What Does "*De Novo* Review" Mean in the Context of Alabama Punitive Damages Awards?

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Twenty-five years ago, we published an article in the predecessor to this *Journal* titled "How Does *Cooper Industries v. Leatherman*[2] Affect the Alabama Practitioner?"[3] In that article we explained that the Constitution protected the jury's findings of fact from reexamination and that the new *de novo* review standard articulated in *Cooper Industries* meant only *de novo* review of the *amount* of the jury's punitive damages verdict.

Here we are twenty-five years later, and our friends among the defense bar continue to overread *Cooper Industries*, suggesting that post-judgment and appellate *de novo* review of jury-decided punitive damages verdicts means they may reexamine, challenge and impugn the trial evidence that led the jury to return a punitive damages verdict in the first place.

Unfortunately, the Supreme Court of Alabama has not yet explained with precision what *de novo* review of a jury's punitive damages verdict is to mean in practice. With this article we hope to offer clarification and guidance.

First a note of caution. Any complete understanding of this critically important but nuanced issue requires a working knowledge of the recent evolution of Alabama punitive damages law which includes at least the following: Alabama Constitution of 1901, Article

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[2] *Cooper Indus., Inc. v. Leatherman Tool Group, Inc.*, 532 U.S. 424 (2001).

[3] David G. Wirtes, Jr. and George M. Dent, III How Does *Cooper Industries v. Leatherman* Affect the Alabama Practitioner?, Alabama Trial Lawyers *Journal*, Vol. 21, No. 4 (Autumn 2001).

I, § 11 (Right to Trial by Jury); Article I, § 13 (Access to Courts and Right to a Remedy); *former* Article III, §§ 42, 43 (Separation of Powers); Alabama Constitution of 2022, Article III, § 42 (Separation of Powers); Alabama Code (1975) §§ 6-11-21(j) (punitive damages limitations and exceptions do not apply to actions for wrongful death or for intentional infliction of physical injury); 6-11-23(a) (no presumption of correctness applies to the amount of punitive damages awarded by the trier of fact); 6-11-23(b) (trial court shall independently without any presumption that the award of punitive damages is correct reassess the nature, extent and economic impact of such an award); 6-11-24(a) (on appeal, no presumption of correctness applies to the amount of punitive damages awarded); 6-11-24(b) (appellate court shall independently reassess the nature, extent and economic impact of punitive damages award); 6-11-29 (article concerning punitive damages shall not pertain to or affect any civil actions for wrongful death); *Hammond v. City of Gadsden*, 493 So.2d 1374 (Ala. 1986); *Aetna Life Ins. Co. v. Lavoie*, 505 So.2d 1050 (Ala. 1987); *Green Oil Co. v. Hornsby*, 539 So.2d 218 (Ala. 1989); *Armstrong v. Roger's Outdoor Sports, Inc.*, 581 So.2d 414 (Ala. 1991); *Duckhead Apparel Co. v. Hoots*, 659 So.2d 897 (Ala. 1995); *BMW of North America, Inc. v. Gore*, 701 So.2d 507 (Ala. 1997); *Horton Homes, Inc. v. Brooks*, 832 So.2d 44 (Ala. 2001); *Target Media Partners Operating Co., LLC v. Specialty Mktg. Corp.*, 177 So.3d 843 (Ala. 2013); *Bednarski v. Johnson*, 351 So.3d 1036 (Ala. 2021); *Springhill Hospitals, Inc. v. West*, 388 So.3d 648 (Ala. 2023); *Pacific Mutual Life Ins. Co. v. Haslip*, 499 U.S. 1 (1991); *TXO Production Corp. v. Alliance Resources Corp.*, 509 U.S. 443 (1993); *Honda Motor Co., Ltd. v. Oberg*, 512 U.S. 415 (1994); *BMW of North America, Inc. v. Gore*, 517 U.S. 559 (1996); and *Cooper Industries, Inc. v. Leatherman Tool Group, Inc.*, 532 U.S. 424 (2001).

Seem like a lot to read and digest? Yes. But your opponents have done the work. You need to do so too.

I. ***Hammond v. City of Gadsden* and its Progeny.**

Because a jury's verdict is constitutionally protected, by both the Seventh Amendment to the United States Constitution and by Article I, § I of the Alabama Constitution of 1901, a reviewing trial or appellate court may not interfere with a jury's punitive damages verdict unless it is flawed as a matter of law. *See Hammond v. City of Gadsden*, *supra*, 493 So.2d at 1378 ("[a] jury verdict may not be set aside unless the verdict is flawed, thereby losing its constitutional protection"). The Court emphasized "[t]he authority to disturb a jury verdict on the ground of excessive damages is one which should be exercised with great caution." *Id*. Assuming a properly functioning jury, a verdict for punitive damages may be remitted only if it is in an amount greater than necessary to accomplish Alabama's societal goals of punishment and deterrence. *See Industrial Chemical v. Chandler*, 547 So.2d 812, 837 (Ala. 1988) ("punitive damages…must not exceed an amount that will accomplish society's goals of punishment and deterrence'").

In *Hammond*, the Supreme Court of Alabama first required trial courts to establish a record of "the reasons for interfering with a jury verdict, or refusing to do so, on the grounds of excessiveness of the damages." Recognizing that "the right to a trial by jury is a fundamental, constitutionally guaranteed right," the Court explained that "in deciding whether a jury verdict is excessive because it is the result of passion, bias, corruption, or other improper motive, '… the trial court is in a better position to observe all the witnesses who testified and other incidents which are not reflected in the record,' but that

nonetheless a trial judge may not substitute his judgment for that of the jury." *Id.*, at 1378. Accordingly, the Court set forth several non-exclusive factors for consideration of whether a jury's punitive damages verdict is excessive as a matter of law, including the culpability of the defendant's conduct, the desirability of discouraging others from similar conduct, and the impact upon the parties. *Id.*, at 1379. The Court reiterated that:

> "[t]he cases have consistently held that in deciding whether a jury verdict is excessive because it is the result of passion, bias, corruption, or other improper motive, a trial judge may not substitute his judgment for that of the jury."

Ibid. (citations omitted).

Three years later, in *Green Oil Co. v. Hornsby*, *supra*, the Court expanded upon and further clarified the procedure for judicial review of the amount of punitive damages, quoting with approval from Justice Houston's concurring opinion in *Aetna Life Ins. Co. v. Lavoie*, 505 So.2d 1050 (Ala. 1987): "[I]n the totality of the system, *we must preserve the reliability of the fact finding process for adjudging liability* and, at the same time, improve the reliability of the damages assessment process in order to fit the punishment (the amount of punitive damages) to the offensive conduct and the offender." *Id*., 539 So.2d at 223-24, quoting *Aetna*, 505 So.2d at 1062 (Houston, concurring) (emphasis added). With that goal in mind, the Court set forth what became known as the "*Green Oil* factors" for consideration by trial courts "in determining whether the jury award of punitive damages is excessive."

In *Shiv-Ram, Inc. v. McCaleb*, 892 So.2d 299 (Ala. 2003), the Court enumerated the seven *Green Oil* factors as: (1) the reprehensibility of the defendant's conduct (including the duration of the conduct, the defendant's awareness of the hazard, any concealment or cover-up, and the existence and frequency of similar past conduct); (2)

the relationship of the punitive-damages award to the harm that actually occurred, or is likely to occur, from the defendant's conduct; (3) the defendant's profit from its misconduct (if the wrongful conduct was profitable to the defendant, the punitive damages should remove the profit and be in excess of it, so that the defendant recognizes a loss); (4) the defendant's financial position; (5) the cost to the plaintiff of the litigation (all costs of litigation should be included so as to encourage plaintiffs to bring wrongdoers to trial); (6) whether the defendant has been subject to criminal sanctions for similar conduct; and (7) other civil actions the defendant has been involved in arising out of similar conduct. *Id*., at 317.

Ultimately, "the invocation of the trial court's authority under Ala. R. Civ. P. 59(f) to determine the proper amount of recovery and to deny a new trial, subject to filing of a remittitur of the amount in excess of the proper amount, is dependent upon the trial court's holding that the presumption of correctness of the jury verdict has been overcome by a clear showing that the amount of the verdict is excessive." *Green Oil*, 539 So.2d at 222. The defendant bears the burden of proving excessiveness. *McDowell v. Key*, 557 So.2d 1243, 1249 (Ala.1990). It is not sufficient for a defendant to merely allege excessiveness; the defendant must prove it by submitting evidence that "will justify interference" with the jury's constitutionally protected verdict. *Fuller v. Preferred Risk Life Ins. Co.*, 577 So.2d 878, 886 (Ala. 1991); *Associates Financial Services Co. of Alabama, Inc. v. Barbour*, 592 So.2d 191, 198-99 (Ala. 1991). Accordingly, "a verdict awarding punitive damages is not considered to be unconstitutionally excessive until the defendant against whom it has been rendered produces evidence that the amount is greater than the sum necessary to accomplish society's goals of punishment and deterrence." *Bednarski v. Johnson*, *supra*,

351 So.3d at 1060 (internal citation omitted).

Alabama's common law method of permitting juries to award punitive damages and trial and appellate judges then reviewing the amount of the punitive damages verdict for excessiveness using the *Hammond* and *Green Oil* factors was expressly approved by the Supreme Court of the United States in *Pacific Mutual Life Ins. Co. v. Haslip*, *supra*, 419 U.S. at 20-23. The Court held that Alabama's "…*Hammond* test ensures meaningful and adequate review by the trial court whenever a jury has fixed the punitive damages." 499 U.S. at 20. *Pacific Mutual v. Haslip*'s holding has never been overruled and is now followed in Alabama and across the country. *Haslip*'s holding and reasoning helps provide context for what *de novo* review of an Alabama punitive damages award is supposed to mean.

II. ***Pacific Mutual v. Haslip*: The Beginning of the Court's Modern Punitive Damages Jurisprudence.**

The Supreme Court of the United States used *Haslip* to review this Country's long-settled history of permitting juries to award punitive damages in civil cases based upon evidence of wrongful conduct warranting punishment and deterrence.

> "Punitive damages have long been a part of traditional state tort law." *Silkwood v. Kerr–McGee Corp.*, 464 U.S. 238, 255, 104 S.Ct. 615, 625, 78 L.Ed.2d 443 (1984). Blackstone appears to have noted their use. 3 W. Blackstone, Commentaries *137–*138. *See also Wilkes v. Wood, Lofft 1*, 98 Eng.Rep. 489 (C.P.1763) (The Lord Chief Justice validating exemplary damages as compensation, punishment, and deterrence). Among the first reported American cases are *Genay v. Norris*, (1 Bay 6 S.C. 1784), and *Coryell v. Colbaugh*, 1 N.J.L. 77 (1791).
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> Under the traditional common-law approach, the amount of the punitive award is initially determined by a jury instructed to consider the gravity of the wrong and the need to deter similar wrongful conduct. The jury's determination is then reviewed by trial and appellate courts to ensure that it is reasonable.

This Court more than once has approved the common-law method for assessing punitive awards. In *Day v. Woodworth*, 13 How. 363, 14 L.Ed. 181 (1852), a case decided before the adoption of the Fourteenth Amendment, Justice Grier, writing for a unanimous Court, observed:

> "It is a well-established principle of the common law, that in actions of trespass and all actions on the case for torts, a jury may inflict what are called exemplary, punitive, or vindictive damages upon a defendant, having in view the enormity of his offence rather than the measure of compensation to the plaintiff. We are aware that the propriety of this doctrine has been questioned by some writers; but if repeated judicial decisions for more than a century are to be received as the best exposition of what the law is, the question will not admit of argument. By the common as well as by statute law, men are often punished for aggravated misconduct or lawless acts, by means of a civil action, and the damages, inflicted by way of penalty or punishment, given to the party injured.
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> ".... This has been always left to the discretion of the jury, as the degree of punishment to be thus inflicted must depend on the peculiar circumstances of each case." *Id.*, at 371.

In *Missouri Pacific R. Co. v. Humes*, 115 U.S. 512, 6 S.Ct. 110, 29 L.Ed. 463 (1885), the Court stated: "The discretion of the jury in such cases is not controlled by any very definite rules; yet the wisdom of allowing such additional damages to be given is attested by the long continuance of the practice." *Id*., at 521, 6 S.Ct., at 113. *See also Barry v. Edmunds*, 116 U.S. 550, 565, 6 S.Ct. 501, 509, 29 L.Ed. 729 (1886) ("For nothing is better settled than that, in such cases as the present, and other actions for torts where no precise rule of law fixes the recoverable damages, it is the peculiar function of the jury to determine the amount by their verdict."); *Minneapolis & St. Louis R. Co. v. Beckwith*, 129 U.S. 26, 36, 9 S.Ct. 207, 210, 32 L.Ed. 585 (1889) ("The imposition of punitive or exemplary damages in such cases cannot be opposed as in conflict with the prohibition against the deprivation of property without due process of law. It is only one mode of imposing a penalty for the violation of duty, and its propriety and legality have been recognized ... by repeated judicial decisions for more than a century. Its authorization by the law in question ... cannot therefore be justly assailed as infringing upon the Fourteenth Amendment of the Constitution of the United States."); *Standard Oil Co. v. Missouri*, 224 U.S. 270, 285, 32 S.Ct. 406, 410, 56 L.Ed. 760 (1912) ("Nor, from a Federal standpoint, is there any invalidity in the judgment because there was no statute fixing a maximum penalty, no rule for measuring damages, and no hearing."); *Louis*

> *Pizitz Dry Goods Co. v. Yeldell*, 274 U.S. 112, 47 S.Ct. 509, 71 L.Ed. 952 (1927) (although the issue was raised in the briefs, the Court did not discuss the claim); *Memphis Community School Dist. v. Stachura*, 477 U.S. 299, 306, n. 9, 106 S.Ct. 2537, 2542, n. 9, 91 L.Ed.2d 249 (1986). Recently, in *Smith v. Wade*, 461 U.S. 30, 103 S.Ct. 1625, 75 L.Ed.2d 632 (1983), this Court affirmed the assessment of punitive damages pursuant to 42 U.S.C. § 1983, where the trial court used the common-law method for determining the amount of the award.

Id., 499 U.S. at 15-17. The Supreme Court expressly noted that when juries decide whether and to what extent punitive damages may be warranted there may be "extreme results," but the Constitution affords adequate safeguards:

> One must concede that unlimited jury discretion—or unlimited judicial discretion for that matter—in the fixing of punitive damages may invite extreme results that jar one's constitutional sensibilities. See Waters–Pierce Oil Co. v. Texas (No. 1), 212 U.S. 86, 111, 29 S.Ct. 220, 227, 53 L.Ed. 417 (1909).8 We need not, and indeed we cannot, draw a mathematical bright line between the constitutionally acceptable and the constitutionally unacceptable that would fit every case. We can say, however, that general concerns of reasonableness and adequate guidance from the court when the case is tried to a jury properly enter into the constitutional calculus….

Id. at 18. The Court reviewed the instruction given to the *Haslip* trial jury – which is essentially the same instruction given today, 36 years later – and found that while Alabama juries have discretion in awarding punitive damages, that discretion is not unlimited:

> We have carefully reviewed the instructions to the jury. By these instructions, see n. 1, supra, the trial court expressly described for the jury the purpose of punitive damages, namely, "not to compensate the plaintiff for any injury" but "to punish the defendant" and "for the added purpose of protecting the public by [deterring] the defendant and others from doing such wrong in the future." App. 105–106. Any evidence of Pacific Mutual's wealth was excluded from the trial in accord with Alabama law. See Southern Life & Health Ins. Co. v. Whitman, 358 So.2d 1025, 1026–1027 (Ala.1978).
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> To be sure, the instructions gave the jury significant discretion in its determination of punitive damages. But that discretion was not unlimited. It was confined to deterrence and retribution, the state policy concerns sought

> to be advanced. And if punitive damages were to be awarded, the jury "must take into consideration the character and the degree of the wrong as shown by the evidence and necessity of preventing similar wrong." App. 106. The instructions thus enlightened the jury as to the punitive damages' nature and purpose, identified the damages as punishment for civil wrongdoing of the kind involved, and explained that their imposition was not compulsory.
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> These instructions, we believe, reasonably accommodated Pacific Mutual's interest in rational decision making and Alabama's interest in meaningful individualized assessment of appropriate deterrence and retribution. The discretion allowed under Alabama law in determining punitive damages is no greater than that pursued in many familiar areas of the law as, for example, deciding "the best interests of the child," or "reasonable care," or "due diligence," or appropriate compensation for pain and suffering or mental anguish.9 As long as the discretion is exercised within reasonable constraints, due process is satisfied. *See, e.g.*, *Schall v. Martin*, 467 U.S. 253, 279, 104 S.Ct. 2403, 2417, 81 L.Ed.2d 207 (1984); *Greenholtz v. Inmates of Nebraska Penal and Correctional Complex*, 442 U.S. 1, 16, 99 S.Ct. 2100, 2108, 60 L.Ed.2d 668 (1979). *See also McGautha v. California*, 402 U.S. 183, 207, 91 S.Ct. 1454, 1467, 28 L.Ed.2d 711 (1971).

Id., at 19-20. The *Haslip* Court also held that in addition to the guidance given juries in their instructions on the law, Due Process concerns are also protected through Alabama's system of post-judgment review of the amount of a jury's verdict for excessiveness:

> Before the trial in this case took place, the Supreme Court of Alabama had established post-trial procedures for scrutinizing punitive awards. In *Hammond v. City of Gadsden*, 493 So.2d 1374 (1986), it stated that trial courts are "to reflect in the record the reasons for interfering with a jury verdict, or refusing to do so, on grounds of excessiveness of the damages." *Id*., at 1379. Among the factors deemed "appropriate for the trial court's consideration" are the "culpability of the defendant's conduct," the "desirability of discouraging others from similar conduct," the "impact upon the parties," and "other factors, such as the impact on innocent third parties." *Ibid*. The *Hammond* test ensures meaningful and adequate review by the trial court whenever a jury has fixed the punitive damages.
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> By its review of punitive awards, the Alabama Supreme Court provides an additional check on the jury's or trial court's discretion. It first undertakes a comparative analysis. *See*, *e.g.*, *Aetna Life Ins. Co. v. Lavoie*, 505 So.2d 1050, 1053 (1987). It then applies the detailed substantive standards it has developed for evaluating punitive awards.10 In particular, it makes its review to ensure that the award does "not exceed an amount that will accomplish society's goals of punishment and deterrence." *Green Oil Co.*

> *v. Hornsby*, 539 So.2d 218, 222 (1989); *Wilson v. Dukona Corp.*, 547 So.2d 70, 73 (1989). This appellate review makes certain that the punitive damages are reasonable in their amount and rational in light of their purpose to punish what has occurred and to deter its repetition.
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> Also before its ruling in the present case, the Supreme Court of Alabama had elaborated and refined the Hammond criteria for determining whether a punitive award is reasonably related to the goals of deterrence and retribution. *Hornsby*, 539 So.2d, at 223–224; *Central Alabama*, 546 So.2d, at 376–377. It was announced that the following could be taken into consideration in determining whether the award was excessive or inadequate: (a) whether there is a reasonable relationship between the punitive damages award and the harm likely to result from the defendant's conduct as well as the harm that actually has occurred; (b) the degree of reprehensibility of the defendant's conduct, the duration of that conduct, the defendant's awareness, any concealment, and the existence and frequency of similar past conduct; c) the profitability to the defendant of the wrongful conduct and the desirability of removing that profit and of having the defendant also sustain a loss; (d) the "financial position" of the defendant; (e) all the costs of litigation; (f) the imposition of criminal sanctions on the defendant for its conduct, these to be taken in mitigation; and (g) the existence of other civil awards against the defendant for the same conduct, these also to be taken in mitigation.
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> The application of these standards, we conclude, imposes a sufficiently definite and meaningful constraint on the discretion of Alabama factfinders in awarding punitive damages. The Alabama Supreme Court's post-verdict review ensures that punitive damages awards are not grossly out of proportion to the severity of the offense and have some understandable relationship to compensatory damages. While punitive damages in Alabama may embrace such factors as the heinousness of the civil wrong, its effect upon the victim, the likelihood of its recurrence, and the extent of the defendant's wrongful gain, the factfinder must be guided by more than the defendant's net worth. Alabama plaintiffs do not enjoy a windfall because they have the good fortune to have a defendant with a deep pocket.

Id. 21-22. The Court scrutinized examples of Alabama's procedural trial, post-verdict and appellate safeguards in practice and concluded they afford adequate constitutional protection:

> These standards have real effect when applied by the Alabama Supreme Court to jury awards. For examples of their application in trial practice, see

> *Hornsby*, 539 So.2d, at 219, and *Williams v. Ralph Collins Ford–Chrysler, Inc.*, 551 So.2d 964, 966 (1989). And post-verdict review by the Alabama Supreme Court has resulted in reduction of punitive awards. *See*, *e.g.*, *Wilson v. Dukona Corp.*, 547 So.2d, at 74; *United Services Automobile Assn. v. Wade*, 544 So.2d 906, 917 (1989). The standards provide for a rational relationship in determining whether a particular award is greater than reasonably necessary to punish and deter. …

Id. 22-23. In sum, *Haslip* approved of Alabama's common law methods for permitting juries to decide punitive damages cases and Alabama's system of reviewing juries' punitive damages verdicts for excessiveness during post-verdict *Hammond-Green Oil* proceedings.

What next followed were a series of decisions from both the Supreme Court of Alabama and the Supreme Court of the United States which further refined the constitutional safeguards necessary to ensure that a jury's punitive damages verdict does not result in an unconstitutional deprivation of property in violation of Due Process.

III. ***TXO Production Corp v. Alliance Resources Corp*: Plurality Finds Substantive Due Process Limit to Amount of Jury's Punitive Damages Verdict.**

In *TXO*, a plurality of the Supreme Court of the United States held a $10 million punitive damages verdict constitutionally sound despite actual damages (for common law slander of title in a West Virginia commercial property dispute) totaling only $19,000. The Court framed the issue as:

> The question we granted certiorari to decide is whether that punitive damages award violates the Due Process Clause of the Fourteenth Amendment, either because its amount is excessive or because it is the product of an unfair procedure.

Id., 509 U.S. 443 at 446. Relative to the meaning of de novo review of a jury's punitive damages verdict, the *TXO* Court noteworthily started its analysis with this observation about the jury's factual findings:

> On August 23, 1985, *TXO Production Corp.* (*TXO*) commenced this litigation by filing a complaint in the Circuit Court of McDowell County, West Virginia, for a declaratory judgment removing a cloud on title to an interest in oil and gas development rights. Respondents, including *Alliance Resources Corp.* (*Alliance*), filed a counterclaim for slander of title that went to trial before a jury in June 1990. The jury verdict in respondents' favor, which has been affirmed by the Supreme Court of Appeals of West Virginia, makes it appropriate to accept respondents' version of disputed issues of fact.

Id., 447 (emphasis added). Focusing on the jury's return of a verdict for 526 times the amount of compensatory damages awarded, the *TXO* plurality identified "substantive limits" contained within the Fourteenth Amendment "beyond which penalties may not go." *Id*., 454. The plurality stated:

> *TXO* first argues that a $10 million punitive damages award—an award 526 times greater than the actual damages awarded by the jury—is so excessive that it must be deemed an arbitrary deprivation of property without due process of law.
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> *TXO* correctly points out that several of our opinions have stated that the Due Process Clause of the Fourteenth Amendment imposes substantive limits "beyond which penalties may not go." *Seaboard Air Line R. Co. v. Seegers*, 207 U.S. 73, 78, 28 S.Ct. 28, 30, 52 L.Ed. 108 (1907). *See also St. Louis, I.M. & S.R. Co. v. Williams*, 251 U.S. 63, 66–67, 40 S.Ct. 71, 73, 64 L.Ed. 139 (1919); *Standard Oil Co. of Ind. v. Missouri*, 224 U.S. 270, 286, 32 S.Ct. 406, 411, 56 L.Ed. 760 (1912).16 Moreover, in *Southwestern Telegraph & Telephone Co. v. Danaher*, 238 U.S. 482, 35 S.Ct. 886, 59 L.Ed. 1419 (1915), the Court actually set aside a penalty imposed on a telephone company on the ground that it was so "plainly arbitrary and oppressive" as to violate the Due Process Clause. *Id*., at 491, 35 S.Ct., at 888. In an earlier case the Court had stated that it would not review state action fixing the penalties for unlawful conduct unless "the fines imposed are so grossly excessive as to amount to a deprivation of property without due process of law." *Waters–Pierce Oil Co. v. Texas* (No. 1), 212 U.S. 86, 111, 29 S.Ct. 220, 227, 53 L.Ed. 417 (1909).

Id., 453-454. Unable – or unwilling – to enunciate a firm standard between the constitutionally acceptable and unacceptable, the plurality reiterated the same standard

first pronounced in Haslip, and surmised that it will require the passage of time and future judicial reviews of such verdicts to clarify when a verdict exceeds constitutional limitations:

> In the end, then, in determining whether a particular award is so "grossly excessive" as to violate the Due Process Clause of the Fourteenth Amendment, *Waters–Pierce Oil Co.*, 212 U.S., at 111, 29 S.Ct., at 227, we return to what we said two Terms ago in *Haslip*: "We need not, and indeed we cannot, draw a mathematical bright line between the constitutionally acceptable and the constitutionally unacceptable that would fit every case. We can say, however, that [a] general concer[n] of reasonableness ... properly enter[s] into the constitutional calculus." 499 U.S., at 18, 111 S.Ct., at 1043. And, to echo *Haslip* once again, it is with this concern for reasonableness in mind that we turn to petitioner's argument that the punitive award in this case was so "grossly excessive" as to violate the substantive component of the Due Process Clause.

Id., 458. In the end, in the case before the Court, a ratio of 526 -to- 1 did not "jar one's constitutional sensibilities" because the conduct as found by the jury, affirmed by the trial court in a post-verdict hearing and as approved by West Virginia's Supreme Court, involved a lot of money potentially at stake, bad faith misconduct, a scheme which was part of a larger pattern of fraud, trickery and deceit, and the defendant had sufficient wealth to pay the judgment:

> While petitioner stresses the shocking disparity between the punitive award and the compensatory award, that shock dissipates when one considers the potential loss to respondents, in terms of reduced or eliminated royalties payments, had petitioner succeeded in its illicit scheme. Thus, even if the actual value of the "potential harm" to respondents is not between $5 million and $8.3 million, but is closer to $4 million, or $2 million, or even $1 million, the disparity between the punitive award and the potential harm does not, in our view, "jar one's constitutional sensibilities." *Haslip*, 499 U.S., at 18, 111 S.Ct., at 1043.
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> In sum, we do not consider the dramatic disparity between the actual damages and the punitive award controlling in a case of this character. On this record, the jury may reasonably have determined that petitioner set out on a malicious and fraudulent course to win back, either in whole or in part, the lucrative stream of royalties that it had ceded to *Alliance*. The punitive damages award in this case is certainly large, but in light of the amount of money potentially at stake, the bad faith of petitioner, the fact that the

> scheme employed in this case was part of a larger pattern of fraud, trickery and deceit, and petitioner's wealth, we are not persuaded that the award was so "grossly excessive" as to be beyond the power of the State to allow.

Id. 462.

IV. ***Honda Motor Co. v. Oberg*: Procedural Due Process Requirements.**

Two years after *Haslip* and one year after *TXO*, the Supreme Court of the United States used *Honda Motor Co. v. Oberg* to emphasize the necessity for conducting post-verdict judicial review of juries' punitive damages verdicts to ensure compliance with the requirements of both substantive and procedural due process. First, the Court reiterated that the Constitution imposes a substantive limit on the size of punitive damages awards:

> Our recent cases have recognized that the Constitution imposes a substantive limit on the size of punitive damages awards. *Pacific Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1, 111 S.Ct. 1032, 113 L.Ed.2d 1 (1991); *TXO Production Corp. v. Alliance Resources Corp.*, 509 U.S. 443, 113 S.Ct. 2711, 125 L.Ed.2d 366 (1993). Although they fail to "draw a mathematical bright line between the constitutionally acceptable and the constitutionally unacceptable," *id*., at 458, 113 S.Ct., at 2720; *Haslip*, 499 U.S., at 18, 111 S.Ct., at 1043, a majority of the Justices agreed that the Due Process Clause imposes a limit on punitive damages awards. A plurality in *TXO* assented to the proposition that "grossly excessive" punitive damages would violate due process, 509 U.S., at 453–455, 113 S.Ct., at 2718–2719, while Justice O'Connor, who dissented because she favored more rigorous standards, noted that "[i]t is thus common ground that an award may be so excessive as to violate due process," *id*., at 480, 113 S.Ct., at 2731.

Id., 512 U.S. at 420. The Court then explained that it was using this case to explain the contours of the procedural due process requirements for review of juries' punitive damages awards:

> In the case before us today we are not directly concerned with the character of the standard that will identify unconstitutionally excessive awards; rather, we are confronted with the question of what procedures are necessary to ensure that punitive damages are not imposed in an arbitrary manner. More specifically, the question is whether the Due Process Clause requires judicial review of the amount of punitive damages awards.

> The opinions in both *Haslip* and *TXO* strongly emphasized the importance of the procedural component of the Due Process Clause. In *Haslip*, the Court held that the common-law method of assessing punitive damages did not violate procedural due process. In so holding, the Court stressed the availability of both "meaningful and adequate review by the trial court" and subsequent appellate review. 499 U.S., at 20, 111 S.Ct., at 1044. Similarly, in *TXO*, the plurality opinion found that the fact that the "award was reviewed and upheld by the trial judge" and unanimously affirmed on appeal gave rise "to a strong presumption of validity." 509 U.S., at 457, 113 S.Ct., at 2720. Concurring in the judgment, Justice Scalia (joined by Justice Thomas) considered it sufficient that traditional common-law procedures were followed. In particular, he noted that " 'procedural due process' requires judicial review of punitive damages awards for reasonableness." *Id*., at 471, 113 S.Ct., at 2727.

Id., 420-421. The Court explained the historical precedents for reviewing juries' punitive damages verdicts for excessiveness dated back to the earliest days of English common law:

> Judicial review of the size of punitive damages awards has been a safeguard against excessive verdicts for as long as punitive damages have been awarded. One of the earliest reported cases involving exemplary damages, *Huckle v. Money*, 2 Wils. 205, 95 Eng.Rep. 768 (C.P.1763), arose out of King George III's attempt to punish the publishers of the allegedly seditious North Briton, No. 45. The King's agents arrested the plaintiff, a journeyman printer, in his home and detained him for six hours. Although the defendants treated the plaintiff rather well, feeding him "beef steakes and beer, so that he suffered very little or no damages," 2 Wils., at 205, 95 Eng.Rep., at 768, the jury awarded him £300, an enormous sum almost 300 times the plaintiff's weekly wage. The defendant's lawyer requested a new trial, arguing that the jury's award was excessive. Plaintiff's counsel, on the other hand, argued that "in cases of tort ... the court will never interpose in setting aside verdicts for excessive damages." *Id*., at 206, 95 Eng.Rep., at 768. While the court denied the motion for new trial, the Chief Justice explicitly rejected plaintiff's absolute rule against review of damages amounts. Instead, he noted that when the damages are "outrageous" and "all mankind at first blush must think so," a court may grant a new trial "for excessive damages." *Id*., at 207, 95 Eng.Rep., at 769. In accord with his view that the amount of an award was relevant to the motion for a new trial, the Chief Justice noted that "[u]pon the whole I am of opinion the damages are not excessive." *Ibid*.
>
> Subsequent English cases, while generally deferring to the jury's determination of damages, steadfastly upheld the court's power to order

> new trials solely on the basis that the damages were too high. *Fabrigas v. Mostyn*, 2 Black.W. 929, 96 Eng.Rep. 549 (C.P.1773) (Damages "may be so monstrous and excessive, as to be in themselves an evidence of passion or partiality in the jury");2 *Sharpe v. Brice*, 2 Black.W. 942, 96 Eng.Rep. 557 (C.P.1774) ("It has never been laid down, that the Court will not grant a new trial for excessive damages in any cases of tort"); *Leith v. Pope*, 2 Black.W. 1327, 1328, 96 Eng.Rep. 777, 778 (C.P.1779) ("[I]n cases of tort the Court will not interpose on account of the largeness of damages, unless they are so flagrantly excessive as to afford an internal evidence of the prejudice and partiality of the jury"); *Jones v. Sparrow*, 5 T.R. 257, 101 Eng.Rep. 144 (K.B.1793)(new trial granted for excessive damages); *Goldsmith v. Lord Sefton*, 3 Anst. 808, 145 Eng.Rep. 1046 (Exch.1796) (same); *Hewlett v. Cruchley*, 5 Taunt. 277, 281, 128 Eng.Rep. 696, 698 (C.P.1813) ("[I]t is now well acknowledged in all the Courts of Westminster-hall, that whether in actions for criminal conversation, malicious prosecutions, words, or any other matter, if the damages are clearly too large, the Courts will send the inquiry to another jury").

Id., 421-423. Those early practices were followed in American courts from the beginning of our Republic:

> Common-law courts in the United States followed their English predecessors in providing judicial review of the size of damages awards. They too emphasized the deference ordinarily afforded jury verdicts, but they recognized that juries sometimes awarded damages so high as to require correction. Thus, in 1822, Justice Story, sitting as Circuit Justice, ordered a new trial unless the plaintiff agreed to a reduction in his damages.3 In explaining his ruling, he noted:
>
> > "As to the question of excessive damages, I agree, that the court may grant a new trial for excessive damages.... It is indeed an exercise of discretion full of delicacy and difficulty. But if it should clearly appear that the jury have committed a gross error, or have acted from improper motives, or have given damages excessive in relation to the person or the injury, it is as much the duty of the court to interfere, to prevent the wrong, as in any other case." *Blunt v. Little*, 3 F.Cas. 760, 761–762 (No. 1,578) (CC Mass.1822)
> >
> > *See also Whipple v. Cumberland Mfg. Co.*, 29 F.Cas. 934, 937–938 (No. 17,516) (CC Me.1843).
>
> In the 19th century, both before and after the ratification of the Fourteenth Amendment, many American courts reviewed damages for "partiality" or "passion and prejudice." Nevertheless, because of the difficulty of probing

juror reasoning, passion and prejudice review was, in fact, review of the amount of awards. Judges would infer passion, prejudice, or partiality from the size of the award.4 *Coffin v. Coffin*, 4 Mass. 1, 41 (1808) (In cases of personal injury, "a verdict may be set aside for excessive damages" when "from the exorbitancy of them the court must conclude that the jury acted from passion, partiality, or corruption"); *Taylor v. Giger*, 3 Ky. 586, 587 (1808) ("In actions of tort ... a new trial ought not to be granted for excessiveness of damages, unless the damages found are so enormous as to shew that the jury were under some improper influence, or were led astray by the violence of prejudice or passion"); *McConnell v. Hampton*, 12 Johns. 234, 235 (N.Y.1815) (granting new trial for excessive damages and noting: "That Courts have a legal right to grant new trials, for excessive damages in actions for torts, is no where denied ..."); *Belknap v. Boston & Maine R. Co.*, 49 N.H. 358, 374 (1870) (setting aside both compensatory and punitive damages, because "[w]e think it evident that the jury were affected by some partiality or prejudice").

Nineteenth-century treatises similarly recognized judges' authority to award new trials on the basis of the size of damages awards. 1 D. Graham, A Treatise on the Law of New Trials 442 (2d ed. 1855) ("[E]ven in personal torts, where the jury find outrageous damages, clearly evincing partiality, prejudice and passion, the court will interfere for the relief of the defendant, and order a new trial"); T. Sedgwick, A Treatise on the Measure of Damages 707 (5th ed. 1869)("The court again holds itself at liberty to set aside verdicts and grant new trials ... whenever the damages are so excessive as to create the belief that the jury have been misled either by passion, prejudice, or ignorance"); 3 J. Sutherland, A Treatise on the Law of Damages 469 (1883) (When punitive damages are submitted to the jury, "the amount which they may think proper to allow will be accepted by the court, unless so exorbitant as to indicate that they have been influenced by passion, prejudice or a perverted judgment").

Modern practice is consistent with these earlier authorities. In the federal courts and in every State, except Oregon, judges review the size of damages awards. *See Dagnello v. Long Island R. Co.*, 289 F.2d 797, 799–800, n. 1 (CA2 1961)(citing cases from all 50 States except Alaska, Maryland, and Oregon); *Nome v. Ailak*, 570 P.2d 162, 173–174 (Alaska 1977); *Alexander & Alexander, Inc. v. B. Dixon Evander & Assocs., Inc.*, 88 Md.App., at 716–722, 596 A.2d, at 709–711, cert. denied, 326 Md. 435, 605 A.2d 137 (1992); *Texaco, Inc. v. Pennzoil, Co.*, 729 S.W.2d 768 (Tex.App.1987); *Grimshaw v. Ford Motor Co.*, 119 Cal.App.3d 757, 174 Cal.Rptr. 348 (1981); Draper, Excessiveness or Inadequacy of Punitive Damages Awarded in Personal Injury or Death Cases, 12 A.L.R. 5th 195 (1993); Schnapper, Judges Against Juries—Appellate Review of Federal Civil Jury Verdicts, 1989 Wis.L.Rev. 237.

Id., 424-426. The Court ultimately held the Oregon's practice of not reviewing juries' punitive damages verdicts for alleged excessiveness – in contrast to Alabama's common law system catalogued in *Haslip* and *Green Oil* – violated the Due Process Clause of the Fourteenth Amendment:

> Punitive damages pose an acute danger of arbitrary deprivation of property. Jury instructions typically leave the jury with wide discretion in choosing amounts, and the presentation of evidence of a defendant's net worth creates the potential that juries will use their verdicts to express biases against big businesses, particularly those without strong local presences. Judicial review of the amount awarded was one of the few procedural safeguards which the common law provided against that danger. Oregon has removed that safeguard without providing any substitute procedure and without any indication that the danger of arbitrary awards has in any way subsided over time. For these reasons, we hold that Oregon's denial of judicial review of the size of punitive damages awards violates the Due Process Clause of the Fourteenth Amendment.

Id., 432.

In Alabama, our case law establishes that so long as the trial court grants a request for a post-verdict hearing and analyzes whether the jury's punitive damages verdict is excessive in light of the *Hammond*, *Green Oil*, *BMW v. Gore* and § 6-11-23(b) factors, the moving defendant's procedural due process protection will be deemed satisfied. If the trial court fails or refuses to conduct such a post-verdict review, or fails to explain its reasoning in granting or denying a motion for new trial premised upon a request for a remittitur as required by *Hammond*, the Supreme Court will remand with instruction to provide a compliant order *See*, *e.g.*, *Farmers Ins. Exch. v. Morris*, 228 So.3d 971 (Ala. 2016); *Williford v. Emerton*, 935 So.2d 1150 (Ala. 2004); *Engineered Cooling Servs., Inc. v. Star Serv., Inc. of Mobile*, 108 So.3d 1022 (Ala. Civ. App. 2012).

V. ***BMW of North America, Inc. v. Gore*: Guideposts for Evaluating Excessiveness.**

By a 5 – 4 vote, the United States Supreme Court in *BMW of North America, Inc. v. Gore*, 517 U.S. 559 (1996), announced for the first time that a jury's punitive damages award, even one that is the product of a fair trial, may be so large as to violate the Due Process clause of the Fourteenth Amendment. To guard against punitive damages awards deemed "grossly excessive" relative to the goals of punishing misconduct and deterring repetition of such misconduct, the *BMW* Court established additional "guideposts" to use in the review of punitive damages for excessiveness: (1) the degree of reprehensibility of the defendant's conduct, (2) the ratio of the punitive damages to the harm inflicted on the plaintiff, and (3) the size of the award in relation to civil or criminal penalties for comparable misconduct. *Id*., 517 U.S. at 574-78.

The Supreme Court of Alabama, on return from remand, held in *BMW of North America, Inc. v. Gore*, *supra*, 701 So.2d 507 (Ala. 1997) that the first two of the new "guideposts" were already included in Alabama's *Hammond*, *Green Oil* review. (*Id*., 701 So. 2d at 510)[4], and that the reprehensibility guidepost should also include an analysis of "any concealment or 'cover-up.'" *Id*., 701 So.2d at 512.[5] The Supreme Court of Alabama first focused upon how the reprehensibility guidepost was to be analyzed:

> According to the Supreme Court, the degree of reprehensibility of the defendant's conduct is perhaps the "most important indicium of the reasonableness of a punitive damages award." *BMW*, 517 U.S. at [575],

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[4] The Alabama Supreme Court's "assessment of the degree of the reprehensibility of the defendant's conduct is broader in a *Hammond*/*Green Oil* review than our assessment in a [*BMW v. Gore*] review." *Shiv Ram v. McCaleb*, *supra*, 892 So.2d at 317.

[5] For examples of opinions examining evidence of cover-up and concealment in the context of a post-judgment analysis of evidence reprehensibility, see *Atkins v. Lee*, 603 So.2d 937 (Ala. 1992) (examining evidence of cover-up by resident and hospital); *Campbell v. Williams*, 638 So.2d 804 (Ala. 1994) (examining evidence of attempted cover-up by physician in medical records); *Springhill Hospitals, Inc. v. West*, 388 So.3d 648 (Ala. 2023) (examining evidence of cover-up by hospital and lying under oath by nurse).

116 S.Ct. at 1599. Reprehensibility of the defendant's conduct is one of the factors Alabama courts consider in the common law excessiveness review required by *Green Oil Co. v. Hornsby*, 539 So.2d 218 (Ala.1989).

> " 'The degree of reprehensibility of the defendant's conduct should be considered. The duration of this conduct, the degree of the defendant's awareness of any hazard which his conduct has caused or is likely to cause, and any concealment or "cover-up" of that hazard, and the existence and frequency of similar past conduct should all be relevant in determining this degree of reprehensibility.' "

539 So.2d at 223.

Courts in Alabama consider this factor as part of a *Hammond–Green Oil* review, but perhaps have not heretofore given it the weight the Supreme Court in *BMW* says the Constitution requires in an excessiveness review of a jury verdict in a civil case. As articulated in *Green Oil*, this factor encompasses considerations such as "the duration of [the defendant's] conduct, the degree of the defendant's awareness of any hazard ... his conduct has caused or is likely to cause, ... any concealment or 'cover-up' of that hazard, and the existence and frequency of similar past conduct." Alabama statutes also require that a court consider whether the defendant has been guilty of the same or similar acts in the past and that it consider the efforts made to remedy the wrong. § 6–11–23(b). To these considerations, the Supreme Court in *BMW* adds two others that principally determine reprehensibility: (1) the defendant's awareness of his actions or omissions causing harm and (2) the quality and quantity of rights of others that were disregarded by the defendant.

In discussing the element of reprehensibility, the United States Supreme Court stated:

> "Perhaps the most important indicium of the reasonableness of a punitive damages award is the degree of reprehensibility of the defendant's conduct. As the Court stated nearly 150 years ago, exemplary damages imposed on a defendant should reflect 'the enormity of his offense.' ... This principle reflects the accepted view that some wrongs are more blameworthy than others. Thus, we have said that 'nonviolent crimes are less serious than crimes marked by violence or the threat of violence.' ... Similarly, 'trickery and deceit' ... are more reprehensible than negligence. ..."

517 U.S. at [575], 116 S.Ct. at 1599 (citations and footnotes omitted).

> Applying this guidepost to the facts in *BMW*, the United States Supreme Court concluded that *BMW*'s conduct was not sufficiently reprehensible to warrant the imposition of a $2 million exemplary damages award. The Supreme Court emphasized that the damage to the well-to-do plaintiff was purely economic in nature. While the Court recognized that economic damage inflicted upon a financially vulnerable plaintiff might well support a large punitive damages award, the fact that the plaintiff in this case was affluent weighed against a finding of great reprehensibility. The Supreme Court also pointed out that *BMW*'s behavior "evinced no indifference to or reckless disregard for the health and safety of others." 517 U.S. at [576], 116 S.Ct. at 1599. The Supreme Court held:
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> > "The sanction imposed in this case cannot be justified on the ground that it was necessary to deter future misconduct without considering whether less drastic remedies could be expected to achieve that goal. The fact that a multimillion dollar penalty prompted a change in policy sheds no light on the question whether a lesser deterrent would have adequately protected the interests of Alabama consumers. In the absence of a history of noncompliance with known statutory requirements, there is no basis for assuming that a more modest sanction would not have been sufficient to motivate full compliance with the disclosure requirement imposed by the Alabama Supreme Court in this case."
>
> 517 U.S. at [584], 116 S.Ct. at 1603.

Id., 701 So.2d at 512-513.

The Supreme Court of Alabama next summarized how the second BMW guidepost ("Ratio of Actual of Likely Harm to Punitive Damages") is to be analyzed:

> The United States Supreme Court in *BMW* stated that the "most commonly cited indicium of an unreasonable or excessive punitive damages award is its ratio to the actual harm inflicted on the plaintiff," and it stated that "exemplary damages must bear a 'reasonable relationship' to compensatory damages." 517 U.S. at [580], 116 S.Ct. at 1601. However, the Court expressly held that due process does not require a purely mathematical formula:
>
> > "Of course, we have consistently rejected the notion that the constitutional line is marked by a simple mathematical formula, even one that compares actual and potential damages to the punitive award. ... Indeed, low awards of compensatory damages may properly support a higher ratio

> than high compensatory awards, if, for example, a particularly egregious act has resulted in only a small amount of economic damages. A higher ratio may also be justified in cases in which the injury is hard to detect or the monetary value of noneconomic harm might have been difficult to determine. ... In most cases, the ratio will be within a constitutionally acceptable range, and remittitur will not be justified on this basis."

517 U.S. at [582], 116 S.Ct. at 1602–03 (citations and emphasis omitted).

Applying this guidepost to the facts in *BMW*, the United States Supreme Court reasoned that due process does not require any exact ratio between punitive and compensatory assessments, but that a high ratio might indicate excessiveness, particularly if the conduct of the defendant was not especially reprehensible. The Court noted that the $2 million punitive damages award is 500 times the amount of actual harm suffered, as determined by the jury, and 35 times the total actual harm suffered by the 14 Alabama consumers who had purchased repainted BMWs. 517 U.S. at [582] and n. 35, 116 S.Ct. at 1602 and n. 35. The Supreme Court recognized that it had upheld a $10 million punitive damages award in *TXO Production Corp. v. Alliance Resources Corp.*, 509 U.S. 443, 113 S.Ct. 2711, 125 L.Ed.2d 366 (1993), where the jury had awarded only $19,000 in actual damages (a punitive damages to compensatory damages ratio of over 500 to 1), but it emphasized that the plaintiffs in that case had faced much greater potential harm and that if the defendant had succeeded in its plan the ratio would have been less than 10 to 1. 517 U.S. at [582], 116 S.Ct. at 1602. The Court thus distinguished *TXO* by finding that "there is no suggestion that Dr. Gore or any other BMW purchaser was threatened with any additional potential harm by BMW's nondisclosure policy;" it therefore concluded that the 500 to 1 ratio "must surely 'raise a suspicious judicial eyebrow.'" 517 U.S. at [582] and [583], 116 S.Ct. at 1602 and 1603, quoting *TXO*, 509 U.S. at 481, 113 S.Ct. at 2732 (O'Connor, J., dissenting).

Although it is difficult to determine case by case what ratio of punitive damages to compensatory damages is excessive, we reject the easy answer of adopting one ratio that would apply to all and would therefore give a wrongdoer precise notice of the penalty that his misconduct might incur. To do so would frustrate the purpose of punitive damages, which is to punish and deter a defendant's misconduct. A ratio that could be deemed reasonable in many cases might well be insufficient in cases where the defendant has reaped great profit from its conduct, or where its conduct is particularly reprehensible. Indeed, the United States Supreme Court has consistently stated, "We need not, and indeed cannot, draw a mathematical bright line between the constitutionally acceptable and constitutionally unacceptable that would fit every case." *TXO*, 509 U.S. at 458, 113 S.Ct. at

> 2720, quoting Haslip, 499 U.S. at 18, 111 S.Ct. at 1043. Likewise, we do not draw a bright line here; however, in light of the lesser degree of reprehensibility apparent in this case, as well as the other considerations of this review, we agree that the 500 to 1 ratio of punitive damages to compensatory damages in this case is grossly excessive.

Id., 513-514. The Supreme Court of Alabama next explained how the third *BMW* guidepost ("Sanctions for Comparable Misconduct") was to be analyzed:

> The Supreme Court in *BMW* required state courts, when reviewing punitive damages verdicts for excessiveness, to "compare[e] the punitive damages award and the civil or criminal penalties that could be imposed for comparable misconduct." 517 U.S. at [583], 116 S.Ct. at 1603. State courts engaged in this endeavor should " 'accord "substantial deference" to legislative judgments concerning appropriate sanctions for the conduct at issue.'" 517 U.S. at [583], 116 S.Ct. at 1603, quoting *Browning–Ferris Industries of Vermont, Inc. v. Kelco Disposal, Inc.*, 492 U.S. 257, 301, 109 S.Ct. 2909, 2934, 106 L.Ed.2d 219 (1989) (O'Connor, J., concurring in part and dissenting in part). However, under the Alabama Deceptive Trade Practices Act, Ala. Code 1975, § 8–19–5, the maximum sanction for committing a fraudulent act against an Alabama consumer is a meager $2,000. Because the legislature has set the statutory penalty for deceitful conduct at such a low level, there is little basis for comparing it with any meaningful punitive damages award, particularly where the defendant is wealthy and the profit gained from the fraudulent act is substantial. In this case, the maximum statutory penalty does not even remove the profit BMW realized from the sale of the damaged automobile to Gore. Accordingly, a consideration of the statutory penalty does little to aid in a meaningful review of the excessiveness of the punitive damages award.

Id., 514. Ultimately, after also considering the verdict in light of the *Green Oil* factors (*Id*., 514-515), the Alabama Supreme Court directed reviewing courts to "apply all the *Green Oil* factors, including the three *BMW* 'guideposts,' on a case-by-case basis to determine whether a punitive damages award is excessive and, if so, to what extent it should be remitted." *Id*., 515.

VI. ***Cooper Industries v. Leatherman*: *De Novo* Review.**

In 2001, in *Cooper Industries, Inc. v. Leatherman Tool Group*, the Supreme Court of the United States held that federal courts of appeals should apply *de novo* review when

reviewing district courts' determinations of the constitutionality of punitive damages awards alleged to be excessive. Note what *Cooper Industries* did not decide: it did not state the standard of appellate review for juries' punitive damages verdicts in state appellate courts, and it did not state that federal district courts or state trial courts were to conduct *de novo* reviews of juries' punitive damages verdicts. Further, the *Cooper Industries* holding is limited to instances only when constitutional challenges are made to the punitive damages verdict. The Court reiterates that when no constitutional issue is raised, federal appellate courts are to review trial courts' determinations about alleged excessiveness of juries' punitive damages verdicts under the traditional abuse-of-discretion standard. *Id*., 532 U.S. 424 at 433.

Cooper Industries requires close reading. The issue decided is framed this way:

> *Cooper*'s petition for a writ of certiorari asked us to decide whether the Court of Appeals reviewed the constitutionality of the punitive damages award under the correct standard and also whether the award violated the criteria we articulated in *Gore*. We granted the petition to resolve confusion among the Courts of Appeals on the first question.4 531 U.S. 923, 121 S.Ct. 297, 148 L.Ed.2d 238 (2000). We now conclude that the constitutional issue merits *de novo* review. Because the Court of Appeals applied an "abuse of discretion" standard, we remand the case for determination of the second question under the proper standard.

Id., at 431. To reach this new and narrow holding, the Court first explained that punitive damages verdicts are not truly findings of "fact" protected by the Seventh Amendment:

> Although compensatory damages and punitive damages are typically awarded at the same time by the same decisionmaker, they serve distinct purposes. The former are intended to redress the concrete loss that the plaintiff has suffered by reason of the defendant's wrongful conduct. *See* Restatement (Second) of Torts § 903, pp. 453–454 (1979); *Pacific Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1, 54, 111 S.Ct. 1032, 113 L.Ed.2d 1 (1991) (O'CONNOR, J., dissenting). The latter, which have been described as "quasi-criminal," *id*., at 19, 111 S.Ct. 1032, operate as "private fines" intended to punish the defendant and to deter future wrongdoing. A jury's assessment of the extent of a plaintiff's injury is essentially a factual

> determination, whereas its imposition of punitive damages is an expression of its moral condemnation. *See Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 350, 94 S.Ct. 2997, 41 L.Ed.2d 789 (1974) ("[Punitive damages] are not compensation for injury. Instead, they are private fines levied by civil juries to punish reprehensible conduct and to deter its future occurrence"); *Haslip*, 499 U.S., at 54, 111 S.Ct. 1032 (O'CONNOR, J., dissenting) ("[P]unitive damages are specifically designed to exact punishment in excess of actual harm to make clear that the defendant's misconduct was especially reprehensible").

Id., 432.[6]

Next, the Court analogized to permissible standards of review when state legislatures impose limits on criminal punishments and judicial decisions are rendered within legislatively prescribed limits, noting that such determinations are reviewed under traditional abuse-of-discretion standards:

> Legislatures have extremely broad discretion in defining criminal offenses, *Schall v. Martin*, 467 U.S. 253, 268–269, n. 18, 104 S.Ct. 2403, 81 L.Ed.2d 207 (1984), and in setting the range of permissible punishments for each offense, *ibid*.; *Solem v. Helm*, 463 U.S. 277, 290, 103 S.Ct. 3001, 77 L.Ed.2d 637 (1983). Judicial decisions that operate within these legislatively enacted guidelines are typically reviewed for abuse of discretion. *See*, *e.g.*, *Koon v. United States*, 518 U.S. 81, 96, 99–100, 116 S.Ct. 2035, 135 L.Ed.2d 392 (1996); *cf. Apprendi v. New Jersey*, 530 U.S. 466, 481, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000) (it is permissible "for judges to exercise discretion... in imposing a judgment within the range prescribed by statute").
>
> As in the criminal sentencing context, legislatures enjoy broad discretion in authorizing and limiting permissible punitive damages awards. *Cf. Gore*, 517 U.S., at 568, 116 S.Ct. 1589 ("States 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"). A good many States have enacted statutes that place limits on the permissible size of punitive damages awards. When juries make particular awards within those limits, the role of the trial judge is "to determine whether the jury's verdict is within the confines set by state law, and to determine, by reference to federal standards developed under Rule 59, whether a new trial or remittitur should

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[6] To be sure, punitive damages *generally* may be deemed something other than a finding of fact, but, as discussed *infra*, pages 32-4, an Alabama wrongful death jury's punitive damages verdict is quintessentially a finding of fact, *i.e.*, the jury's determination of the sum of money necessary to punish the defendant and to deter that defendant and others similarly situated from engaging in the same or similar conduct which might in the future lead to loss of another human life.

> be ordered." *Browning–Ferris Industries of Vt., Inc. v. Kelco Disposal, Inc.*, 492 U.S. 257, 279, 109 S.Ct. 2909, 106 L.Ed.2d 219 (1989). If no constitutional issue is raised, the role of the appellate court, at least in the federal system, is merely to review the trial court's "determination under an abuse-of-discretion standard." *Ibid*.

Id., at 433. Invoking the Eighth Amendment's prohibition against excessiveness and cruel and unusual punishment, the Court next contrasts punishments rendered within legislative limits with common law civil punitive damages verdicts:

> 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. That Clause makes the Eighth Amendment's prohibition against excessive fines and cruel and unusual punishments applicable to the States. *Furman v. Georgia*, 408 U.S. 238, 92 S.Ct. 2726, 33 L.Ed.2d 346 (1972) (per curiam). The Due Process Clause of its own force also prohibits the States from imposing "grossly excessive" punishments on tortfeasors, *Gore*, 517 U.S., at 562, 116 S.Ct. 1589; *TXO Production Corp. v. Alliance Resources Corp.*, 509 U.S. 443, 453–455, 113 S.Ct. 2711, 125 L.Ed.2d 366 (1993) (plurality opinion).
>
> The Court has enforced those limits in cases involving deprivations of life, *Enmund v. Florida*, 458 U.S. 782, 787, 801, 102 S.Ct. 3368, 73 L.Ed.2d 1140 (1982) (death is not "a valid penalty under the Eighth and Fourteenth Amendments for one who neither took life, attempted to take life, nor intended to take life"); *Coker v. Georgia*, 433 U.S. 584, 592, 97 S.Ct. 2861, 53 L.Ed.2d 982 (1977) (opinion of White, J.)(sentence of death is "grossly disproportionate" and excessive punishment for the crime of rape); deprivations of liberty, *Solem v. Helm*, 463 U.S., at 279, 303, 103 S.Ct. 3001 (life imprisonment without the possibility of parole for nonviolent felonies is "significantly disproportionate"); and deprivations of property, *United States v. Bajakajian*, 524 U.S. 321, 324, 118 S.Ct. 2028, 141 L.Ed.2d 314 (1998) (punitive forfeiture of $357,144 for violating reporting requirement was "grossly disporportional" to the gravity of the offense); *Gore*, 517 U.S., at 585–586, 116 S.Ct. 1589 ($2 million punitive damages award for failing to advise customers of minor predelivery repairs to new automobiles was "grossly excessive" and therefore unconstitutional).
>
> In these cases, the constitutional violations were predicated on judicial determinations that the punishments were "grossly disproportional to the gravity of ... defendant[s'] offense[s]." *Bajakajian*, 524 U.S., at 334, 118 S.Ct. 2028; *see also Gore*, 517 U.S., at 585–586, 116 S.Ct. 1589; *Solem*, 463 U.S., at 303, 103 S.Ct. 3001; Coker, 433 U.S., at 592, 97 S.Ct. 2861

(opinion of White, J.). We have recognized that the relevant constitutional line is "inherently imprecise," *Bajakajian*, 524 U.S., at 336, 118 S.Ct. 2028, rather than one "marked by a simple mathematical formula," *Gore*, 517 U.S., at 582, 116 S.Ct. 1589. But in deciding whether that line has been crossed, we have focused on the same general criteria: the degree of the defendant's reprehensibility or culpability, *see*, *e.g.*, *Bajakajian*, 524 U.S., at 337, 118 S.Ct. 2028; *Gore*, 517 U.S., at 575–580, 116 S.Ct. 1589; *Solem*, 463 U.S., at 290–291, 103 S.Ct. 3001; *Enmund*, 458 U.S., at 798, 102 S.Ct. 3368; *Coker*, 433 U.S., at 598, 97 S.Ct. 2861 (opinion of White, J.); the relationship between the penalty and the harm to the victim caused by the defendant's actions, *see*, *e.g.*, *Bajakajian*, 524 U.S., at 339, 118 S.Ct. 2028; *Gore*, 517 U.S., at 580–583, 116 S.Ct. 1589; *Solem*, 463 U.S., at 293, 103 S.Ct. 3001; *Enmund*, 458 U.S., at 798, 102 S.Ct. 3368; *Coker*, 433 U.S., at 598, 97 S.Ct. 2861 (opinion of White, J.); and the sanctions imposed in other cases for comparable misconduct, *see*, *e.g.*, *Bajakajian*, 524 U.S., at 340–343, 118 S.Ct. 2028; *Gore*, 517 U.S., at 583–585, 116 S.Ct. 1589; *Solem*, 463 U.S., at 291, 103 S.Ct. 3001; *Enmund*, 458 U.S., at 789–796, 102 S.Ct. 3368; *Coker*, 433 U.S., at 593–597, 97 S.Ct. 2861 (opinion of White, J.). Moreover, and of greatest relevance for the issue we address today, in each of these cases we have engaged in an independent examination of the relevant criteria. *See*, *e.g.*, *Bajakajian*, 524 U.S., at 337–344, 118 S.Ct. 2028; *Gore*, 517 U.S., at 575–586, 116 S.Ct. 1589; *Solem*, 463 U.S., at 295–300, 103 S.Ct. 3001; *Enmund*, 458 U.S., at 788–801, 102 S.Ct. 3368; *Coker*, 433 U.S., at 592–600, 97 S.Ct. 2861 (opinion of White, J.).

In *Bajakajian*, we expressly noted that the courts of appeals must review the proportionality determination "*de novo*" and specifically rejected the suggestion of the respondent, who had prevailed in the District Court, that the trial judge's determination of excessiveness should be reviewed only for an abuse of discretion. "The factual findings made by the district courts in conducting the excessiveness inquiry, of course, must be accepted unless clearly erroneous.... But the question whether a fine is constitutionally excessive calls for the application of a constitutional standard to the facts of a particular case, and in this context *de novo* review of that question is appropriate." 524 U.S., at 336–337, n. 10, 118 S.Ct. 2028 (citing *Ornelas v. United States*, 517 U.S. 690, 697, 116 S.Ct. 1657, 134 L.Ed.2d 911 (1996)).

Likewise, in *Ornelas*, we held that trial judges' determinations of reasonable suspicion and probable cause should be reviewed *de novo* on appeal. The reasons we gave in support of that holding are equally applicable in this case. First, as we observed in *Ornelas*, the precise meaning of concepts like "reasonable suspicion" and "probable cause" cannot be articulated with precision; they are "fluid concepts that take their substantive content from the particular contexts in which the standards are being assessed." *Id.*, at 696, 116 S.Ct. 1657. That is, of course, also a characteristic of the concept of "gross excessiveness." Second, "the legal rules for probable cause and

> reasonable suspicion acquire content only through application. Independent review is therefore necessary if appellate courts are to maintain control of, and to clarify, the legal principles." *Id*., at 697, 116 S.Ct. 1657. Again, this is also true of the general criteria set forth in *Gore*; they will acquire more meaningful content through case-by-case application at the appellate level. "Finally, *de novo* review tends to unify precedent" and " 'stabilize the law.' " 517 U.S., at 697–698, 116 S.Ct. 1657. Justice Breyer made a similar point in his concurring opinion in *Gore*:
>
> > "Requiring the application of law, rather than a decisionmaker's caprice, does more than simply provide citizens notice of what actions may subject them to punishment; it also helps to assure the uniform general treatment of similarly situated persons that is the essence of law itself." 517 U.S., at 587, [116 S.Ct. 1589].
>
> Our decisions in analogous cases, together with the reasoning that produced those decisions, thus convince us 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., 433-436 (emphasis added).

Note carefully within the foregoing analysis this critical sentence extracted from *Bajakajian* and repeated for emphasis: "[T]he factual findings made by the district courts in conducting the excessiveness inquiry, of course, must be accepted unless clearly erroneous...." *Id*., 435. The Seventh Amendment forbids reexamination of juries' fact-findings in federal courts the same as it (and Art. 1 Sec. II) forbid reexamination of juries' fact-findings in Alabama's courts. *Cooper Industries* reiterates this trenchant constitutional mandate, so any interpretation of *de novo* review as permitting losing defendants to challenge or impugn the trial evidence which led the jury to return a punitive damages verdict in the first instance must be categorically rejected.

To repeat: nothing in *Cooper Industries v. Leatherman* suggests that state trial or appellate courts *are to revisit factual findings made by juries*. On the contrary, the Court expressly states:

> 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 439, n. 12 (citations omitted; emphasis added). **Thus, *Leatherman* specifically *preserves* the fact-finding function of the jury, and it cloaks the jury's findings of facts with constitutional protection.** In fact, the Court made this same point yet again:

> While we have determined that the Court of Appeals must review the District Court's application of the *Gore* test *de novo*, **it of course remains true that the Court of Appeals should defer to the District Court's findings of fact unless they are clearly erroneous.** *See United States v. Bajakajian*, 524 U.S. 321, 336–337, n. 10, 118 S.Ct. 2028 (1998).

Id., 440, n. 14 (emphasis added).

Again, *Cooper v. Leatherman* did not question or overrule *Pacific Mutual v. Haslip*, it embraced its holding. Therefore, when reviewing punitive damages verdicts for excessiveness, Alabama's trial and appellate courts should properly continue to apply the factors set out in *Hammond v. City of Gadsden*, *Green Oil Co. v. Hornsby, BMW v. Gore,* and § 6-11-23(b), but must do so with the caveat that "the fact-finding function of the jury" is "preserved."

VII. Alabama's Additional Statutory Considerations.

The Alabama Legislature, as part of 1987's comprehensive tort reform agenda, promulgated a series of statutes concerning punitive damages including Ala. Code §§ 6-

11-23(a),[7] 6-11-23(b)[8] and 6-11-24[9] which required *de novo* review of punitive damages awards with no presumption of correctness. These provisions were declared *unconstitutional* on March 8, 1991 on separation of powers grounds (over strong dissents by Justices Houston, Maddox and Steagall) in *Armstrong v. Roger's Outdoor Sports, Inc.*, 581 So.2d 414 (Ala. 1991), reh'g denied May 10, 1991. However, following the release on May 14, 2001 in *Cooper Industries v. Leatherman*, *supra*, where 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," our Supreme Court in *Horton Homes, Inc. v. Brooks*, 832 So.2d 44, 57 (Ala. 2001) resurrected Ala. Code §§ 6-11-23(a), 6-11-23(b), and 6-11-24 and held on rehearing that *de novo* review of Alabama punitive damages awards was again required in conformance with the statutory mandates.

As noted, on its face the *Cooper Industries v. Leatherman* holding applied only in federal appellate courts, and applied only to federal civil jury verdicts for punitive damages challenged as unconstitutionally excessive. However, in *Horton Homes, Inc. v. Brooks*, the justices who dissented ten years earlier in *Armstrong v. Roger's Outdoor Sports*, had

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[7] Section 6-11-23(a) states: "No presumption of correctness shall apply as to the amount of punitive damages awarded by the trier of the fact."

[8] Section 6-11-23(b) states, in pertinent part, "… After such post-verdict hearing, the trial courts have independently (without any presumption that the award of punitive damages is correct) reassess the nature, extent and economic impact of such an award of punitive damages and reduce or increase the award if appropriate in light of all the evidence."

[9] Section 6-11-24 reads in its entirety:

> a) On appeal, no presumption of correctness shall apply to the amount of punitive damages awarded.
>
> b) The appellate court shall independently reassess the nature, extent and economic impact of such an award and reduce or increase the award if appropriate in light of all the evidence.

by then commanded a majority, and they seized on the language in *Cooper Industries* to declare *Armstrong* wrongly decided. The Court quoted with approval from *Leatherman* and held that it will "apply the *de novo* standard of review." *Horton Homes*, *supra*, 832 So.2d at 57.

a. Statutory Command About Evidence Which May Properly be Considered as Part of *De Novo* Review.

The comprehensive punitive damages tort reform legislation included a provision specifying the types of evidence to be considered during any post-verdict review of punitive damages awards for excessiveness. Section 6-11-23(b) states:

> (b) In all cases wherein a verdict for punitive damages is awarded, the trial court shall, upon motion of any party, either conduct hearings or receive additional evidence, or both, concerning the amount of punitive damages. Any relevant evidence, including but not limited to the economic impact of the verdict on the defendant or the plaintiff, the amount of compensatory damages awarded, whether or not the defendant has been guilty of the same or similar acts in the past, the nature and the extent of any effort the defendant made to remedy the wrong and the opportunity or lack of opportunity the plaintiff gave the defendant to remedy the wrong complained of shall be admissible; however, such information shall not be subject to discovery, unless otherwise discoverable, until after a verdict for punitive damages has been rendered. After such post-verdict hearing the trial court shall independently (without any presumption that the award of punitive damages is correct) reassess the nature, extent, and economic impact of such an award of punitive damages, and reduce or increase the award if appropriate in light of all the evidence.

Id. (emphasis added). Thus, the legislature embraced the seven *Green Oil* factors and the *BMW v. Gore* guideposts, codified them, and expanded upon them to include "[a]ny relevant evidence." The challenge created by this statutory language is to limit such relevant evidence to post-verdict considerations. It is not a license to reexamine the jury's liability verdict.

b. Remittitur v. Additur.

Regarding the last sentence of § 6-11-23(b), while trial and appellate courts are authorized to *reduce* a jury's punitive damages verdict because of excessiveness, they may not order an *additur* of punitive damages under any combination of the *Hammond*/*Green Oil*/*BMW v. Gore*/§ 6-11-23(b) factors. In *Bozeman v. Busby*, 639 So.2d 501 (Ala. 1994), the Court struck this provision of § 6-11-23(b) authorizing trial courts to grant additurs of punitive damages verdicts as violative of the right to trial by jury under Article 1, Section 11. In *Ex parte Vulcan Materials Co.*, 992 So.2d 1252 (Ala. 2008), the Court held that the *Hammond* hearing and *Green Oil* review process exist for the benefit of defendants to protect against due process violations arising from excessive damages awards, not as a mechanism for plaintiffs to seek an increase in such awards.

c. The Wrongful Death Punitive Damages Conundrum.

There remains an interesting and unresolved tension between the regulation of punitive damages verdicts in civil cases generally and the legislature's commands in Ala. Code §§ 6-11-21(j)[10] and 6-11-29[11] that such regulations not apply in Alabama wrongful death cases.

Alabama Code § 6-5-410(a) states: "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." *Id*. (emphasis added). This statute and the judicial interpretation that it allows only punitive damages predate the Alabama

[10] Section 6-11-21(j) states: "This section shall not apply to actions for wrongful death or for intentional infliction of physical injury."

[11] Section 6-11-29 states: "This article shall not pertain to or affect any civil actions for wrongful death pursuant to Sections 6-5-391 and 6-5-410, as amended."

Constitution of 1901. *See, e.g., South & North Alabama R.R. v. Sullivan*, 59 Ala. 272 (1877). Thus, the jury's determination of the sum of money necessary to punish and deter is unquestionably a finding of fact clothed with the protection of the Seventh Amendment and Article I, § 11. *See Gilbreath v. Wallace*, 292 Ala. 267, 292 So.2d 651 (1974). The present pattern jury instruction for wrongful death cases makes this plain:

> This is a claim for the wrongful death of (name of decedent).
>
> The damages in this case are punitive and not compensatory. Punitive damages are awarded to preserve human life, to punish (name of defendant) for (his/her/its) wrongful conduct, and to deter or discourage (name of defendant) and others from doing the same or similar wrongs in the future.
>
> The amount of damages must be related directly to (name of defendant)'s culpability, and by that I mean how bad (his/her) wrongful conduct was. You do not consider the monetary value of (name of decedent)'s life because the damages are not to compensate (name of plaintiff) or (name of decedent)'s family from a monetary standpoint because of (his/her) death.
>
> The amount you award is within your discretion based on the evidence and the guidelines in this instruction.

APJI Civil 4th 4.28 [PL] Wrongful Death.

In *Cain v. Mortgage Realty Co.*, 723 So.2d 631 (Ala. 1998), the Court concluded that because § 6-11-29 exempts punitive damages sought in wrongful death actions from the operation of the heightened evidentiary standard imposed by § 6-11-27(a) for the recovery of punitive damages generally, the trial court committed reversible error in a wrongful death case when it instructed the jury that it could not award punitive damages unless it found that the defendant's conduct met that heightened evidentiary standard.

Accordingly, it seems beyond debate that judicial review of any wrongful death verdict does in fact require deference to the jury's finding of fact about the amount necessary to punish the defendant for its bad conduct and to deter the defendant and

others similarly situated from engaging in such conduct in the future.

Nevertheless, in *Mack Trucks, Inc. v. Witherspoon*, 867 So.2d 307 (Ala. 2003), a wrongful death case brought under the Alabama Extended Manufacturers Liability Doctrine, the Court held – without substantive analysis of the statutory implications of §§ 6-11-21(j) and 6-11-29, that "[w]e review the trial court's award of punitive damages *de novo*, with no presumption of correctness." *Id*., at 309. The Court then remitted that $25,000,000 punitive damages award to $6,000,000 conditionally on threat of entry of order for a new trial. *Id*., at 310.

Numerous opinions since *Witherspoon* have continued to engage in *de novo* review of juries' wrongful death punitive damages verdicts despite the legislative command otherwise. *See, e.g., Boudreaux v. Pettaway*, 108 So.3d 486 (Ala. 2012); *Gillis v. Frazier*, 214 So.3d 1127 (Ala. 2014); *Springhill Hospitals, Inc. v. West*, 388 So.3d 648 (Ala. 2023).

VIII. How Does *De Novo* Review Work in Practice?

In *Duckhead Apparel Co. v. Hoots*, 659 So.2d 897 (Ala. 1995), the Supreme Court upheld the trial court's exclusion of evidence that was not properly directed at the *Green Oil* factors, confirming that the hearing has a defined and limited evidentiary scope. The Court held that "[s]uch hearings were not intended to become second-phase trials of cases." *Id*., at 909. Because the purpose of a *Hammond* hearing is specifically to "protect a defendant against due-process violations arising from an award of excessive damages," *Ex parte Vulcan Materials Co.*, *supra*, 992 So.2d at 1253, quoting *Ex parte Weyerhauser Co.*, 702 So,2d 1227, 1229 (Ala. 1996), it is not a mechanism for revisiting the jury's determination that a defendant's conduct was sufficiently reprehensible to warrant a

punitive damages verdict at all. *Duck Head* explains:

> Upon review of a jury verdict, a reviewing court will view the evidence in the light most favorable to the party in whose favor the verdict was returned, drawing all reasonable inferences to that end that the evidence will sustain. *King Motor Co. v. Wilson*, 612 So.2d 1153 (Ala. 1992). Furthermore, just as the presumption of correctness in favor of a verdict is strengthened when the circuit court denies a motion for new trial on the ground that the verdict is against the great weight and preponderance of the evidence, *Kent v. Singleton*, 457 So.2d 356, 359 (Ala. 1984), the circuit court's refusal to remit the punitive damages any further, and its *Hammond* findings as to the reprehensibility of [the defendant's] conduct, strengthen the presumption in favor of the verdict finding that [defendant's] activities were in fact highly deserving of punishment, not merely the result of accidents and mistakes as [defendant may contend]. …

Duck Head, 659 So.2d at 914. *Hammond*, *Green Oil*, and § 6-11-23(b) plainly catalogue the types of evidence that should be considered in post-verdict proceedings, including the trial evidence about the reprehensibility of the conduct, financial impact, remedial measures, awards in similar cases, any opportunities to remedy the wrong, costs of litigation, etc. In short, the post-verdict *Hammond* hearing may not be used to relitigate the defendant's liability for punitive damages in the first place.

If a defendant were allowed to withhold evidence from the jury, acquiesce in the jury reaching a verdict on the evidence presented to it, but then later present evidence to a trial judge post-verdict in an effort to impeach the verdict, the constitutionally protected right to trial by jury would be rendered meaningless. *De novo* review, as contemplated in *Cooper Industries v. Leatherman* and in *Horton Homes v. Brooks*, can mean only that the trial court in post-verdict proceedings, and the appellate court upon further review of the trial court's rulings for error, may review only the evidence introduced at trial about the reprehensibility of the conduct and then consider *that evidence* in light of the evidence admissible in the post-verdict *Hammond* hearing (such as evidence of available

insurance, financial impact, comparable awards and costs of litigation) to determine whether the jury's punitive damages verdict is greater than permissible to meet society's goals of punishment and deterrence without effecting an unconstitutionally arbitrary taking of a defendant's property. This is the essence of *de novo* review, an independent assessment of whether the new post-verdict evidence – which was not presented to the jury – requires a holding that the jury's punitive damages verdict punishes the defendant beyond the limits of due process.

De novo review cannot mean that a trial court judge in post-verdict proceedings or appellate judges in appellate proceedings are to consider new evidentiary matters and magically become second-guessing triers of facts. If permitted, a defendant could offer at post-verdict hearings evidence that the defendant simply failed (or refused) to present at trial in derogation of the strict limitations imposed for presentation of newly discovered evidence.[12] If permitted, this would completely undermine the *plaintiff's* right to trial by jury protected by the Seventh Amendment and Article I, § 11.

Any other construction of *de novo* review would throw out all traditional standards of review including, for example, the standard of review on summary judgment which, while reviewed *de novo* in an appellate court, applies the same standard as the trial court, *i.e.*, examines the evidence in the light most favorable to the non-moving party and resolves all inferences (and reasonable doubts) in favor of the non-moving party. *See, e.g., EBSCO Indus., Inc. v. Royal Ins. Co. of America*, 775 So.2d 128, 130 (Ala. 2000).

[12] To establish a right to a new trial based on newly discovered evidence, the movant must demonstrate: (1) that the evidence has been discovered since the trial; (2) that it could not have been discovered before the trial by the exercise of due diligence; (3) that it is material to the issue; (4) that it is not merely cumulative or impeaching; and (5) that the evidence will probably change the result if a new trial is granted. *Talley v. Kellogg Co.*, 546 So.2d 385 (Ala. 1989). All five requirements ordinarily must be met, so the failure to satisfy any single element is fatal to the motion. *Ex parte Heaton*, 542 So.2d 931, 933 (Ala. 1989).

The presumptions are designed to protect the non-moving party's right to trial by jury. The presumptions have never been undercut or rendered meaningless by appellate *de novo* review of a trial court's summary judgment order.

Same principles apply at the JML stage. The trial judge must view the evidence in the light most favorable to the plaintiff and indulge all inferences the jury might reasonably derive from the properly admitted evidence in determining whether there is an issue of fact to be decided by the jury. *Universal Dev. Corp. v. Bellinger*, 415 So.3d 1025, 1043 (Ala. 2024); *Mobile Infirmary Med. Ctr. v. Hodgen*, 884 So.2d 801, 808 (Ala. 2003). Any appellate review of that determination examines the evidence in the same way, with protection of the right to trial by jury by viewing the evidence in the light most favorable to the non-movant and considering inferences which the jury may have drawn in the non-movant's favor.

Accordingly, whatever is meant by *de novo* review of a jury's punitive damages verdict for excessiveness, it cannot mean that a trial court or an appellate court is permitted to substitute its determinations for those of the jury any more than *de novo* review of a summary judgment order or an order denying a motion for judgment as a matter of law might permit. In short, *de novo* review does not mean that trial or appellate judges may substitute themselves for the collective judgment of a jury. Rather, trial judges in post-verdict proceedings and appellate judges in appellate proceedings apply the *Hammond*/*Green Oil*/*BMW v. Gore*/§ 6-11-23(b) considerations *to the amount of the verdict* and determine only whether it is excessive *in light of the facts as found by the jury*.

IX. Examples of *De Novo* Review Cited with Approval by our Supreme Court.

Courts evaluate and apply the *Hammond*, *Green Oil*, *BMW v. Gore* and § 6-11-

23(b) factors in two ways: (1) describing the record evidence presented at trial concerning reprehensibility factors with a focus on "'[t]he duration of the conduct, the degree of the defendant's awareness of any hazard which his conduct has caused or is likely to cause, and any concealment or 'cover up' of that hazard, and the existence and frequency of similar past conduct,'" and (2) making factual findings regarding any "additional evidence" that the jury was not permitted to consider (e.g., financial impact, insurance, remedial measures, opportunities to remedy the wrong, cost of litigation, etc.). Courts then decide whether each factor weighs in favor of or against remittitur, determining the maximum constitutionally sustainable punitive damages award based on the balancing of those factors. The reviewing court then enters a written order reflecting its analysis – all while being careful to strictly adhere to the requirement that it not substitute its own judgment for that of the jury. U.S. Const. Amend. 7; Alabama Constitution of 1901, Art. I, § II.

A few examples of trial courts' post-verdict *Hammond* orders reviewing punitive damages awards for excessiveness illustrate the varied approaches cited with approval by our Supreme Court.

An early example (post-dating *Hammond*, *Green Oil* and § 6-11-23(b), but pre-dating *BMW v. Gore* and *Cooper Industries v. Leatherman*) is *Atkins v. Lee*, 603 So.2d 937 (Ala. 1992), where the Supreme Court of Alabama reviewed, with approval, the following portion of a trial court's order on reprehensibility:

> [I]n its order denying the defendants' post-judgment motions, the trial court observed that counsel for the Hospital had "participated with his client in withholding the name of a material witness." More specifically, the court stated:
>
> > "Following [Dr. Atkins's] testimony, the plaintiffs presented Nurse Cheryl Castner. Her testimony was in clear contradiction of Dr. Atkins. *There was evidence from which*

the jury could find that Children's Hospital had full knowledge of her whereabouts, but intentionally withheld her name from answers to interrogatories ordered by the court. It was undisputed that Ms. Castner had been contacted by the attorney for the defendant, Children's Hospital. *The evidence would allow the jury to conclude* that the attorney attempted to intimidate her and urged her not to become involved in the case....

"....

"Children's Hospital called as its only witness Mr. Pete VanPelt. He is the Risk Manager at Children's Hospital and was the last witness to testify in the case. The hospital had previously been ordered to answer interrogatories, which called for it to identify hospital employees who treated the Lee child. In response to that order, the hospital listed some 57 names. The request and the answer to this interrogatory were admitted into evidence during Nurse Geraci's testimony ['Geraci' was nurse Castner's former name]. Despite the numerous ... times Nurse Geraci had been involved in the Lee child's care, her name was not on the list.

"Mr. VanPelt testified that Nurse Geraci's name had been left off unintentionally because they could not read her name in the chart. In place of her name, the hospital listed the fictitious name of Nurse Cathy Guardanio. When asked to do so on cross-examination, Mr. VanPelt had no problem reading Nurse Geraci's name from the chart, and he readily admitted the hospital had payroll records from which it could have given more detailed information had it chosen to do so. *The jury was free to draw the inference from the evidence* that the hospital had intentionally withheld Nurse Geraci's name from the list of employees in an effort to preclude the jury from having the benefit of her observations....

"....

"Nurse Castner testified that the attorney for Children's Hospital had contacted her some time before trial and had recommended that she not talk to anyone, that she could not be subpoenaed, and that he was aware nurses did not have a lot of money and was trying to 'protect her.' ... Without question, i*f this evidence is believed by the jury*, these matters would support a conclusion of reprehensible conduct on behalf of this defendant."

(Emphasis added.) These observations of the trial court are fully supported

by the record.

Atkins v. Lee, 603 So.2d at 949 (emphasis added). The highlighted passages reflect clear and unequivocal deference to the jury's findings of fact and permissible inferences the jury may have drawn from the admitted trial evidence.

Another earlier medical negligence wrongful death opinion involving deceit and coverup by the defendant physician is *Campbell v. Williams*, 638 So.2d 804 (Ala. 1994). There, Ms. Williams brought an action in Etowah County following her mother's death by asphyxiation at the hands of Dr. Campbell at Holy Name of Jesus Hospital when her airway closed off from swelling following a severe work-related burn injury. Dr. Campbell admitted the mother, Ms. Sumpter, even though hospital policy required she be transferred to a Level 1 Trauma Center which was properly equipped to treat burn victims. After she died, Dr. Campbell had another physician change his records from what he actually observed:

> "Testimony at trial indicated that Dr. Campbell had another physician, Dr. Richard Gallo, change Dr. Gallo's records from a notation that Ms. Sumpter's respiratory failure occurred following a gradual closing of her airway, to a notation which indicated that her respiratory failure occurred suddenly. Dr. Campbell's summary of Ms. Sumpter's treatment included the notation that Ms. Sumpter had experienced a sudden coughing spell just before her respiratory failure and that he felt that she suffered airway blockage due to the presence of a mucous plug. The nurse who was with Ms. Sumpter when she began to experience respiratory distress, testified that there was no coughing spell."

The Supreme Court reviewed the findings of the trial court in its post-verdict *Hammond* order relative to the evidence of coverup:

> The trial court, in its order denying Dr. Campbell's motion for a judgment notwithstanding the verdict, or a new trial, or a remittitur, stated:
>
> > "As to the involvement of Dr. Campbell in a possible cover-up or concealment, <u>the Court must disagree with Dr. Campbell's</u>

> assertion that there was no evidence presented of such cover-up or concealment. Evidence was presented that Dr. Campbell asked another physician, Dr. Richard Gallo, to correct Dr. Gallo's notes which had indicated that Ms. Sumpter suffered a gradual closing-off of her airway. Dr. Campbell asked Dr. Gallo to change the notation so as to reflect that Ms. Sumpter suffered a sudden onset of the closing-off of her airway. [R.T. 959–61.] Additionally, Dr. Campbell's written report stated that Ms. Sumpter had respiratory arrest following a coughing spell. This was in contrast to the testimony of the nurse on duty who denied any coughing spell. [R.T. 106–08.] *While this evidence may not indicate an attempt to conceal facts about Ms. Sumpter's treatment, this Court cannot with assurance say that the jury did not consider that concealment existed and punished accordingly*."
>
> The trial court did not err in charging the jury on spoliation of the evidence, because there was evidence in the record to support the giving of the charge.

Id., at 817 (underlined and italicized emphasis added).

> The [circuit] court next addressed Dr. Campbell's conduct, viewing his professional treatment of Ms. Sumpter separately from his conduct concerning any alleged cover up or concealment of the circumstances surrounding Ms. Sumpter's death. The court noted that Dr. Campbell undertook to be diligent in treating Ms. Sumpter, and it did not consider his conduct in treating her to be reprehensible conduct. However, the court noted that the jury could have considered Dr. Campbell's role in any alleged cover up or concealment and punished him accordingly by its award of punitive damages.

Id., at 818 (emphasis added). Ultimately, the Supreme Court affirmed based upon its own independent (*de novo*) review of the trial court's findings of what the jury could have found or inferred from the evidence admitted during trial:

> From a review of the trial court's findings and from our independent review of the evidence, applying the *Green Oil* standards, we conclude that the $4 million punitive damages award in this case does not exceed an amount necessary to punish Dr. Campbell for his action and to deter him and others from committing similar acts in the future. Therefore, we affirm the trial court's denial of a remittitur.

Ibid.

In a more recent case – one decided after all the *Hammond*, *Green Oil*, *BMW v. Gore* and § 6-11-23(b) factors were in place - *Bednarski v. Johnson*, *supra*, the Supreme Court reviewed, with approval, a trial court's post-verdict *Hammond* order that after *de novo* review of the jury's wrongful death punitive damages verdict made its own factual findings from the record:

> The Bednarski defendants argue that "[t]here is no evidence of any reprehensible conduct." The Bednarski defendants' brief at 64. In its post-judgment order, *the trial court spent almost five full pages explaining the evidence supporting its conclusion that the Bednarski defendants' conduct in this case was reprehensible*. The Bednarski defendants do not directly address the trial court's analysis, but, in summary, they generally contend: (1) that their conduct was less reprehensible than that of Dr. Hensarling and Dr. Willis because, they say, the care Dr. Bednarski rendered to Hope on her first visit to the AUC clinic was adequate and they had no reason to expect any problems with Dr. Willis's care on Hope's second visit; (2) that Dr. Willis could have used Dr. Bednarski's login credentials to access AUC's electronic medical-records system on December 3, 2014; (3) that Dr. Willis knew on December 3, 2014, that Dr. Bednarski had treated Hope two days earlier; and (4) that what happened with Hope was an isolated incident.
>
> *To summarize the trial court's findings, it determined that* the conduct of the Bednarski defendants was more reprehensible than the conduct of either Dr. Hensarling or Dr. Willis because Dr. Hensarling's breach of the standard of care could properly be classified as a " 'mere accident' " and Dr. Willis's medical malpractice was the result of being bewildered and overwhelmed on the first day of his job at the AUC clinic, where he was asked to follow the established system or be discharged. By contrast, *the trial court found that* the Bednarski defendants' conduct contributing to Hope's death was the result of deliberate decisions designed to maximize financial gain.
>
> Specifically, *the trial court found that* the Bednarski defendants had deliberately implemented a system that assigned only one doctor to the AUC clinic and did not limit the number of patients that doctor could see per shift, often resulting in one doctor seeing between 50 and 90 patients in one 12-hour shift. *The trial court found that* this system encouraged doctors to take shortcuts and to make diagnostic guesses. *It further found that* Dr. Bednarski had taken shortcuts when he had treated Hope on December 1, 2014, by failing to properly document her medical record. *The trial court also found that* Dr. Bednarski had instructed Dr. Willis not to access the

> electronic medical-records system and that he had not given Dr. Willis a code to do so because Dr. Bednarski did not want to pay for an additional code. *The trial court stated:* "*Dr. Bednarski created a business model, not a healthcare model. It is a reasonable inference that the business model was reckless and thus endangered the safety of patients*."
>
> *The trial court further stated: "This Court finds from the evidence and all reasonable inferences to be drawn from the evidence that the degree of reprehensibility is quite high*. The case arose from a healthcare setting, in which the patient must rely upon the defendant doctor because the patient has no ability to make a diagnosis, determine a treatment plan, and prescribe appropriate medications. On December 1, 2014, Dr. Bednarski told Hope to return to Auburn Urgent Care if she was worse in a few days. [S]he returned, unbeknownst to her, with blood clots in her lungs[,] and still she was not evaluated, diagnosed, and treated. She came back to [the AUC clinic] because she was told to come back for follow-up medical care. What she got was anything but follow-up medical care. If she had been properly taken care of, she likely would be alive today."
>
> We conclude that *the trial court's findings with regard to the reprehensibility* of the Bednarski defendants' conduct *are supported by the record*, and we conclude that, based on those findings, this factor weighs in favor of affirming the damages awarded.

Id., 351 So.3d at 1056–57 (emphasis added). In *Bednarski*, the trial court made its own extensive factual findings in its *Hammond* order, including credibility assessments about witness testimony, but those findings were unquestionably consistent with and complimentary of the jury's verdict. The Supreme Court even quoted from the portion of the trial court's order that explained the trial court was "making these determinations upon consideration of all the evidence, drawing all reasonable inferences from the evidence, watching all the witnesses, and judging for itself the credibility of each witness and the weight to be given the testimony of each witness." *Id*., at 1058. In short, a trial judge may make its own factual findings after *de novo* review, so long as those findings are consistent with and do not impugn the jury's factual findings. Recall *Hammond*'s command: "a trial judge may not substitute his judgment for that of the jury."

Most recently, in *Springhill Hospitals, Inc. v. West*, *supra*, the Supreme Court reviewed, again with approval, another trial court's order that made its own factual findings following a comprehensive post-judgment *Hammond* hearing during which extensive evidence was presented by both sides:

> In its analysis of the degree of reprehensibility in the June 27, 2022, postjudgment order, *the trial court first observed* that "[v]irtually every expert testified Mr. West received an extremely high dose of Dilaudid (8 milligrams within one hour and fifty-one minutes)." *That observation is borne out by the record*: witnesses for both parties testified that the doses given were "egregious," "extremely high," and "excessive." Nurse Elenwa herself described the Dilaudid doses listed in the MAR as "ridiculous," "not appropriate," "unacceptable," and a "gross violation" of the standard of care.
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> …
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> SMH also argues that it was unfair of *the trial court to place "significant emphasis on Nurse Elenwa's lack of truthfulness at her deposition* when she denied that she had administered any Dilaudid to Mr. West" because, "when Nurse Elenwa gave her erroneous deposition testimony, she was a former employee living in a different state."16 SMH's brief, p. 55. SMH cites no authority in support of that argument. Moreover, SMH ignores the fact that, *as the trial court observed*, SMH did not concede that its medical records were accurate until just before the trial. Up to that point, SMH wanted to maintain the option of being able to argue to the jury that Nurse Elenwa was telling the truth. In fact, even in closing arguments at trial, SMH's counsel attempted to excuse Nurse Elenwa's testimony by contending that she was remembering the medication she had given to another patient. Moreover, *the trial court noted SMH's lack of documentation for giving Narcan to Mr. West* even though his estate was billed for five missing doses of Narcan. Finally, it is undisputed that SMH inexplicably failed to order a forensic-pathology autopsy that would include a finding as to Mr. West's cause of death despite the fact that SMH had a policy that, in sudden and unexpected death situations, ordering such an autopsy from a medical examiner was required. Thus, *several pieces of evidence supported the trial court's inference* that SMH attempted to cover up the mistakes that led to Mr. West's death. We do not believe that it was inappropriate for the trial court to consider that evidence in determining the degree of reprehensibility.
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> Concerning reprehensibility, the trial court also noted:
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> > "SMH admitted at the time of Mr. West's death it had been

> aware of opioid induced respiratory depression for years, including the emphasis on creating a safety program and policies and procedures to address the issue, and that it did not create those programs and policies. SMH employees testified that the failure to do so was 'not acceptable,' and agreed that in retrospect there should have been a policy for continuous pulse oximetry monitoring for high risk patients receiving opioids."
>
> SMH does not deny the truth of those statements. Instead, it complains that the trial court ignored evidence indicating that its practices "corresponded to what many hospitals in the country were doing at the time of Mr. West's death." SMH's brief, p. 56. But the evidence SMH cites was either not admitted at trial (in the case of testimony from Dr. Downs) or it did not establish what "many" hospitals were doing (in the case of testimony from Nurse Nash). In contrast, Mrs. West elicited testimony from a number of witnesses concerning SMH's failure to have policies and procedures with respect to the well-known dangers that accompany the administration of opioids by IV. For example, Mrs. West's CNO expert, Kim Arnold, testified that, in June 2014, SMH had no policies regarding opioid administration by IV, no training for nurses in IV opioid/hospital-patient safety, no dosing guidelines, and no monitoring policies in place. Thus, Arnold's testimony -- and that of other witnesses -- supports *the trial court's finding of a high degree of reprehensibility*.

Id., 388 So.3d at 673-74 (footnotes omitted; emphasis added). In *West*, the Court specifically noted that the trial court considered "Nurse Elenwa's adamant denials that she had administered any Dilaudid" as evidence of "concealment, cover up, (and) deceit" in determining reprehensibility. *Id*., at 674 fn.16. This again demonstrates that credibility determinations about witnesses' truthfulness may be proper components of a trial court's reprehensibility analysis, so long as consistent with the jury's findings. *Hammond*, *supra*.

Other examples of trial courts' post-verdict *Hammond* orders following *de novo* reviews of punitive damages verdicts for excessiveness which met with approval by the Supreme Court of Alabama include: *ALFA Mut. Ins. Co. v. Brewton*, 554 So.2d 953, 958 (Ala. 1989); *Life and Acc. Ins. Co. v. Harrington*, 658 So.2d 892, 904 (Ala. 1994); *Duck*

Head Apparel Co., Inc. v. Hoots, 659 So.2d 897, 907-908 (Ala. 1995); *Life Ins. Co. of Georgia v. Parker*, 726 So.2d 619, 622 (Ala. 1998); *S. Pine Elec. Co-op. v. Burch*, 878 So.2d 1120, 1130 (Ala. 2003); *Boudreaux v. Pettaway*, 108 So.3d 486 (Ala. 2012); *Target Media Partners Operating Co., LLC v. Specialty Mktg. Corp.*, 177 So.3d 843, 879-882 (Ala. 2013); and *Alabama River Grp., Inc. v. Conecuh Timber, Inc.*, 261 So.3d 226 (Ala. 2017).

X. Conclusion.

Following *Cooper Industries* and *Horton Homes*, *de novo* review of punitive damages verdicts requires trial and appellate courts to independently assess whether the *amount* of the punitive damages verdict is constitutionally excessive under Due Process principles. This review entails application of the United States Supreme Court's three *BMW v. Gore* "guideposts," the Alabama Supreme Court's seven *Green Oil* "factors," the statutory criteria set out in Ala. Code § 6-11-23(b) and, following the command in *Hammond*, any other factors which might bear on whether the jury's verdict exceeds the amount necessary to accomplish Alabama's societal goals of punishment and deterrence without exceeding the amount which jars constitutional sensibilities. Trial and appellate courts are to weigh and consider whether the guideposts and factors or any combination thereof warrant remittitur or leaving the verdict intact. But trial and appellate courts must *always* respect and give deference to the jury's findings of facts from the evidence and permissible inferences presented during the trial.

In the context of Alabama wrongful death punitive damages verdicts, there are compelling constitutional principles suggesting there should not be *de novo* review of a jury's wrongful death verdict because the jury is charged with ascertaining the sum

necessary to punish and deter given all the evidence of just how bad the defendant's conduct was. The legislature expressly exempted wrongful death verdicts from the comprehensive tort reform regulations of punitive damages in § 6-11-21(j) and § 6-11-29. Our Supreme Court has not yet answered how these legislative commands may be ignored out of deference to the holding in *Cooper Industries v. Leatherman* when *Leatherman* itself recognizes that the Seventh Amendment protects juries' factual findings.

At bottom, post-verdict *Hammond*/*Green Oil*/*BMW v. Gore*/§ 6-11-23(b) hearings were not intended to become second-phase trials of cases. Trial courts in post-verdict proceedings and appellate jurists in appeals must safeguard against attempts by defendants to revisit in such post-verdict *Hammond* proceedings the trial evidence which led the jury to return a verdict for punitive damages in the first place. The jury's factual findings are *sacrosanct*, and our right to trial by jury must remain *inviolate*.