Ms. 1000346, July 13, 2001] (Ala. 2001), the Alabama Supreme Court quoted with approval from Leatherman and held that it will "apply the de novo standard of review." Horton Homes, ___ So.2d at ___, Ms. at 26. How are these holdings likely to affect appellate review of punitive damages verdicts in Alabama?

DAVID G. WIRTES, JR. is a member of Cunningham, Bounds, Yance, Crowder and Brown, L.L.C. He serves as a member of the Executive Committee of the Alabama Trial Lawyers Association. He is Chairman of ATLA's Amicus Curiae Committee. He also serves as an editor and frequent contributor to the Alabama Trial Lawyers Journal. Additionally, Mr. Wirtes also serves on national ATLA's Amicus Curiae Committee.

GEORGE M. DENT, III is an associate with Cunningham, Bounds, Yance, Crowder and Brown, L.L.C. Mr. Dent formerly served as staff attorney for Justice Reneau P. Almon of the Alabama Supreme Court. He is a member of the Alabama Trial Lawyers Association and serves on its Amicus Curiae Committee. He is a member and the co-reporter of the Supreme Court's Committee on the Alabama Rules of Civil Procedure.

WHAT *LEATHERMAN* DOES AND DOES NOT DO

First, Leatherman should not apply to an Alabama wrongful death action, because Ala. Code §6-5-410(a)(1975) provides that "A personal representative may commence an action and recover *such damages as the jury may assess* . . . for the wrongful act . . . whereby the death of his testator or intestate was caused." (Emphasis added). This statute and the judicial interpretation that it allows only punitive damages predate the Alabama Constitution of 1901. See, e.g., South & North Alabama R.R. v. Sullivan, 59 Ala. 272 (1877). Thus, the jury's award of punitive damages

in a wrongful death case is clothed in the protection of §11 of the Alabama Constitution of 1901. Gilbreath v. Wallace, 292 Ala. 267, 292 So.2d 651 (1974). Therefore, judicial review of a wrongful death verdict *does* require deference to the right of trial by jury. Whatever effect Leatherman might otherwise have, it does *not* affect an Alabama wrongful death verdict, in which the jury's award of punitive damages uniquely *is* a product of the jury's fact-finding function.

Second, Leatherman should do little or nothing to change the standard of review in Alabama of punitive damage verdicts. The Alabama standard of review expressly approved by the United States Supreme Court in Pacific Mutual Life Ins. Co. v. Haslip, 499 U.S. 1 (1991) continues to control in Alabama punitive damages appeals. Therefore, the trial courts and the appellate courts will continue to apply the factors set out in Hammond v. City of Gadsden, 493 So.2d 1374 (1986), Green Oil v. Hornsby, 539 So.2d 218 (Ala. 1989), and Ala. Code § 6-11-23 (1975), as they have done in large numbers of cases in recent years. The Leatherman Court simply said that the second and third "guideposts" ("ratio" and "similar civil or criminal sanctions") of BMW of North America, Inc. v. Gore, 517 U.S. 559 (1996), are just as much within an appellate court's competence as a trial court's:

> *Only with respect to the first Gore inquiry do the District Courts have a somewhat superior vantage over courts of appeals, and even then the advantage exists primarily with respect to issues turning on witness credibility and demeanor. Trial courts and appellate courts seem equally capable of analyzing the second factor. And the third Gore criterion, which calls for a broad legal comparison, seems more suited to the expertise of appellate courts.*

Leatherman, 532 U.S. at ___, 121 S.Ct. at 1687-88. The Alabama Supreme Court is well familiar with the "guideposts" of BMW v. Gore and perfectly capable of applying them without invoking some broad, new-found "de novo" review.

Third, nothing in Leatherman suggests that appellate courts are to revisit factual findings made by juries. To the contrary, the Court expressly noted as follows:

> *The jury was instructed to consider the following factors: (1) "The character of the defendant's conduct that is the subject of Leatherman's unfair competition claims"; (2) "The defendant's motive"; (3) "The sum of money that would be required to discourage the defendant and others from engaging in such conduct in the future"; and (4) "The defendant's income and assets." . . . Although the jury's application of these instructions may have depended on specific findings of fact,* ***nothing in our decision suggests that the Seventh Amendment would permit a court, in reviewing a punitive damages award, to disregard such jury findings.***

532 U.S. at ___, 121 S.Ct. at 1687, fn. 12 (citations omitted; emphasis added). Thus, Leatherman specifically *preserves* the fact-finding function of the jury.

At bottom, the Alabama Supreme Court knows perfectly well how to balance the right of trial by jury, deference to fact finders, deference to trial courts, and a defendant's constitutional right not to be deprived of property without due process of law. Indeed, the Alabama Supreme Court has led the way in recognizing the necessity and importance of protecting defendants from unconstitutionally excessive punishments. Hammond v. City of Gadsden, 493 So.2d 1374 (Ala. 1986), and Green Oil Co. v. Hornsby, 539 So.2d 218 (Ala. 1989). Cooper Industries v.

continued on page 28

 continued from page 27

Leatherman contains no hint of any upheaval of Alabama's time-tested jurisprudence.

WHAT *DE NOVO* REVIEW IS AND IS NOT

The use in Leatherman of the phrase *"de novo review"* does not mean that an appellate Court sits as a trial court. In certain circumstances, as in certain appeals from district court to circuit court in Alabama, an "appellate" court conducts a *de novo* ***trial***. Ala. Code § 12-11-30(3) (1975). No such thing is contemplated in appellate review of punitive damages verdicts. The Supreme Court of Alabama is not a trial court. Buchanon v. City Bd. of Ed., 288 Ala. 474, 475, 262 So.2d 296, 297 (1972) (Supreme Court is "a court of appellate jurisdiction only," and it is "beyond [the Court's] authority" "to process appellant's case from its inception, both in its evidential and in its procedural aspects"). Surely the Court, when it announced its decision in Horton Homes, Inc. v. Brooks did not intend to announce that it would henceforth sit as a trial court in all appeals from punitive damages verdicts.

De novo appellate review does not permit an appellate court to go outside the record or consider inadmissible evidence belatedly and improperly offered at a Hammond hearing. If it did, a defendant could offer at the Hammond hearing evidence that the defendant simply failed to present at trial.

It would completely undermine the concept of a jury trial if a defendant were allowed to withhold evidence from the jury, allow the jury to reach a verdict, and then later to present evidence to a trial judge and ultimately to the Supreme Court in an effort to impeach the verdict. *De novo* review as contemplated in Leatherman (and in Horton Homes) can only mean that the appellate court looks at the trial evidence and any properly admitted Hammond evidence (e.g., evidence of the defendant's wealth, its insurance, or subsequent remedial measures) with all ordinary presumptions as to the fact-finding process but with an independent application of the law to the facts found by the jury.

An illustration of the concept of *de novo* review on appeal is given in several recent cases. In EBSCO Industries, Inc. v. Royal Ins. Co. of America, 775 So.2d 128, 130 (Ala. 2000), the Court stated: "This Court will review a summary judgment de novo, and it will apply the same standard as the trial court." In Ex parte Kraatz, 775 So.2d 801, 803 (Ala. 2000), and Dobbs v. Shelby County Economic & Indus. Dev. Auth., 749 So.2d 425, 428 (Ala.1999), the Court stated: "In reviewing a summary judgment, an appellate court, *de novo*, applies the same standard as the trial court." However, that did not mean that the Court substituted itself for the jury as fact finder. On the contrary, the usual presumptions against the movant for summary judgment were also stated in Kraatz: "The court must accept the tendencies of the evidence most favorable to the nonmoving party and must resolve all reasonable doubts in favor of the nonmoving party." 775 So.2d at 803. These presumptions are designed to protect the nonmoving party's right of trial by jury, and they are ***not*** undercut by "de novo" review of a summary judgment. Whatever the new-found "de novo" review of a jury verdict on punitive damages may be, it does not authorize an appellate court to substitute itself for a jury, any more than *de novo* review of a summary judgment does. In short, an appellate court exercising *de novo* review does ***not*** substitute itself for the jury; it simply applies the law to the trial record and *to the facts as found by the jury.*

As the Court stated in Ex parte Alabama Real Estate Appraisers Bd., 739 So.2d 14, 16 (Ala. 1999), review of a question of law is de novo. However, "rulings on the admissibility of evidence are within

the sound discretion of the trial judge and will not be disturbed on appeal absent an abuse of that discretion." Bell v. T.R. Miller Mill Co., Inc., 768 So.2d 953, 959 (Ala. 2000). Thus, an evidentiary ruling, is ***not*** a "question of law" and is ***not*** reviewed *de novo*.

A ruling on a JML (formerly directed verdict/J.N.O.V.) motion is reviewed de novo, but the Court nevertheless views the evidence in a light most favorable to the non-moving party, as shown by the following quotations from Cackowski v. Wal-Mart Stores, Inc., 767 So.2d 319 (Ala. 2000):

"In considering the question whether the evidence of wantonness was sufficient to be submitted to the jury, this Court must accept as true the evidence most favorable to the plaintiff, and must indulge such reasonable inferences as the jury was free to draw from that evidence."...

Our review of the trial court's ruling on a motion for a directed verdict is de novo. ...

Cackowski v. Wal-Mart Stores, *supra*, 767 So.2d at 326 (citations omitted). The contrast between the statements that "this Court must accept as true the evidence most favorable to the plaintiff" and that "review of the trial court's ruling on a motion for a directed verdict is de novo show the limits of *de novo* review as it has historically been envisioned in the law.

Defendants arguing for a broad reading of Leatherman and Horton Homes would have the Supreme Court simply do away with all standards of review and peremptorily decide a punitive damages case on appeal.

• A summary judgment is reviewed *de novo*, but the Court indulges all presumptions in favor of the non-moving party. Do Leatherman and Horton Homes dispense with these presumptions in a punitive damages case? **No.**

• A ruling on a motion for JML is reviewed *de novo*, but the Court views the evidence in a light most favorable to the non-moving party and does not weigh credibility of

continued on page 30

"AMFS Only the Best Medical Experts..."

Speak to one of our staff physicians with just one phone call—at no charge to you.

AMFS staff physicians collaborate to personally review your medical records, formulate opinions, and match experts to your cases from our carefully pre-screened panel of board-certified specialists in your region.

AMFS bridges medicine and law... more than 5,000 specialists in more than 25,000 cases since 1990.

AMFS
American Medical Forensic Specialists, Inc.
A physician managed company

1-800-275-8903
www.amfs.com
medicalexperts@amfs.com

AMFS CLIENT
Michael F. Cardoza
SAN FRANCISCO TRIAL ATTORNEY

 continued from page 29

witnesses. Does the Court now view the evidence in a punitive damages case most favorably to the moving party and weigh credibility of witnesses whom it has not seen testify? **No.**

- A trial court's evidentiary rulings are entitled to presumptions of correctness and will be reversed only for abuse of discretion. Do Leatherman and Horton Homes mean that the Supreme Court will now presume error in evidentiary rulings in punitive damages cases? **No.**

- A trial court's denial of a motion for new trial heightens the presumption of correctness that attends a jury verdict. If a trial court denies a motion for a new trial in a punitive damages case, does that create a presumption of error in both the verdict and the denial of the new trial motion? **No.**

These hyperbolic examples show that the "*de novo* review" set forth in Leatherman and Horton Homes is not a new trial in an appellate court. It simply means that questions of law presented by a remittitur motion will be reviewed without a presumption of correctness. This is no different from the legal question of sufficiency of evidence presented on review of a summary judgment motion or a JML motion. The evidence is viewed in a light most favorable to the non-moving party, and any underlying rulings that were entitled to deference before Leatherman are entitled to deference now. The trial court's rulings on the admissibility of evidence at the Hammond hearing are entitled to presumptions of correctness and will not be reversed except for abuse of discretion. Underlying those rulings were the trial judge's observations while conducting the trial. Will the appellate court somehow weigh the demeanor and credibility of witnesses when deciding whether the trial court abused its discretion when ruling on objections to evidence? How can the plaintiff respond? By bringing the trial witnesses to the Supreme Court's chambers? An appellate court does not need to make itself into a trial court to decide whether a trial court's discretion has been abused.

CONCLUSION

The *de novo* review standard applies ***only*** to the questions of law implicit or stated in a defendant's remittitur motion arguing that a punitive award is unconstitutionally excessive. Thus, the BMW v. Gore "guideposts" of "ratio" and "similar civil or criminal sanctions" are matters as to which there is no jury finding involved. However, the "reprehensibility" guidepost ***does*** involve a matter as to which the jury has necessarily made findings. Leatherman acknowledges as much, and this point should be driven home by a Plaintiff's attorney arguing against a remittitur. If a jury has said conduct is reprehensible, an appellate court cannot say that it is not. A similar analysis can be made for the Hammond and Green Oil factors — some of them involve jury findings, and some of them involve findings by the trial court as a fact finder after hearing post-verdict Hammond evidence that was not properly admissible during the jury trial, such as evidence of the wealth of the defendant.

It is predictable that defendants will overread Leatherman and Horton Homes and argue that appellate courts are now the fact finders engaged in *de novo* ***trials***. Plaintiffs should call to the attention of the appellate courts the potential for this unintended consequence of the decisions in Leatherman and Horton Homes. The BMW due process analysis is only part of a review of a punitive damages award, and only part of that analysis is subject to Leatherman *de novo* review. In all other respects, plaintiffs should ask for, and courts should give, proper deference to jury verdicts.■