

CASE NOS. 1131285, 1131380 & 113181

IN THE SUPREME COURT OF ALABAMA

NINETEENTH STREET ENTERPRISES, et al.,

Appellants,

v.

SHARON ROBERTSON, as mother of TIMOTHY ANDREW, et al.,

Appellees.

ON APPEAL FROM THE CIRCUIT COURT OF
JEFFERSON COUNTY, ALABAMA

BRIEF OF AMICUS CURIAE
ALABAMA DEFENSE LAWYERS ASSOCIATION

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INTEREST OF THE AMICUS CURIAE

The Alabama Defense Lawyers Association ("ADLA") is a non-profit association of over 1,000 Alabama lawyers who devote a substantial portion of their professional practice to the defense of civil lawsuits. Founded in 1964, ADLA's purpose includes promoting improvement in the administration and quality of justice. Consistent with ADLA's stated purpose, the Association, by and through its *Amicus Curiae* Committee, often participates in cases that involve important questions of law to assist the Court in its consideration and resolution of those cases. ADLA and its undersigned counsel have no pecuniary interest in this case and no professional relationship with the parties. ADLA is grateful for the opportunity to submit the following authorities and argument in response to the Court's order issued October 1, 2015 inviting the ADLA to submit a brief herein.

I. STATEMENT OF THE CASE

This case involves a 20-year old adult who was allegedly sold beer illegally (being underage) and who then, while intoxicated, drove and crashed her automobile injuring three minors (also drinking) who were passengers. One passenger was killed and two seriously hurt, as well as the driver whose mother has made a claim. The plaintiffs sued the alleged seller of the beer, Nineteenth Street Investments, Inc. (Nineteenth), which operated a convenience store where the beer allegedly was sold.

In the trial below, a jury returned verdicts totaling \$15.15 million dollars, including \$13.5 million in punitive damages and \$1.65 million in compensatory damages. The individual verdicts were in the following amounts:

Sharon Robertson As parent of Drew Robertson	\$7,000,000 (Wrongful Death)
Jennifer Vickery	\$ 900,000 (Compensatory) \$3,000,000 (Punitive)
Michael Waldrop	\$ 750,000 (Compensatory) \$3,000,000 (Punitive)
Tammy Hardin Mother of Brittany Caffee (driver)	\$ 500,000 (Punitive)
Total Gross	\$15,150,000
Total Punitive	\$13,500,000

On post-verdict review, the trial court upheld each verdict in its entirety. It further cleared the way for the plaintiffs to enforce those judgments (both compensatory and punitive) against Nineteenth's parent company and its sole shareholder by declining to recognize Nineteenth's separate corporate status.

In its Order dated October 1, 2015, this Court requested an *amicus curiae* brief from the Alabama Defense Lawyers Association. It seeks input on three questions involving the standards for excessiveness review of multiple verdicts for punitive damages. It also asks whether comparative fault is a proper consideration on excessiveness review, given the distinction between compensatory and punitive damages.

II. QUESTIONS PRESENTED

1. Case law makes clear that contributory negligence/fault on the part of the plaintiff does not prohibit recovery of compensatory damages in a "dram shop" case such as this. May the fault of the plaintiff be considered in determining whether and in what amount punitive damages may be appropriate?
2. In a punitive damages case with multiple plaintiffs, should punitive damages be assessed for each individual plaintiff or should there be one punitive damage amount which is then divided between the plaintiffs?

3. Should this Court review the amount of punitive damages awarded to the individual plaintiffs in isolation to determine whether the punitive damages are excessive or should this Court review the total punitive damages awarded in the case for excessiveness?

III. SUMMARY OF THE ARGUMENT

The process of Constitutional review of a punitive damages judgment has become more exacting in the ensuing years since the original enactment of the statutory remedies involved here. A court must review all potential mitigating factors that reflect on the fundamental fairness of the punitive judgment (as viewed from the standpoint of the defendant). It would seem from the relevant case law and statutory history that any shared fault by the plaintiffs is a factor that can and should be weighed in the Due Process excessiveness analysis.

The issue of multiple punitive damage awards has been flagged by the U.S. Supreme Court as an area of constitutional concern. Due Process principles of double jeopardy come into play when a person faces multiple punishments for the same act or course of conduct. This suggests the need to evaluate the punitive awards both in the aggregate *and* individually. The overall total must be fair in relation to the wrongful conduct and the

defendant's position, while unique differences (such as Wrongful Death) may require a different allocation. A fully compensated plaintiff, for instance, has no interest in punitive damages where punishment has been achieved in another case.

Within the boundaries of Due Process reasonableness, it appears this Court has discretion to allocate the punitive damages to best serve public policy and state law. No risk of constitutional prejudice exists for the plaintiffs who, under Alabama law, have no legal right to punitive damages and serve essentially as an "agent of the state" in seeking to enforce public policy. The balancing of these public and private interests, which differ for compensatory and punitive damages, is a role for which this Court is uniquely suited.

Finally, the punitive-compensatory distinction has ramifications for enforcement of the judgment, since Due Process forbids any attempt to visit the financial burden of a punitive award upon a third party not involved in the wrongful conduct.

IV. ARGUMENT

The law of punitive damages has evolved much since the enactment of the statutes involved here. The Court is right to take a fresh look at how punitive damages are assessed under these statutes, since many of the Court's prior decisions construing the statutes were rendered well before Due Process excessiveness standards, at a time when this Court made little or no distinction between compensatory and punitive damages. Many factors go into answering the three questions posed by the Court, which *amicus* will summarize briefly by way of preface.

Despite the broad discretion of states to assess criminal penalties and punitive damages, "the Constitution imposes certain limits, in respect both to *procedures* for awarding punitive damages and to *amounts* forbidden as "grossly excessive.'" Philip Morris USA v. Williams, 549 U.S. 346, 353 (2007) (emphasis added). Unlike actual damages, which present a question of historical fact, the question of whether and how much to punish certain conduct is fundamentally a public policy determination for the courts under the Due Process clause of the Fourteenth Amendment. Cooper Indust., Inc. v. Leatherman Tool Grp.,

Inc., 532 U.S. 424, 437 (2001); Honda Motor Co. v. Oberg, 512 U.S. 415, 434-35 (1994).

"As long as this discretion is exercised within reasonable constraints, Due Process is satisfied," Pacific Mutual Life Ins. Co. v Haslip, 499 U.S. 1, 20 (1991), and states are free to exercise their authority, which authority "is large." Gasperini v. Center for Humanities, Inc., 518 U.S. 415, 433 (1996).

Nevertheless, the process of drawing the constitutional line of excessiveness is "not an easy task,"¹ as it requires identifying all relevant criteria that shape society's notion of fair punishment, including (for example) "the relationship between the penalty and the harm to the victim caused by the defendant's actions." Leatherman, 532 U.S. at 435. That "relationship" is at the heart of the Court's questions in this case, since it encompasses the factual context of the injury-causing harm, including any contributory fault by the parties.

A reviewing court must consider that certain cases such as this one involve "fluid" liability standards, which

¹ Browning-Ferris Indust. v. Kelco Disposal, Inc., 492 U.S. 257, 300 (1989) (O'Connor, J., dissenting.)

"take their substantive content from the particular context in which the standards are being assessed," rendering the determinations more subjective and susceptible to error. Leatherman, 532 U.S. at 436. The more subjective a punitive award, the more judicial scrutiny is required since such decisions are vulnerable to bias and emotion, especially with minors.

This process of excessiveness review also requires awareness that the *character* of punitive damages has changed over time, as observed by the Leatherman court. 532 U.S. at 437 n.11. It noted that punitive damages historically were intended partially to compensate for intangible injuries where such compensation was not otherwise available under the then narrower concepts of compensatory damages prevalent at the time. Today's concept of compensatory damages has been broadened to allow plaintiffs to seek compensation for those same intangible injuries, such as mental anguish, which now have become a recoverable element of compensation. Id. (citations omitted). See also, State Farm Mut. Ins. Co. v. Campbell, 538 U.S. 408, 426 (2003).

The beginning point for excessiveness review is the principle that where a plaintiff already is made whole by compensatory damages, "punitive damages should only be awarded if the defendant's culpability is so reprehensible as to warrant further sanctions to achieve society's goal of punishment and deterrence." Campbell, 538 U.S. at 419. Alabama recognized this principle a century earlier, that the punishment should be "an amount in damages sufficient to punish for the wrong done [and] *no more damages than that* should be awarded." Randle v. Birmingham Ry., Light & Power Co., 169 Ala. 314, 53 So. 918, 920 (1910) (emphasis added).

The right question, therefore, is not what amount is the largest that can be justified, but *what is the least amount* (if any) necessary to achieve society's goal of punishment and deterrence, given the nature of the harm and the station of the defendant. See Horton Homes Inc. v. Brooks, 832 So. 2d 44, 55 (Ala. 2001); Wilson v. Dukona Corp., 547 So. 2d 70, 72-73 (Ala. 1989). This process requires application of the strictest review standard (*de novo*) which must be undertaken by the Court independently and without any deference to the trial court's verdicts or

post-judgment rulings. Leatherman, 532 U.S. at 443; Horton Homes, 832 So. 2d at 55-57.

The purpose of these heightened review standards is to ensure a high degree of confidence in the punitive result. The public policy determinations necessary to this process are uniquely within this Court's expertise. Likewise a heightened scrutiny is critical where, as here, the claims were brought under a statutory cause of action that was non-existent at common law and thus is "in derogation," requiring "strict construction" to ensure the claim (and any ensuing punishment) does not exceed the Legislature's specific intent at the time of passage.

A court also "should accord 'substantial deference' to legislative judgments concerning appropriate sanctions for the conduct at issue." BMW of North America, Inc. v. Gore, 517 U.S. 559, 583 (1996). These include legislative and regulatory caps, fines, penalties, and other societal measures of the severity of certain conduct. A prime example is Ala. Code § 6-11-21 (1975), which authorizes punitive damages for certain classes of wrongdoing, subject to maximum limits. The appellees argue they are exempt from those limitations in statutory Dram Shop claims. Even where

non-binding, however, such limits serve at least as an objective benchmark of society's judgment about the reprehensibility and appropriate punishment for certain wrongdoing. They are not only relevant; a court applying Federal constitutional standards would likely give "less indulgen[ce]" to a punitive award made without the benefit of an objective legislative limit to serve as a guide. See Kelco Disposal, 492 U.S. at 281. (Brennan, J., concurring).

Fundamentally, a punitive damages claim is essentially a state action in which the plaintiff's role is to serve as an "agent of the state" in representing society's interest in punishing wrongful conduct. Maryland Cas. Co. v. Tiffin, 537 So. 2d 469, 471 (Ala. 1988). This is particularly true in a wrongful death claim, where the plaintiff is said to serve "by legislative appointment for declaring the public policy" of the state condemning certain wrongful conduct. Geohagan v. General Motors Corp., 291 Ala. 167, 171, 279 So. 2d 436, 439 (1973). A trove of articles and opinions discusses this feature of the act.²

² See, e.g., Tatum v. Schering Corp., 523 So.2d 1042 (Ala. 1988); Black Belt Wood Co. v. Sessions, 514 So.2d 1249 (Ala. 1987); Bert S. Nettles & Forrest S. Latta, Alabama's Wrongful Death Statute: A Problematic Existence,

Legal standards such as strict construction also come into play in assessing whether any punitive damages are appropriate, as illustrated (for example) in Geohagan v. General Motors Corp., 291 Ala. 167, 171, 279 So. 2d 436, 439 (1973). The court dismissed a statutory warranty claim for wrongful death on grounds that it was "[in]compatible . . . with the concept that *any action permissible under our wrongful death acts must in nature be in tort . . .*" 291 Ala. at 170. This has been the "well settled" judicial interpretation "for decades." Id. See also King v. National Spa & Pool Inst., Inc., 607 So. 2d 1241, 1248 (Ala. 1992) (a wrongful death remedy is "sole[ly] . . . for the tortious infliction of death in our state). However, compare Appellee's Br., pp. 42-43 ("a Dram Shop action is not a tort").

Within the dram shop context, such strict construction has led to results such as Maples v. Chinese Palace, Inc., 389 So. 2d 120 (Ala. 1980), wherein the Court held that the Wrongful Death Act creates a right of action only for *tort claims* which the decedent, were he still alive, could have

40 Ala. L. Rev. 475 (1989); Murray Alley, Jr., Alabama's Wrongful Death Statute, 4 Ala. L. Rev. 93 (1951).

brought at common law -- the decedent being a minor in that case as well.³

The point is, all four claims presented here are purely statutory, the statutes each representing a specific expression of public policy, which must be strictly construed. The challenge for this Court will be to reconcile those statutory claims with the applicable constitutional review standards and public policy concerns governing these punitive verdicts.

Without diminishing in the slightest the genuine losses suffered by Appellees, or the sincerity of the jury's response to the courtroom presentations, it is the duty of the Court and counsel to ensure that any punishment imposed upon Nineteenth and its affiliates is consistent with Due Process. When harm has resulted that cannot be rectified with money, an element of frustration and vengeance is

³ The law construing Alabama's dram shop actions, including sales to minors, is canvassed in several articles. See J. Johnson & L. Alvis, Liquor Liability Litigation in Alabama, Birmingham Bar Journal, at 24 (Winter 2005); Sid McAnnally, Liquor Liability in Alabama, Alabama Defense Lawyers Journal, at 19 (April 1993); Ken Mendelson, Liquor Liability: An Overview of Claims Against Liquor Providers, No. 4 Alabama Trial Lawyers Journal, at 12 (Fall 1992); and Ken Mendelson, Dram Shop Liability, 50 The Alabama Lawyer 328 (Nov. 1989).

present, often leading to irrational results. Businesses, perceived by a jury to have substantial resources, are inevitably targets for such frustration.

It is the Court's obligation to independently review these punitive judgments, considering all of the relevant factors bearing on whether they conform to society's goals; and if not, to make them so.

A. Whether the Court May Consider the Combined Fault of the Parties in Reviewing the Punitive Damages Award for Excessiveness.

"Over 100 years ago, this Court announced the rule that there was no common law cause of action for negligently dispensing alcohol." Hatter v. Nations, 480 So. 2d 1209, 1210 (Ala. 1985) (citation omitted). The only remedy is statutory, as found in Ala. Code § 6-5-71 (1975). This statute has been construed to create a notice-based duty to not sell alcohol if a seller is aware the buyer is under-age or is already intoxicated. If the seller has notice, but sells alcohol anyway, Alabama law holds him legally responsible under a "strict liability" standard, meaning he cannot avoid legal responsibility by proving contributory

negligence by the plaintiff. McIsaac v. Monte Carlo Club, Inc., 587 So. 2d 320, 324 (Ala. 1991).⁴

In traditional wrongful death claims, even though punitive only, the defense of contributory negligence has always been recognized. Sloss-Sheffield Steel & Iron Co. v. Stapp, 195 Ala. 340, 70 So. 267, 268 (1915). This court historically has also cited comparative fault as a justification for reducing the *amount* of punitive damages. See Louisville & Nashville Ry. v. Davis, 236 Ala. 191, 181 So. 695 (1938) ("the amount of damages must depend on the degree of culpability of the respective parties"); Southern Ry. v. Sherrill, 232 Ala. 184, 167 So. 731 (1936) (reducing damages due to "concurrent negligence . . . by the acts of both parties").

The present cases incorporate by reference the prohibition of sale to minors, in which the standard of

⁴ Similar notice-based causes of action, for example, include where a duty arises from notice that a driver is incompetent (negligent entrustment) or a dog is vicious (the one bite rule) or a person is already drunk (the visible intoxication standard). In the absence of such notice no duty arises, and thus no liability. This "notice" element, however, which requires the fact-finder to make subjective judgments about a person's mental operation (unlike objective violations) raises inherent concerns about such a punitive award's reliability and certainty, requiring maximum scrutiny.

liability is the "totality of the circumstances." See Moreland v. Jitney Jungle, Inc., 621 So. 2d 285 (Ala. 1993). Where the fact of an illegal sale is disputed (as here), the Court must look beyond the simple fact of the buyer's birth date to decide whether mitigating circumstances existed at the point of sale, such as (for example) use of a proxy or a false I.D. These facts bear on whether the seller is legally chargeable with sufficient notice to produce a violation, which must be proven by the higher "clear and convincing" evidence standard to authorize punishment.

While contributory fault always has been a defense to traditional wrongful death claims (at least a factor compelling reduction of damages, discussed above), it is correct that McIsaac held that contributory negligence is not a defense to Dram Shop claims. That does not, however, preclude its consideration on Due Process excessiveness review.

The dram shop statutes themselves do not expressly impose "strict liability," a standard that was applied by judicial construction following this Court's review of other jurisdictions on whether a party's "complicity"

should matter. McIsaac, 587 So. 2d at 320. The Court found authority on both sides but opted to treat the Dram Shop Act as "penal" so as to preclude any defense of contributory negligence. It did, however, leave intact "assumption of the risk" where a claimant is shown to have "knowingly assented" to the risk. Cf. Lemond Constr. Co. v. Wheeler, 669 So. 2d 855, 869 (Ala. 1995) (Houston, J., dissenting).

More importantly for this case, it is noteworthy that McIsaac was decided several years before BMW v. Gore when this Court made little or no distinction between compensatory and punitive damages. Even in McIsaac this Court's stated goal was to best serve public policy, the same goal served by consideration of complicity on a punitive damages award. Indeed, the public policy of not rewarding a complicit plaintiff is evident from the Legislature's exclusion of the intoxicated party from the class of eligible plaintiffs. See, e.g., Ex parte Macon Cty. Greyhound Park, Inc., 634 So.2d 997, 999 (Ala. 1993)

No state rule or standard can hinder an appellate court from exercising its overriding constitutional duty to consider all facts that may be relevant to fair punishment

under Due Process excessiveness review. See Oberg, 512 U.S. at 426-34 (nullifying Oregon's constitutional limitation on judicial review of punitive awards). Numerous examples exist of evidentiary facts not admissible to a jury but which the Court in its excessiveness review must consider.

If evidence exists of shared fault in creating the harm, no impediment exists to prevent the Court from its overriding duty to consider such evidence in determining fair punishment.

B. Should the Court Conduct its Excessiveness Review of the Multiple Punitive Damages Verdicts Separately, or in the Aggregate?

This question, at first glance, appears answered in Campbell wherein Justice Kennedy cautioned against the unconstitutional risk of multiple punitive damage awards for the same conduct. Campbell, 538 U.S. at 423. Numerous courts and commentators have raised concerns over the risk of punitive damages "overkill."⁵

⁵ See generally, Juzwin v. Amtorg Trading Corp., 705 F. Supp. 1053 (D.N.J. 1989) (multiple awards of punitive damages against a manufacturer violate due process), modified, 718 F. Supp. 1233, 1234 (D.N.J. 1989) ("the court abides by its previous ruling that repetitive awards of punitive damages for the same conduct violate a defendant's due process rights"); Dennis Neil Jones, S. Brett Sutton & Barbara D. Greenweld, Multiple Punitive Damages for a Single Course of Wrongful Conduct: The Need for a National

In the present case, the aggregate \$13.5 Million appears to bear no rational relationship whatever to the "severity of the offense." Haslip, 499 U.S. at 22. This is true especially given the highly fluid and circumstantial nature of the alleged violation. It is also patently excessive in light of comparable awards, not to mention the defendant's financial condition.

Because the cases were consolidated for trial, the exact same facts and circumstances were common to all four verdicts. The same alleged misconduct served as the basis for punitive awards in each case. The same jury that found \$500,000 sufficient to accomplish society's punitive damages goals in one case awarded \$7 Million in another, and \$3 Million each in two others. The only differences were the plaintiffs' injuries. Such rationale plainly and improperly based the punitive awards upon the plaintiffs' injuries rather than the defendant's conduct. See Fuller v.

Policy to Protect Due Process, 43 Ala. L. Rev. 1 (1991); Victor E. Schwartz & Liberty Magarian, Multiple Punitive Damage Awards in Product Liability Litigation: an Assault on Due Process, 8 Adelphi L. J. 101 (1992); Dorsey D. Ellis, Jr., Fairness and Efficiency in the Law of Punitive Damages, 56 S. Cal. L. Rev. 1 (1982).

Preferred Risk Life Ins. Co., 577 So. 2d 878, 885 (Ala. 1991).

The \$7 Million punitive award would rank it among the most egregious examples of wrongful death verdicts upheld to date, most of which were during the pre-Gore era and thus not reviewed under de novo Due Process standards. It is erroneous to suggest that these amounts were justified by evidence that Nineteenth had engaged in previous underage sales. Other similar acts can be considered in assessing "reprehensibility" but not to justify imposing a larger award to punish harm caused to others. Philip Morris USA v. Williams, 549 U.S. 346, 354-57 (2007).

This Court recognized the need to consider multiple punitive damage awards as the seventh Green Oil factor, which expressly takes into consideration "other civil actions against the same defendant, based on the same conduct." Green Oil Co. v. Hornsby, 539 So. 2d 218, 223 (Ala. 1989). See also, Wilson v. Dukona Corp., 547 So. 2d at 74. The U.S. Supreme Court had previously held that repeated civil punishments for the same course of conduct violates the concept of "fundamental fairness" inherent in Due Process. Lassiter v. Dep't of Soc. Servs. of Durham

Cty., 452 U.S. 18, 24 (1981). It therefore cited this seventh factor in approving Alabama's post-verdict review program. Haslip, 499 U.S. at 22.

Despite the fact that the consolidation of these cases allowed a jury to return four separate punitive damages verdicts, the defendant's conduct still only justifies one punishment without a multiplier. See State Farm v. Campbell, 538 U.S. at 424 (cautioning against multiple punitive damage awards for the same conduct which, in the aggregate, produce an excessive punishment.) Multiple punitive awards serve no legitimate state function and serve only to create a windfall. See Smith v. States Gen. Life Ins. Co., 592 So. 2d 1021, 1027 (Ala. 1992) (Shores, J., concurring and dissenting).

Fortunately, these Due Process concerns can be ameliorated by rational reductions in the four verdicts, which is easier here, where the claims are combined in a single case, as opposed to multiple punitive damages awards in repetitive cases.

C. **How Should Punitive Damages be Allocated Among the Plaintiffs in a Multiple Plaintiff Case Involving the Same Act or Course of Conduct?**

The U.S. Supreme Court's decisions thus far do not furnish a clear guide for how to allocate an aggregate punitive damages award among multiple plaintiffs. It stands to reason that the state may articulate its own rationale for the distribution of such damages, since the plaintiffs have no legal right to them under Alabama law. See Md. Cas. Co. v. Tiffin, 537 So. 2d 469, 471 (Ala. 1988).⁶ "As long as the discretion is exercised within reasonable constraints, Due Process is satisfied" in a state's administration of punitive damages. Haslip, 499 U.S. at 20.

The punitive damages could perhaps be simply pro-rated, but *amicus* suggests that a rational process more in harmony with public policy entails starting with recognition that the wrongful death claim is distinctly different from the others. Being a death case and punitive-only, it would be more efficient to decide the appropriate punishment in that

⁶ See generally Deborah S. Braden, Has the Time Come for Apportionment of Punitive Damages in Alabama, 28 Cum. L. Rev. 65, 68 (1998); Nettles & Latta, supra, at 502 & 509. See also Smith v. States General Life Insurance Co., 592 So. 2d 1021 (Ala. 1992), in which this Court explored whether a plaintiff's punitive damages judgment could be allocated to the General Fund of the State budget.

case first, and then whether any additional punishment is needed in the two cases where the plaintiffs already are compensated. A fully compensated plaintiff has no interest in punitive damages where punishment already has been achieved.

The appropriate amount of punitive damages for wrongful death rests on the notion that all lives in Alabama are equally incapable of being valued in dollar terms. Instead of measuring the pecuniary value of a life lost, Alabama recognizes an equal right to live. Louisville & N.R. Co. v. Tignor, 125 Ala. 593, 28 So. 510, 512 (Ala. 1900). Thus the amount is not measured by the financial loss to survivors but by the degree of the defendant's misconduct, any aggravating factors, and comparable punitive awards involving similar degrees of wrongdoing. See Boudreaux v. Pettaway, 108 So. 3d 486, 498-99 (Ala. 2012); Lance, Inc. v. Ramanauskas, 731 So. 2d 1204, 1219 (Ala. 1999).

Non-death cases represent a different public policy goal, which gives priority to the plaintiff's interest in compensation. "It should be presumed a plaintiff has been made whole for his injuries by compensatory damages, so punitive damages should only be awarded if the defendant's

culpability, after having paid compensatory damages, is so reprehensible as to warrant the imposition of further sanctions to achieve punishment or deterrence." Campbell, 538 U.S. at 419, citing BMW v. Gore, 517 U.S. at 575. See also, Green Oil Co. v. Hornsby, 539 So. 2d at 218; Wilson v. Dukona Corp., 547 So. 2d at 73. The two personal injury claims must therefore be viewed in light of the existing compensatory award.

Alabama's current wrongful death statute was first passed in 1859 amidst visions of armed Yankees invading the state, the very same week the Legislature voted to establish a militia. See generally, Nettles & Latta, supra, at 480-85. Prior to that only compensatory damages were allowed, limited to "three years income" not to exceed \$3,000. Id. While it appears the Legislature merely was removing the cap (replaced with "such sum as the jury deem just"), this Court construed the statute to authorize only punitive damages, and that interpretation has stuck. Id.

This background offers insight into why some of this Court's opinions have said that wrongful death damages, while construed as purely punitive in intent, have a fortuitous "compensatory" effect. See, e.g., Southern & N.

Ala. R. Co. v. Sullivan, 59 Ala. 272, 279, 1877 WL 1158 (1877). In more recent years, the Court has stated emphatically that such damages "are not compensation, and our system should not be contorted to treat them as such." King v. Nat'l Spa & Pool Inst., 607 So. 2d 1241, 1247 (Ala. 1992). See also, Merrill v. Ala. Power Co., 382 So. 2d 494, 496 (Ala. 1980). Thus wrongful death judgments undoubtedly must be reviewed under the same Due Process excessiveness standards as other punitive awards, the amount being only such damages as are "sufficient to punish for the wrong done [and] no more than that." Randle v. Birmingham Ry., 169 Ala. 314, 53 So. 918, 920 (1910). See also, Gen. Motors Corp. v. Johnston, 592 So. 2d 1054, 1063 (Ala. 1992).

This leaves the Court in a situation in which it must evaluate a wrongful death verdict without the aid of an underlying compensatory award to perform a simple "ratio" analysis. Lance, Inc. v. Ramanauskas, 731 So. 2d 1204, 1218-19 (Ala. 1999). It is nonetheless significant in such cases that a defendant has incurred no compensatory liability, despite the infliction of death-causing harm. The main point of reference has thus become comparable

judgments in similar cases, reviewed in light of the BMW and Green Oil factors.

Depending upon the amount upheld for the wrongful death claim herein, the court can better determine what to do with the two \$3 million awards. A similar process would apply to the \$500,000 verdict for the driver's mother. Given that her 20-year-old daughter is held to an adult standard (despite being underage to purchase alcohol) the Court should give additional consideration to any contributory fault in arriving at a fair punishment.

D. Constitutional Concerns May Also Govern Enforcement of Punitive Damages Against a Third Party.

The same punitive-compensatory distinction plays a role in whether Due Process allows the enforcement of a punitive damages judgment against innocent third parties. Punitive damages are personal to the wrongdoer and their financial burden should not be visited upon blameless third parties without a predicate showing of complicity or imputed liability under an intelligible legal standard. See Lake Shore & Mich. S. R.R. Co. v. Prentice, 147 U.S. 101, 107 (1893) (punitive damages "can only be awarded against one who has participated in the offense."); Logan v. Zimmerman

Brush Co., 455 U.S. 422, 429 (1982) (Due Process protects "civil litigants" either "as defendants hoping to protect their property or as plaintiffs attempting to redress grievances").

"It is the wrongdoer himself who is made to suffer for his unlawful conduct," and "neither reason nor justice" suggests that such retribution should be "visited upon" the shoulders of blameless third parties by enforcement of a judgment. Newport v. Fact Concerts Inc., 453 U.S. 247, 267 (1981). Just as it is unfair to impose a punitive burden that will be passed through to city taxpayers (as owners of the municipal corporation), so it is unfair to impose a punitive burden against the innocent officers and shareholders of a business corporation.

An otherwise unconstitutional punitive award may not be justified by the argument that the wrongdoer has a business affiliate with additional assets, or that a theoretical "bad faith" claim exists against its insurance company. Tillis Trucking Co. v. Moses, 748 So.2d 874, 887 (Ala. 1999) (rejecting any argument for considering a bad faith claim as an asset, stating the highest amount that can be awarded is the defendant's net worth plus insurance). See

also Gillis v. Frazier, ___ So. 3d ___, 2014 WL 3796382 (Ala. 2014).

The financial status of the wrongdoer is an element of Due Process concern, which mandates that the final punitive award "should not be so much as would financially destroy" the defendant. Fuller v. Preferred Risk Life Ins. Co., 577 So. 2d 878, 885 (Ala. 1991). It must be recognized, moreover, that a compensatory award has a punitive effect so that no additional damages may be needed to achieve society's goal. Id. See also, Wilson v. Dukona Corp., 547 So. 2d at 73-74; Industrial Chemical & Fiberglass Corp. v. Chandler, 547 So. 2d 812 (Ala. 1988) (quoting Jones, J., concurring, in Brown Services, Inc. v. Holloway, 397 So. 2d 125 (Ala. 1981)).

The plaintiffs, without proving any punitive conduct by Nineteenth's parent company and its shareholder, seek to levy the punitive judgment against them on a theory of "piercing the corporate veil" to reach their assets.

This issue should be easily resolved under Messick v. Moring, 514 So. 2d 892 (Ala. 1987), which was a similar dram shop case. A young mother of small children was killed in a crash caused by a drunk driver who had just left "The

Met" dance club. This Court, rejecting the same general arguments made by the Appellees here, held that the plaintiff could not pursue The Met's corporate owner and stockholders. There, as here, no claim of direct or imputed liability was made against the parent company and its shareholders.

Absent outright fraud, the occasions in which a judgment creditor is allowed to "pierce the corporate veil" should remain exceedingly rare. If a defendant corporation is a pure sham, then a plaintiff may hold the directors and shareholders liable for a routine judgment. See generally, Cohen v. Williams, 294 Ala. 417, 318 So. 2d 279 (Ala. 1979). However, this rule has never been extended to punitive damages, which raises serious constitutional questions.

"Piercing the corporate veil" simply means that if a corporation's officers and directors do not observe the fundamental legal requirements for maintaining the separate existence of a corporation, *neither will the courts*. However, Courts generally require more than simple administrative neglect. The most common factors are fraud or intentional gross undercapitalization. See generally,

Forrest S. Latta, Disregarding the Entities of Closely Held and Parent-Subsidiary Corporate Structures in Alabama, 12 Cum. L. Rev. 155 (1981).

If a corporation is reasonably maintained and reasonably capitalized with sufficient resources to meet its ordinary obligations, the officers and shareholders should have no personal risk. The public policy reason is obvious - promoting business activity by protecting the assets of one who uses the corporate structure in a lawful manner. The feature of limited liability is not unlawful, notwithstanding appellees' complaint that it seems "unconscionable."

Besides fraud, the other most common reason cited for piercing the corporate veil is intentional gross undercapitalization. This naturally begs the question of what constitutes adequate capitalization in the normal course of a business where investors rightly try to limit their financial risk. In this respect, it seems significant that Nineteenth alleges it proved assets equaling at least \$100,000, equal to the minimum insurance requirement contained under Administrative Reg. 20-x-5-.14 issued by the Alcoholic Beverage Control Board. This fact, given the

ABC Board's role as the public agency charged with setting standards of conduct (and whose administrative judgment is due "great deference"), should end any question about whether Nineteenth was intentionally grossly undercapitalized to such a degree that its officers and shareholders should be made to forfeit their right to limited liability, especially against punitive damages.

V. CONCLUSION

Amicus submits that this Court can and should consider any blameworthy conduct by the plaintiffs as bearing on the fairness of any punitive damages award. Where a jury returns multiple punitive damage verdicts, the amounts should be evaluated both individually and in the aggregate. However, an aggregate award can be allocated among the plaintiffs in the Court's discretion. In no event should the punitive damages judgment be visited upon an innocent third party.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of Court using the ACIS System, which will send notification of such filing to the following on this the 13th day of October, 2015. I also certify that I have placed ten (10) true and exact paper copies of the foregoing, along with a paper copy of the e-filing confirmation receipt, in the U.S. Mail, postage prepaid, certified and addressed to the Clerk of the Alabama Supreme Court at 300 Dexter Avenue, Montgomery, Alabama 36104.

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