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No. _____

**IN THE SUPREME COURT OF APPEALS
OF WEST VIRGINIA**

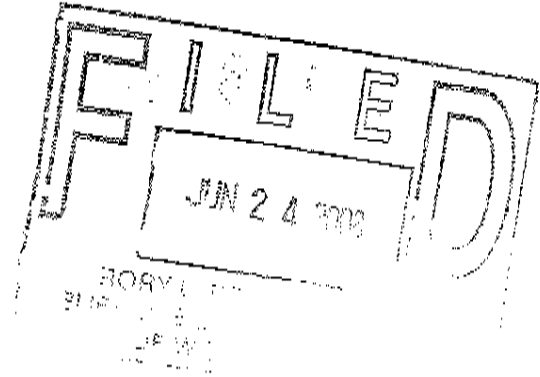
E.I. DU PONT DE NEMOURS AND COMPANY,

Petitioner,

v.

LENORA PERRINE, et al.,

Respondents.



***AMICUS CURIAE* BRIEF ON BEHALF OF JOE MANCHIN, III,
GOVERNOR OF THE STATE OF WEST VIRGINIA**

Respectfully submitted,

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STATE OF WEST VIRGINIA

COMES NOW the Honorable Joe Manchin, III, Governor of the State of West Virginia (the "Governor"), by counsel, and pursuant to Rule 19 of the West Virginia Rules of Appellate Procedure, hereby submits this *amicus curiae* brief in support of the petition for appeal. Because the disposition of cases involving punitive damages awards at the petition stage raises significant due process concerns, the Governor respectfully requests that this Court grant the petition to clarify the law regarding the constitutionally mandated appellate review of punitive damages.

INTEREST OF AMICUS

Petitioner E.I. du Pont Nemours and Company seeks appellate review of a jury verdict delivered in the Circuit Court of Harrison County that, *inter alia*, awarded over one hundred ninety-six million dollars in punitive damages. Numerous decisions guarantee the right to appellate review of such an assessment of punitive damages. However, this Court has concluded that its obligation

to conduct a meaningful and adequate appellate review of a punitive damages award is satisfied through the mere consideration (and rejection) of a petition for appeal. See Syl. Pt. 2, *Garnes v. Fleming Landfill, Inc.*, 186 W. Va. 656, 413 S.E.2d 897 (1992) (indicating that a meaningful and adequate review “may occur when an application is made for an appeal.”).

Since *Garnes* was decided, however, the United States Supreme Court has provided additional guidance to appellate courts that are presented with challenges to the constitutionality of punitive damages awards. Namely, in *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408 (2003), the Court held that the Due Process Clause of the Fourteenth Amendment guarantees the right to *de novo* appellate review of an award of punitive damages. As a result, serious questions are raised as to whether this Court’s constitutional obligation to provide *de novo* appellate review of a punitive damages award may be satisfied by the mere consideration of a petition for appeal. Indeed, this practice appears to place this Honorable Court in conflict with the mandates of the United States Supreme Court, thereby depriving litigants like the Petitioner the minimum due process protections guaranteed by the Fourteenth Amendment.

Ensuring that West Virginia courts provide the appropriate level of appellate review to Petitioner, as well as all other parties seeking review of punitive damages awards, is an issue of vital public importance to the State and her citizens. Consequently, the Governor is interested in one of the central issues highlighted by this case and other petitions seeking review of punitive damages awards: What sort of appellate review is required by the Due Process Clause?

DISCUSSION OF LAW

I. Adequate appellate review is critical to the fair and rational imposition of punitive damages.

Punitive damages serve as an important legal remedy in West Virginia courts; when justified, the award of punitive damages can serve to effectively punish wrongdoers and discourage future wrongdoing. As this Court has stated,

It is axiomatic that when consumers, employees, etc. are the victims of illegal, wilfully and wantonly wrongful, and/or fraudulent misconduct, the social remedy of punitive and penalty damages may be a powerful tool – for the benefit of the plaintiff and for the benefit of society in general – to punish the wrongdoer and to deter the commission of similar offenses in the future.

State ex rel. Dunlap v. Berger, 211 W.Va. 549, 567 S.E.2d 265, 278 (2002) (internal quotations and citation omitted). Whereas compensatory damages “are intended to redress the concrete loss that the plaintiff has suffered by reason of the defendant’s wrongful conduct[,]” punitive damages, by contrast, “serve a broader function; they are aimed at deterrence and retribution.” *State Farm*, 538 U.S. at 416 (citations omitted); *see also BMW of North America, Inc. v. Gore*, 517 U.S. 559, 568 (1996) (“Punitive damages may properly be imposed to further a State’s legitimate interests in punishing unlawful conduct and deterring its repetition.”); *Garnes*, 413 S.E.2d at 901-02 (“Punitive damages are necessary when compensatory damages are not large enough to convince a defendant or future defendants to take precautions against similar problems.”).

Nevertheless, the “punitive” nature of such awards dictates that appellate courts conduct a careful and detailed examination of those instances in which punitive damages have been assessed. As the United States Supreme Court has noted, exacting appellate scrutiny of punitive damages is imperative since “[p]unitive damages pose an acute danger of arbitrary deprivation of property.”

Honda Motor Co. v. Oberg, 512 U.S. 415, 432 (1994); *see also Pacific Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1, 42 (1991) (O'Connor, J., dissenting) ("Punitive damages are a powerful weapon. Imposed wisely and with restraint, they have the potential to advance legitimate state interests. Imposed indiscriminately, however, they have a devastating potential for harm."); *Garnes*, 413 S.E.2d at 902 ("[u]nchecked punitive damages awards . . . can have effects that are detrimental to society as a whole."). Accordingly, appellate review is an essential component to a fair and rational system for imposing punitive damages; absent such review, the "acute danger" that an excessive and unsupported award will be left standing becomes even more pronounced.¹

II. Due process mandates *de novo* appellate review of punitive damages awards.

To that end, the United States Supreme Court has recognized that detailed appellate review of punitive awards serves as the foundation of the procedural rights afforded to litigants. In *Haslip*, *supra*, the Court examined the constitutional sufficiency of procedures used by the State of Alabama in punitive damages cases. In concluding that the procedures were constitutional, the Court took particular note of the Alabama Supreme Court's practice of conducting thorough appellate review of punitive awards, which provides "an additional check on the jury's or trial court's discretion" and "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." *Haslip*, 499 U.S. at 20-21. Similarly, in a case arising in West Virginia, *TXO Production Corp. v. Alliance Resources Corp.*, 509 U.S. 443, 465 (1993), the Court was presented with the argument that the jury's award of

¹ Additionally, the circuit courts of West Virginia could benefit from this Court's guidance regarding some of the complex issues raised by the award of punitive damages in the instant case, namely whether voluntary conduct that appears to comply with applicable federal and state regulatory provisions can constitute the type of "wanton, willful or reckless" conduct necessary to sustain a punitive damages award. *See* Syl. Pt. 4, *Mayer v. Frobe*, 40 W. Va. 246, 22 S.E. 58 (1895).

punitive damages was not adequately reviewed by the appellate court.² *Id.* at 462-63. Rejecting this contention, the Supreme Court praised this Court for its detailed analysis and “thorough opinion,” which “was unanimous and gave careful attention to the relevant precedents.” *Id.* at 465.

In *Honda Motor Co., Ltd. v. Oberg*, 512 U.S. 415, 432 (1994), the Court moved beyond merely considering lower courts’ appellate procedures and explicitly held for the first time that the Constitution *requires* judicial review of punitive damages awards. Noting the historical and long-standing tradition of judicial review as a safeguard against excessive punitive damages awards, the Court invalidated an amendment to the Oregon Constitution that prohibited judicial review of punitive damage awards under certain circumstances, observing that the “denial of judicial review of the size of punitive damages awards violates the Due Process Clause of the Fourteenth Amendment.” In so holding, the Court acknowledged its prior decisions in *Haslip* and *TXO*, which “stressed the availability of both ‘meaningful and adequate review by the trial court’ and *subsequent appellate review*.” *Id.* at 420 (quoting *Haslip*, 499 U.S. at 20) (emphasis added).

Two years later in *Gore, supra*, the Court further expounded on its prior decisions, concluding that due process ensures not simply a fair procedure, but also a fair substantive result. *Gore*, 517 U.S. at 574. To extend “fair notice” to litigants facing potential punitive awards of the “severity of the penalty that a State may impose,” *Id.*, the Court crafted three guideposts for courts to utilize in reviewing the substantive constitutionality of punitive awards.³ *Id.* at 575.

² However, it is important to emphasize that the *TXO* Court was not presented with the opportunity to opine on the central issue raised in this brief: whether the mere consideration of punitive damages awards at the petition stage – standing alone – passes constitutional muster. In *TXO*, this Court had granted the petition for appeal, which led to the extensive briefing, oral argument, and ultimately a “thorough” opinion.

³ The three guideposts include: (1) the degree of reprehensibility of the defendant’s misconduct; (2) the disparity between the actual or potential harm suffered by the plaintiff and the punitive damages award; and (3) the difference between the punitive damages awarded by the jury and the civil penalties authorized or imposed in

Thereafter, in 2001, the Court's procedural and substantive due process jurisprudence came together in *Cooper Indus., Inc. v. Leatherman Tool Group, Inc.*, 532 U.S. 424 (2001). Faced with determining the appropriate procedural standard for reviewing the substantive merits of an award under the *Gore* guideposts, the Court ruled that such appellate review must be conducted *de novo*. *Id.* at 431. Explaining that certain legal concepts are "fluid" and "take their substantive content from the particular contexts in which [they] are being assessed[.]" the Court emphasized that an "independent review" by an appellate court is necessary to clarify the applicable legal principles, unify precedent, and stabilize the law. *Id.* at 436 (internal quotations and citation omitted). Moreover, the Court analyzed the institutional differences between trial and appellate judges and concluded that differing competencies between the two tip the scales in favor of strict, exacting appellate review. *Id.* at 440 (examining the three *Gore* guideposts, and reasoning that whereas "district courts have a somewhat superior vantage over courts of appeals" in considering the first criteria, they are both "equally capable of analyzing the second factor . . . [a]nd the third *Gore* criterion, which calls for a broad legal comparison, seems more suited to the expertise of appellate courts.").

Although the decision in *Cooper Industries* concerned only federal appellate review, the Court's subsequent decision in *State Farm, supra*, eliminated any doubt that "state appellate courts, too, must exercise *de novo* review over whether punitive damages are excessive." Erwin Chemerinsky, *The Constitution and Punishment*, 56 Stan. L. Rev. 1049, 1069-70 (2004). On certiorari to the Supreme Court of Utah, the *State Farm* Court opined that its decision in *Cooper Industries* "mandated appellate courts to conduct *de novo* review" of a trial court's application of the

comparable cases. *Gore*, 517 U.S. at 575.

Gore guideposts, writing: “Exacting appellate review ensures that an award of punitive damages is based upon an application of the law, rather than a decisionmaker’s caprice.” *State Farm*, 538 U.S. at 418 (internal quotation and citation omitted).

III. The consideration (and rejection) of a petition for appeal conflicts with post-*Garnes* due process guarantees.

Given this constitutional overlay, the possibility that an award of punitive damages could be summarily upheld through the refusal of a petition for appeal raises serious due process concerns. Admittedly, this Court has recognized that, to comport with the requirements of due process, punitive damages must be subject to both post-verdict and appellate review. *Garnes*, 413 S.E.2d 907-08; see also *Vandevender v. Sheetz, Inc.*, 200 W. Va. 591, 490 S.E.2d 678, 685 (1997) (“Through [the *Garnes*] decision, we imposed the necessary, but previously lacking, requirement of a ‘meaningful and adequate review’ by both the trial and appellate court systems[.]”). Furthermore, this Court has even acknowledged that *Cooper Industries* requires that appellate review of a punitive damages award must be conducted *de novo*. *Boyd v. Goffoli*, 216 W. Va. 552, 608 S.E.2d 169, 176-77 (2004) (citations omitted).

Despite this explicit recognition that due process requires “meaningful and adequate” – and *de novo* – appellate review, this Court, relying upon its decision in *Garnes*, frequently issues summary denials of petitions seeking review of punitive damages awards. As noted, the *Garnes* Court indicated that the obligation to conduct a “meaningful and adequate” appellate review of a punitive award may be satisfied through the consideration of a *petition* for appeal. See Syl. pt. 2, *Garnes*; see also Syl. pt. 5, *Id.* (noting that this Court will review punitive damages awards “upon petition”).

However, the mandates of *State Farm* brings this practice, as well as this aspect of the *Garnes* decision, into question. More to the point, it is unclear whether this Court's periodic practice of determining the validity of a punitive damages award solely through consideration of a petition for appeal could withstand constitutional scrutiny today. Unfortunately, the United States Supreme Court has not explicitly addressed whether this aspect of our process provides litigants with "meaningful and adequate" appellate review.⁴ However, a review of the Supreme Court's post-*Garnes* jurisprudence implies, at the very least, that the Constitution requires something more.

In attempting to discern the type of review that is required, this Court's own description of *de novo* review is illuminating. In *State v. Legg*, 207 W. Va. 686, 536 S.E.2d 110 (2000), this Court concluded that "[t]he term '*de novo*' means 'anew.' In other words, we review the circuit court's ruling in the same way that the circuit court made the ruling, as though the ruling were never made." *Id.* at 115 n.8. In *State ex rel. Clark v. Blue Cross Blue Shield of West Virginia, Inc.*, 203 W. Va. 690, 510 S.E.2d 764 (1998), this Court further explained the nature of *de novo* review, observing that the term is frequently used interchangeably with the term "plenary," which means "[f]ull, entire, complete, absolute, perfect, unqualified." *Id.* at 775 (quoting Black's Law Dictionary 1154 (6th

⁴ This is understandable – and the concerns especially pronounced – given the unique structure of West Virginia courts, where no civil litigant is provided an appeal as a matter of right and – lacking any intermediate appellate courts – this Court is the only appellate tribunal that can provide the level of review mandated by *State Farm*. And yet, this Court may grant or refuse a petition for appeal in its sole discretion. See Rule 7, West Virginia Rules of Appellate Procedure. By contrast, forty-eight States offer civil litigants at least one appeal as a matter of right, either to an intermediate appellate court or to the State's highest court. See Note, *Expanding the Due Process Rights of Indigent Litigants: Will Texaco Trickle Down?*, 61 N.Y.U. L. Rev. 463, 467 (1986) ("Today, appeal as of right . . . is the rule in federal court and in the courts of all states except New Hampshire, Virginia, and West Virginia."). In 2004, however, New Hampshire changed course, providing for a "mandatory appeal" as of right from a "final decision on the merits" issued by a trial court, subject to a handful of limited exceptions. See N.H. S.Ct. R. 3, 7. In addition, New Hampshire imposes significant statutory limits on punitive awards. See N.H. Rev. Stat. Ann. § 507:16 ("No punitive damages shall be awarded in any action, unless otherwise provided by statute.")

Thus, only West Virginia and the mother state of Virginia continue to provide only discretionary appeals in most civil cases. However, Virginia extends a critical safeguard against the "acute danger" posed by arbitrary punitive damages awards in the form of a statutory cap of \$350,000 on all punitive awards.

ed.1990) (citation omitted)). In other words, *de novo* review requires a fresh, independent determination of the issues at stake; as such, the appellate court is charged with placing itself in the trial court's place and determining anew the judgment made below. Indeed, *Cooper Industries's* mandate of *de novo* review was premised largely on the need for greater judicial scrutiny and control of punitive awards. *De novo* review, the Court explained, is "necessary if appellate courts are to maintain control of, and to clarify, the legal principles;" the *Gore* guideposts "will acquire more meaningful content through case-by-case application at the appellate level;" and further "*de novo* review tends to unify precedent and stabilize the law." *Cooper Indus.*, 532 U.S. at 436 (internal quotations omitted).

As the foregoing would suggest, the *de novo* review mandated by *Cooper Industries* and *State Farm* must at least be one that turns on the merits. However, it is a well-settled principle of West Virginia law that this Court's rejection of a petition for appeal is not a consideration of the merits of the petition. As this Court expressly stated in *Triggs v. Berkeley County Bd. of Educ.*, 188 W. Va. 435, 425 S.E.2d 111, 118 n.9 (1992), the rejection of a petition for appeal "is not an adjudication on the merits and does not carry any implication of approval of the judgment sought to be reviewed." See also *Syl., Smith v. Hedrick*, 181 W. Va. 394, 382 S.E.2d 588 (1989) ("This Court's rejection of a petition for appeal is not a decision on the merits precluding all future consideration of the issues raised therein, unless, as stated in Rule 7 of the West Virginia Rules of Appellate Procedure, such petition is rejected because the lower court's judgment or order is plainly right, in which case no other petition for appeal shall be permitted."); *Blackburn v. State of West Virginia*, 170 W. Va. 96, 290 S.E.2d 22, 27 (1982) (noting that an appellate court's "refusal to docket an application for appeal from the judgment of an inferior court is not a final judgment having *res judicata* effect unless the

appellate court's rejection of the application for appeal specifically addresses the issues raised by the applicant and finds that the lower court's judgment is plainly right"). Insofar as the rejection of a petition for appeal neither operates as, nor even purports to be a decision on the merits, the disposition of appeals involving punitive damages awards in this manner arguably runs afoul of the mandates of *State Farm*.

Regardless of whether the summary disposal of such petitions is deemed to turn on the merits, however, it appears to fall well short of the exacting, *de novo* review required by the Fourteenth Amendment. At a minimum, *State Farm*'s mandate casts a shadow over the adequacy of our state's punitive damages procedural safeguards. Taken into context, the appellate procedures approved in *Garnes* appear thin in comparison to the weight of authority discussed above. Indeed, if due process requires "exacting" (and *de novo*) appellate review, under what circumstances will the mere consideration (and terse denial) of a *request* for an appeal withstand constitutional scrutiny? Given *Cooper Industries*'s recitation of appellate courts' duty to stabilize and refine the law by articulating its reasons for affirming or rejecting a plea for appellate relief, a one-sentence denial of an application for appeal provides little "meaningful content" to the substance of this State's punitive damages jurisprudence. Broadly speaking, the value of written judicial opinions lies in their demonstration of the "recognition that under a government of laws, ordinary people have a right to expect that the law will apply to all citizens alike Even to approach a goal of consistency, litigants, lawyers, reviewing judges, the press, and ordinary citizens need to know why a particular judge came to a particular decision in a particular set of circumstances." Patricia M. Wald, *The Rhetoric of Results and the Results of Rhetoric: Judicial Writings*, 62 U. Chi. L. Rev. 1371, 1372 (1995).

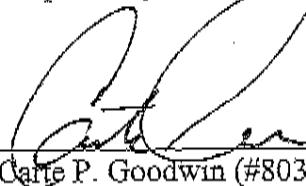
Here, the value of a detailed, exacting review and opinion is especially salient; indeed it is mandated to ensure that a punitive award is based upon the law, rather than caprice. However, a summary refusal of a petition for appeal provides no such assurances; its reasoning is obscure, its justifications elusive or nonexistent. When an opinion is effectively silent – as such summary rejections are – there is no assurance that adequate appellate review (and therefore due process) was actually afforded to the litigants. Although entirely appropriate in most settings, when presented with a litigant's only opportunity for the constitutionally mandated *de novo* review of a punitive damages award, this process appears lacking.

A West Virginia jury, exercising the sovereign power of the State, has punished the Petitioner severely. Petitioner now seeks what due process requires – a meaningful, adequate, and *de novo* review of its nine figure punishment. Such an exacting and fresh examination of the record – even if affirmance is warranted – should be provided.

CONCLUSION

WHEREFORE, in light of the foregoing, the Governor respectfully requests that this Court grant the Petition for Appeal and clarify the law regarding the type of appellate review afforded to awards of punitive damages.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I, Carte P. Goodwin, on behalf of the Honorable Joe Manchin, III, Governor of the State of West Virginia, hereby certify that "**AMICUS CURIAE BRIEF ON BEHALF OF JOE MANCHIN, III, GOVERNOR OF THE STATE OF WEST VIRGINIA**" was served upon the persons listed below by mail in accordance with the requirements of the West Virginia Rules of Civil

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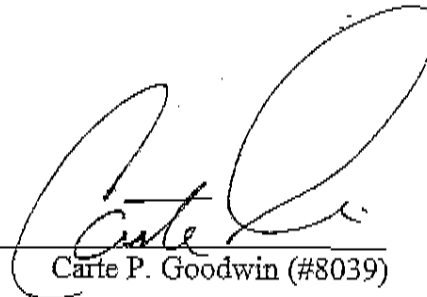
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