No. 522A02 TWENTY-SEVEN A DISTRICT

SUPREME COURT OF NORTH CAROLINA

****

DAN RHYNE and ALICE RHYNE,	)	
	)	
v.	)	From Gaston County
	)	
K-MART CORPORATION, SHAWN ROBERTS, and JOSEPH HOYLE.	)	

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MOTION OF THE CHAMBER OF COMMERCE OF THE UNITED STATES FOR LEAVE TO FILE BRIEF AS *AMICUS CURIAE* IN SUPPORT OF DEFENDANT-APPELLEE K-MART CORPORATION

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Pursuant to Rule 28(i) of the North Carolina Rules of Appellate Procedure, the Chamber of Commerce of the United States (the "Chamber") respectfully moves for leave to file the accompanying brief as *amicus curiae* in support of Defendant-Appellee K-Mart Corporation. The Chamber wishes to address the question whether N.C. Gen. Stat. § 1D-25, which places limits on punitive damages awards, is consistent with the North Carolina Constitution. In the Chamber's view, the Court of Appeals was correct in rejecting Plaintiffs-Appellants' multiple constitutional objections and in upholding the statute as a valid legislative act of the General

Assembly. *See Rhyne v. K-Mart Corp.*, 149 N.C. App. 672, 677-685, 562 S.E.2d 82, 87-92 (2002), *review allowed*, 357 N.C. 63, 579 S.E.2d 393 (2003). Accordingly, the Chamber urges this Court to affirm this aspect of the lower court's decision.

The Chamber is the world's largest business federation. With a substantial presence in all fifty States and the District of Columbia, the Chamber represents an underlying membership of more than three million businesses and organizations of every size and kind. As the principal voice of American businesses, the Chamber regularly advocates the interests of its members in federal and state courts throughout the country on issues of national concern.

This appeal involves issues of substantial importance to the Chamber's members. In response to growing evidence of excessive damages awards in civil litigation, many States have enacted statutes aimed at bringing greater predictability and fairness to the legal system and lowering the costs and risks of doing business. These measures have included caps on punitive and compensatory damages awards as well as other reforms to substantive liability rules and the procedures used in tort litigation. Like the North Carolina statute at issue in this appeal, many of these reforms have placed limits on punitive damages awards in an effort to better calibrate punishment to the States' interest in deterrence and retribution, to afford greater due process protections to putative defendants, and to improve local economic conditions

for the benefit of all citizens. *See* D. OWEN & M. MADDEN, MADDEN AND OWEN ON PRODUCTS LIABILITY § 18.6 (2003); 2 J. KIRCHER & C. WISEMAN, PUNITIVE DAMAGES: LAW AND PRACTICE § 21.16 (2003) (discussing statutory caps on punitive damages in Alabama, Colorado, Connecticut, Florida, Georgia, Oklahoma, Kansas, Nevada, Texas, and Virginia).

These reform measures – which represent quintessential determinations of social and economic policy by the legislative branches of state governments – have been repeatedly challenged in court, often based (as here) on a litigant's submission that no "punitive damages crisis" exists and, as a result, the State had no reason (and therefore, the argument goes, no authority) to place any limits on the size of damage awards. The Chamber's members, who are the primary targets of lawsuits seeking large punitive exactions, have a substantial interest in seeing that such challenges are addressed within the proper analytical framework. The Chamber's members also have an interest in ensuring that democratically elected representatives of the people (*i.e.*, state legislators) retain the authority to address aspects of the tort system that are unfair, irrational, or economically harmful.

The Chamber has frequently participated as an *amicus* in cases raising important questions concerning the constitutionality of punitive damages awards imposed on business defendants. *See*, *e.g.*, *State Farm Mut. Auto. Ins. Co. v.*

Campbell, 123 S. Ct. 1513 (2003); *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559 (1996); *Honda Motor Co. v. Oberg*, 512 U.S. 415 (1994). The Chamber has also been active in efforts to encourage and support legal reform of the civil justice system by the people's elected representatives at the state and national levels. Because of this broad national experience, the Chamber believes it brings to this case a distinctive – distinctively valuable – perspective on the issues before this Court. Accordingly, the Chamber requests leave to file the accompanying brief.

Respectfully submitted, this the 18th day of July, 2003.

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BRIEF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES AS *AMICUS CURIAE* IN SUPPORT OF DEFENDANT-APPELLEE K-MART CORPORATION

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BRIEF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES AS *AMICUS CURIAE* IN SUPPORT OF DEFENDANT-APPELLEE K-MART CORPORATION

****

QUESTION PRESENTED

WHETHER N.C. GEN STAT. § 1D-25, WHICH PLACES LIMITS ON THE SIZE OF PUNITIVE DAMAGES AWARDS, VIOLATES THE NORTH CAROLINA CONSTITUTION?

STATEMENT OF INTEREST

The Chamber of Commerce of the United States (the "Chamber") is the world's largest business federation. With a substantial presence in all fifty States and the District of Columbia, the Chamber represents an underlying membership of more than three million businesses and organizations of every size and kind. As the principal voice of American businesses, the Chamber regularly advocates the interests of its members in state and federal courts throughout the country on issues of national concern. As explained in greater detail in the accompanying motion for leave, the Chamber's members have a substantial interest in ensuring that legal reforms concerning the availability and size of punitive damages awards – such as N.C. GEN. STAT. § 1D-25 – are not invalidated based on erroneous interpretations of state constitutional law.

STATEMENT OF THE CASE

The Chamber adopts the statement of the case contained in the brief of Defendant-Appellee K-Mart Corporation.

INTRODUCTION AND SUMMARY OF ARGUMENT

This case involves the authority of the General Assembly, on behalf of the people of this State, to decide what level of punishment should be meted out in the form of punitive damages awarded in civil lawsuits for violations of North Carolina law. More specifically, it raises the question whether the North Carolina Constitution bars the General Assembly from limiting punitive damages awards to "three times the amount of compensatory damages or two hundred fifty thousand dollars ($250,000), whichever is greater." N.C. GEN. STAT. § 1D-25(b). As we explain below, nothing in the North Carolina Constitution prevents the General Assembly from enacting entirely sensible legal reforms concerning penalties or punishment, and the contrary arguments of Plaintiffs-Appellants Dan and Alice Rhyne ("the Rhynes") are unavailing.

Section 1D-25's cap on punitive damages was enacted in 1995 as part of a broader effort by the General Assembly to regulate and reform the administration of punitive damages awards, including the procedures used to impose them. Among other things, the 1995 legislation clearly articulated the purposes behind punitive damages as being "to punish … for egregiously wrongful acts and to deter the defendant and others from committing similar wrongful acts" (N.C. GEN. STAT. § 1D-1); imposed on claimants the burden of proving one or more "aggravating factors" – "fraud," "malice" or "willful or wanton behavior" – by "clear and convincing

evidence" (*id.* § 1D-15(a),(b)); barred punitive damages in contract cases (*id.* § 1D-15(d)); required a bifurcated procedure for determining liability for punitive damages (*id.* § 1D-30(d)); directed "the trier of fact" to consider only certain factors in initially setting the amount of punitive damages (*id.* §§ 1D-35, -40); and required reviewing courts to provide a written explanation for their conclusions concerning the "evidence, or lack thereof, as it bears on the liability for or the amount of punitive damages" (*id.* § 1D-50). In addition to capping punitive damages, Section 1D-25 required the fact-finder to "determine the amount of punitive damages separately from the amount of compensation for all other damages," prevented the parties from informing the jury about the cap (no doubt because such knowledge might influence the compensatory damages award), and directed the trial court to apply the statutory cap to reduce verdicts "in excess of the maximum amount." *Id.* § 1D-25(b). The 1995 Act also exempted from the cap cases involving driving while intoxicated (*id.* § 1D-26), and it authorized defendants who are the target of "frivolous or malicious" punitive damages claims to recover their attorneys' fees. *Id.* § 1D-45.

At the time the General Assembly passed these reform measures in 1995, the United States Supreme Court had already voiced "concern about punitive damages that 'run wild.'" *Pac. Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1, 18 (1991). And even before that, several Justices had identified the explosion of large punitive damages

awards as a recent, and deeply troubling, phenomenon in the American justice system:

> *Awards of punitive damages are skyrocketing*. As recently as a decade ago, the largest award of punitive damages affirmed by an appellate court in a products liability case was $250,000. *See* Owen, *Punitive Damages in Products Liability Litigation*, 74 Mich. L. Rev. 1257, 1329-1332 (1976). Since then, awards more than 30 times as high have been sustained on appeal. *See Ford Motor Co. v. Durrill*, 714 S.W.2d 329 (Tex. App. 1986) ($10 million); *Ford Motor Co. v. Stubblefield*, 171 Ga.App. 331, 319 S.E.2d 470 (1984) ($8 million); *Palmer v. A.H. Robins Co.*, 684 P.2d 187 (Colo. 1984) ($6.2 million). The threat of such *enormous awards* has a detrimental effect on the research and development of new products.

Browning-Ferris Indus. of Vt., Inc. v. Kelco Disposal, Inc., 492 U.S. 257, 282 (1989) (O'Connor, J., joined by Stevens, J., concurring in part and dissenting in part) (emphasis added). Of course, judged by today's standards, the "enormous awards" identified by Justices O'Connor and Stevens in 1989 seem almost Lilliputian. *See*, *e.g.*, Joni Hersch & W. Kip Viscusi, *Punitive Damages: How Judges and Juries Perform*, Harvard-Olin Center for Law, Economics and Business, Disc. Paper No. 362 (May 2002) (cataloguing more than 50 punitive damages awards exceeding $100 million since mid-1980s), *available at* http://www.law.harvard.edu/programs/olin-center; *Developments in the Law – The Paths of Civil Litigation*, 113 HARV. L. REV. 1752, 1783 (2000) (counting at least a dozen cases where juries assessed punitive damages ranging from $20 million to more than $200 million).[1] In addition to

[1] In the past four years, multi-*billion* dollar punitive damages awards have been

expressing concern over "skyrocketing" punitive damages awards, Justices O'Connor and Stevens took note in *Browning-Ferris* of the "vagueness and procedural due process problems presented by juries given unbridled discretion to impose punitive damages." 492 U.S. at 283 (O'Connor, J., joined by Stevens, J., concurring in part and dissenting in part).

It was against this backdrop – and the ensuing national debate over how to impose reasonable limitations on the size of punitive damages awards and secure greater due process safeguards – that the General Assembly took action by passing the legislation at issue in this case. Nor was North Carolina alone in deciding that legal reforms were needed to address the risk of "punitive damages that 'run wild.'" *Haslip*, 499 U.S. at 18. In fact, many states have enacted similar reform measures. *See generally* D. OWEN & M. MADDEN, 2 MADDEN AND OWEN ON PRODUCTS LIABILITY § 18.6 (3d ed. 2003); 2 J. KIRCHER & C. WISEMAN, PUNITIVE DAMAGES:

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imposed by jurors in Alabama, California, Illinois, Florida, and Missouri. *See* Walter Olson, *Courting Stupidity*, REASON, Jan. 1, 2003, at 22; *A Huge Tobacco Verdict Breaks Mold in L.A.*, NAT'L L.J., Feb. 3, 2003, at C2 ($28 billion punitive award to individual smoker); *Judge Cuts $2.2 Billion Award for Diluted Drugs to $330 Million*, February 19, 2003 APWIRES 04:03:00 ($2 billion punitive award returned by Missouri jury); Andrew Pollack, *$4.9 Billion Verdict In G.M. Fuel Tank Case*, N.Y. TIMES, July 10, 1999, at A8. While many of these jury awards were later reduced by the trial judge or on appeal, the risk of gigantic punitive exactions by juries undeniably has increased in recent years.

LAW AND PRACTICE § 21.16 (2003) (discussing statutory caps on punitive damages in Alabama, Colorado, Connecticut, Florida, Georgia, Oklahoma, Kansas, Nevada, Texas, and Virginia). Like the North Carolina law challenged in this case, these statutes often limit the circumstances in which *punitive* damages may be awarded, thus constraining jury discretion, *see*, *e.g.*, ALASKA STAT. § 09.17.020; FLA. STAT. ANN. § 768.73; N.C. GEN. STAT. § 1D-35; or place caps on the amount of punitive exactions, *see*, *e.g.*, COLO. REV. STAT. § 13-21-102(1)(a); GA. CODE ANN. § 51-12-5.1(g); VA. CODE ANN. § 8.01-581.15.

The Rhynes nevertheless maintain (Br. 71-72) that N.C. GEN. STAT. § 1D-25(b) has "no rational basis" because, at the time the law was passed, there was no "crisis" concerning punitive damages in North Carolina and therefore no "overwhelming public necessity" that would justify the legislation. As we explain in Section I below, this argument is based on a fundamental misunderstanding not only of rational-basis review but also of the compelling policy considerations supporting N.C. GEN. STAT. § 1D-25(b)'s cap on punitive damages – considerations the General Assembly was free to weigh and evaluate. The Rhynes' scattershot constitutional arguments provide no basis for interfering with the legislature's authority to set the punishment for violations of North Carolina law.

Equally misguided (for reasons we explain in Section II below) is the Rhynes' argument that the statutory cap should be invalidated because it somehow impairs their "vested" right to recover unlimited punitive damages. That argument, which the Rhynes advance in contending that the statute works a taking and violates their right to a jury trial, ignores a basic fact: their claim for punitive damages arose or accrued *after* the statute was passed. Because any interest the Rhynes might have in seeking punitive damages was limited by N.C. GEN. STAT. § 1D-25(b)'s cap, they have suffered no impairment of any "vested" right. Nor does it matter that the legislature designed the cap to apply only *after* the fact-finder has made an initial determination of the amount of punitive damages. Contrary to the Rhynes' suggestion, there is no analytical difference between N.C. GEN. STAT. § 1D-25(b), which authorizes the jury to make an award that is subject to a legal limit of which the jury is unaware, and a scheme that informs the jury of the cap and allows it to make an award up to the specified limit. The Rhynes' argument to the contrary elevates form over substance and ignores governing constitutional principles. It should be rejected by this Court.

ARGUMENT

Punitive damages have played a historic – and evolving – role in shaping private and commercial conduct throughout the United States. Generally, these

damages "are not compensation for injury[, but] private fines levied by civil juries to punish reprehensible conduct and to deter its future occurrence." *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 350 (1974). North Carolina's punitive damages remedy is no exception. *See Overnite Transp. Co. v. Int'l Bhd. of Teamsters*, 257 N.C. 18, 30 (N.C.) ("Punitive damages are never awarded as compensation. They are awarded above and beyond actual damages, as punishment for the defendant's intentional wrongs."), *cert. denied*, 371 U.S. 862 (1962); N.C. GEN. STAT. § 1D-1 ("Punitive damages may be awarded … to punish a defendant for egregiously wrongful acts and to deter the defendant and others from committing similar wrongful acts."). Punitive damages supplement existing mechanisms that are available to the States to control and influence behavior. As a "private attorney general," a plaintiff receives a punitive award "not because [he] has a *right* to the money, but … because it is assessed in his suit." *Osborn v. Leach*, 135 N.C. 628, 47 S.E. 811, 813 (1904) (emphasis added).

Punitive damages, however, do not come without a cost. As noted above, the United States Supreme Court has repeatedly warned of the danger of leaving civil juries to determine penalties that can, and often do, seriously affect companies (and their employees, customers, and shareholders), industries, and even the entire economy. In response to such concerns, the General Assembly passed N.C. GEN.

STAT. § 1D-25, which caps punitive exactions at $250,000 or three times the compensatory damages, whichever is greater. By design, these limits apply only to those punishments that most frequently harm the State's interests and violate defendants' due process rights. *See State Farm Mut. Auto. Ins. Co. v. Campbell*, 123 S. Ct. 1513, 1524 (2003) (noting that "in practice, few awards exceeding a single-digit ratio between punitive and compensatory damages, to a significant degree, will satisfy due process"). The cap thus acts as a safety mechanism; it exists to check awards that are presumptively unreasonable without eliminating punitive damages as a regulatory device. As we explain below, nothing in the North Carolina Constitution bars the General Assembly from calibrating punishment by imposing such a cap on punitive awards.

I. N.C. GEN. STAT. § 1D-25 RATIONALLY BALANCES THE STATE'S INTEREST IN AN EFFECTIVE PUNITIVE DAMAGES REMEDY AGAINST THE POTENTIAL COSTS OF EXCESSIVE PUNISHMENTS

The Rhynes argue (Br. 66-74) that the punitive-damages cap violates the due process and equal protection guarantees of the North Carolina Constitution (art. I, § 19) because (a) there is no rational relationship between the statute and any legitimate state interest, and (b) there was no punitive damages "crisis" in North Carolina – and thus "no overwhelming public necessity" that might justify the measure – in 1995

when the General Assembly passed the law. Rhynes Br. 71; *see also id.* at 72 (emphasizing that, according to one study, "punitive damages awards represented only four percent of all plaintiff verdicts" in North Carolina during 1992-97). The dissenting judge in the Court of Appeals relied on substantially the same argument. *See Rhyne v. K-Mart Corp.,* 149 N.C. App. 672, 697, 562 S.E.2d 82, 99 (2002) (Greene, J., concurring in part, dissenting in part) (citing "authority on the low incidence and general stability of punitive damages awards in North Carolina" and the lack of evidence before the General Assembly to the contrary). The Rhynes also contend (Br. 74) that the available empirical evidence shows that, even today, "[t]here is no punitive damages crisis nationwide, nor is there one in North Carolina."

A majority of the Court of Appeals rejected these arguments, explaining that the North Carolina Constitution does not relegate the General Assembly to a purely "reactive" function or prevent the people's representatives from taking steps that are "proactive" in nature to protect the State and its economy against anticipated harms. 149 N.C. App. at 683, 562 S.E.2d at 91. Moreover, the Court of Appeals observed, all that is required for a statute to survive rational-basis review is a showing that the legislature "*reasonably could have concluded* that there was a rational relationship between the punitive damages cap and the State's legitimate interest in economic

development" (*ibid.* (emphasis in original; citation omitted)). Since N.C. GEN. STAT. § 1D-25(b) easily passes that test, the Court of Appeals reasoned, the Rhynes' constitutional arguments must be rejected. This Court of Appeals' analysis was correct and its decision should be affirmed.

A. The Rhynes Misunderstand The Rational-Basis Inquiry

The Rhynes ask this Court to invalidate the General Assembly's handiwork because, at the time N.C. GEN. STAT. § 1D-25(b) was enacted, there was "no overwhelming public necessity" for the measure and no "crisis" concerning punitive damages awards in the North Carolina courts. Rhynes Br. 71. This argument fundamentally misconceives the nature of rational-basis review. "As long as a legislative classification in a statute concerning matters of economics or social welfare has a reasonable basis," this Court has explained, and the classification "is rationally related to a governmental objective which is permissible," then "this Court will defer to the wisdom of the legislature." *Powe v. Odell*, 322 S.E.2d 762, 764 (N.C. 1984). There is no requirement that a "crisis" (or "overwhelming public necessity") exist before the legislature may act.

Moreover, contrary to the Rhynes' suggestion, there is no requirement that a statute's defender show that the General Assembly *actually considered* the available

data relevant to the subject of legislation, much less compiled a record similar to that required in a judicial proceeding. Rather, all that is required is that the General Assembly "*could* reasonably have concluded" that the punitive damages cap "was a valid one" and served a legitimate public purpose. *Lowe v. Tarble*, 323 S.E.2d 19, 22 (N.C. 1984) (emphasis added). And in applying that highly deferential standard of review, this Court begins with the strong presumption that a statute is constitutional and places a "'heavy burden'" on the challenger to prove otherwise. *State v. Green*, 348 N.C. 588, 604, 502 S.E. 819, 829 (1998) (*quoting Gregg v. Georgia*, 428 U.S. 153, 175 (1976), *cert. denied*, 525 U.S. 1111 (1999)); *see also Dept. of Transp. v. Rowe*, 549 S.E.2d 203, 208 (N.C. 2001), *cert. denied,* 534 U.S. 1130 (2002); *State v. Brockwell*, 209 N.C. 209, 183 S.E. 378, 379 (1936) ("if there is *any* reasonable doubt" about merits of constitutional challenge, it must be rejected) (emphasis added). These settled rules governing judicial review of constitutional challenges to legislation serve a vital role in *protecting* the separation of powers principles that the Rhynes elsewhere (and mistakenly) invoke. *See Brockwell*, 209 N.C. 209, 183 S.E. at 379 (principles of deferential review are "founded upon a proper respect for the intelligence and good faith of a co-ordinate department of the state government").

Equally incorrect is the Rhynes' suggestion that the North Carolina Constitution

disables the General Assembly from passing prophylactic or protective measures to address problems that have not yet materialized within the State (but are expected to in the future). If that were true, the General Assembly would be powerless to pass a quarantine measure for SARS or some other infectious disease unless and until North Carolina residents became infected (even if an outbreak had occurred in Virginia, Tennessee, or South Carolina). That cannot be the law. *See Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 160 (1963) ("[W]hile the Constitution protects against invasions of individual rights, it is not a suicide pact."). The General Assembly is perfectly free to address problems preemptively and to rely on judgments about the likely harms that will occur if no action is taken. *See Brockwell*, 209 N.C. 209, 183 S.E. at 379 ("The exercise of the police power is left largely to the discretion of the General Assembly.").

Moreover, this case confirms the General Assembly's prescience concerning the danger of large punitive damages in North Carolina. The jury imposed a punishment of *$23 million* against Defendant-Appellee K-Mart based on conduct that resulted in *less than $19,000* of compensable harm to the Rhynes. The fact that the jury saw fit to impose a penalty *more than 1200 times greater* than the compensatory damages underscores the need for the cap to protect putative defendants in this State from

excessive and arbitrary punishments.

B. The Statutory Cap Reaches Only Those Awards That Are Presumptively Unreasonable

Beyond applying the wrong analytical framework, the Rhynes' challenge to N.C. GEN. STAT. § 1D-25(b)'s rationality overlooks the precise, and carefully targeted, impact of the cap. The statutory cap affects only large awards that have high punitive-to-compensatory ratios; it leaves all other awards – the vast majority in the State, if the Rhynes' description is accurate – entirely unaffected. Thus, the cap does not affect punitive damages awards that are below $250,000; and it limits those above that amount only insofar as they exceed a reasonable ratio (3:1) to the harm caused by the underlying conduct. In other words, for the vast majority of punitive damages awards mentioned in the 1992-97 survey cited by the Rhynes, it's as if N.C. GEN. STAT. § 1D-25 does not exist.

Precisely for this reason, it makes no sense to question whether the General Assembly had sufficient evidence of widespread punitive damages awards (in-state or across the country) or whether those awards *unaffected by the cap* are reasonable. Rather, all that matters is that the General Assembly had reason to preemptively limit the class of awards that presented the greatest danger of excessive punishment and overdeterrence. With the cap or without it, the State (and different parties within the

State) will incur benefits and costs. The General Assembly, balancing these competing interests, did nothing more than "'adjust[] the burdens and benefits of economic life,'" *Usery v. Turner Elkhorn Mining Co.,* 428 U.S. 1, 15 (1976), to maximize the State's ability to punish wrongdoing without, at the same time, suffering the adverse consequences of excessive punitive exactions. Given the interests on both sides, the legislative branch is in the best position to determine where that balance should fall.

Nonetheless, the Rhynes challenge the cap on the ground that it entirely lacks a rational basis. But again, they rely principally on the argument (and prediction) that the vast majority of punitive awards in North Carolina will remain entirely untouched by the statute – because they will be less than $250,000 or will stay within the three-to-one ratio. The Rhynes' argument simply ignores that statutory caps can be justified whether or not a so-called punitive damages crisis exists, so long as *the cap itself* is rational. The appropriate focus is therefore on the statutory limit and the awards that the limit will affect, *not* on punitive damages awards across the board. Put differently, the proper rational-basis review should focus on whether the General Assembly's decision to statutorily reduce certain awards (however large or small that category may be) has a rational basis – a question that the Rhynes' proffered data simply do not address.

C. The General Assembly's Decision To Rely On A Bright-Line Statutory Damages Cap Furthers Many Legitimate State Objectives

As the United States Supreme Court recently noted, "'[p]unitive 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.'" *State Farm*, 123 S. Ct. at 1520 (*quoting Haslip*, 499 U.S. at 42 (O'Connor, J., dissenting)). As explained in greater detail below, N.C. GEN. STAT. § 1D-25 is a rational mechanism for balancing the benefits and costs of a punitive damages system. The General Assembly targeted those awards that most frequently cross the line, and chose to eliminate the costs of those awards rather than preserve the benefits of the occasional high, yet justifiable, verdict. This does not mean that every affected award has to be "excessive" for the statute to withstand challenge; rather, the cap is like a balancing mechanism, or an averaging device. What is important is whether, *in the aggregate*, the cap has a rational basis.

To be sure, the cap may favor certain parties, but *failing* to limit liability would favor other parties; either way, costs and benefits exist, and either plaintiffs or defendants will have to bear them. In such a situation, as noted above, the legislature is entitled to "'structure the burdens and benefits of economic life,'" *Duke Power Co. v. Carolina Envtl. Study Group, Inc.*, 438 U.S. 59, 83 (1978), which is all it did here.

See Williamson v. Lee Optical of Okla., Inc., 348 U.S. 483, 487 (1955) ("The Oklahoma law may exact a needless, wasteful requirement in many cases. But it is for the legislature, not the courts, to balance the advantages and disadvantages of the new requirement.").[2] Moreover, when courts rather then legislatures "become embroiled in the passions of the day and assume primary responsibility in choosing between competing political, economic and social pressures," "[h]istory teaches that the independence of the judiciary is jeopardized." *State v. Green*, 348 N.C. 588, 604, 502 S.E. 819, 829 (1998) (*quoting Gregg v. Georgia*, 428 U.S. 153, 175 (1976), *cert. denied*, 525 U.S. 1111 (1999)).

Regardless of whether the line chosen by the North Carolina General Assembly is over- or under-inclusive, drawing it provides notice and security to businesses, and prevents the kind of huge awards (and the threat thereof) that frequently injure the economy. Thus, the statute easily passes rational-basis review. Indeed, it is supported by *multiple* reasons, each of which is independently sufficient to provide a rational

[2] *Cf. also Miller* v. *Schoene*, 276 U.S. 272, 279-80 (1928) ("When forced to such a choice the state does not exceed its constitutional powers by deciding upon the destruction of one class of property in order to save another which, in the judgment of the legislature, is of greater value to the public. … And where the public interest is involved preferment of that interest over the property interest of the individual, to the extent even of its destruction, is one of the distinguishing characteristics of every exercise of the police power which affects property.").

basis for the law.

1. To begin with, the North Carolina cap obviously prevents those punitive awards that are most likely to offend due process, and thereby not only protects the constitutional rights of putative defendants but also saves judicial resources. As the United States Supreme Court recently explained:

> [There is] a long legislative history, dating back over 700 years and going forward to today, providing for sanctions of double, treble, or quadruple damages to deter and punish. While these ratios are not binding, they are instructive. They demonstrate what should be obvious: Single-digit multipliers are more likely to comport with due process, while still achieving the State's goals of deterrence and retribution, than awards with [higher] ratios.

State Farm, 123 S. Ct. at 1524 (citations omitted). Here again, it does not matter that the General Assembly may have been able to push up the ratio (say, to four-to-one); the State is under no obligation to authorize awards to the outer limits of due process. *Cf. State Farm*, 123 S. Ct. at 1531 (Ginsburg, J., dissenting) ("In a legislative scheme or a state high court's design to cap punitive damages, the handiwork in setting a single-digit and 1-to-1 benchmarks *could hardly be questioned*." (emphasis added)).

Moreover, the provision of fair notice of "'the severity of the penalty that a State may impose,'" *State Farm*, 123 S. Ct. at 1520, is itself a social good. The smaller the maximum punitive-to-compensatory ratio, the less uncertainty putative

defendants will face, and the more likely the award will stay within constitutional bounds. States reasonably can (and arguably must) act to protect the constitutional rights of their citizens. *See BMW of N. Am., Inc. v. Gore,* 517 U.S. 559, 574 (1996) ("Elementary notions of fairness enshrined in our constitutional jurisprudence dictate that a person receive fair notice not only of the conduct that will subject him to punishment, but also of the severity of the penalty that a State may impose.").

Indeed, the Supreme Court in *State Farm* recently reiterated its "concerns over the imprecise manner in which punitive damages systems are administered." 123 S. Ct. at 1520. "Although these awards serve the same purposes as criminal penalties," the Court explained, "defendants subjected to punitive damages in civil cases have not been accorded the protections applicable in a criminal proceeding." *Ibid*. The efforts by North Carolina (and other States) in recent years to impose specific monetary caps on punitive damages awards are directly responsive to this need for greater precision. As with criminal penalties, punitive damages may not be left to the whim or unfettered discretion of a particular jury without creating serious due process problems of fairness and adequate notice. Caps provide one type of limit and thus enhance the precision of punishments meted out by the State in civil litigation.

Capping punitive damages awards also reduces the need for parties to seek

judicial review of damage awards. "The most exhaustive study of punitive damages establishes that over half of punitive damage awards were appealed, and that more than half of those appealed resulted in reductions or reversals of the punitive damages." *Honda Motor Co. v. Oberg*, 512 U.S. 415, 433 n.11 (1994). If the cap, by reducing damage awards to presumptively reasonable levels, *cf. Wackenhut Applied Techs. Ctr., Inc. v. Sygnetron Prot. Sys., Inc.*, 979 F.2d 980, 985 (4th Cir. 1992) ("a statutory cap is one factor that might be considered in insulating a punitive damages award against a constitutional attack based on unbridled jury discretion and infringement of substantive due process rights"), does the work for the court, litigants save money and court time, and the judiciary preserves valuable resources.

Nor is this the only way the cap lessens the burden on the judicial system. The possibility that a runaway jury will impose a massive award of punitive damages often presents a serious impediment to settlement on reasonable terms. As a consequence, more cases go to trial than otherwise would – and settlements, when they do occur, are artificially inflated to take account of the possibility that the plaintiff will win the punitive-damages lottery. *See* George L. Priest, *Punitive Damages Reform: The Case of Alabama*, 56 LA. L. REV. 825, 830 (1996). By providing reasonable limits on punitive awards, the North Carolina statute fosters settlement and provides all litigants

with a much clearer idea of the potential value of claims. That, too, conserves judicial resources.

2. As the Court of Appeals correctly recognized, the punitive damages cap also protects the State's economy from excessive damage awards and their harmful effects. Even if infrequent, excessive awards can bankrupt companies, cause serious losses to employees and shareholders (including retirees), deter useful innovation, reduce entries into higher-risk fields, and cause overinvestment in liability avoidance – all of which may result in higher costs for consumers. *See*, *e.g.*, Victor E. Schwartz *et al*., *Fostering Mutual Respect and Cooperation Between State Courts and State Legislatures: A Sound Alternative to a Tort Tug of War*, 103 W. VA. L. REV. 1, 4 (2000) (noting punitive damages "could – and did – chill the introduction of new products, cause effective products to be removed from the marketplace, and create issues regarding insurance availability and affordability for small and medium-sized businesses"); *Castano v. Am. Tobacco Co.*, 84 F.3d 734, 746 (5th Cir. 1996) (explaining the threat of "an all-or-nothing verdict presents too high a risk, even when the probability of an adverse judgment is low"); *Insurance Companies, Fearing Jury Verdicts, Shy Away from State*, A.P. State & Regional Wire, June 19, 2001 (noting that over forty insurers in Missouri stopped selling certain types of insurance or

ceased in-state activity as a response to excessive jury verdicts).

These negative effects, moreover, are felt whether or not a company is ever hit with an award; it's the mere *possibility* of a large damages verdict – "limited only by the ability of lawyers to string zeros together in drafting a complaint," *Oki Am., Inc. v. Microtech Int'l, Inc.*, 872 F.2d 312, 315 (9th Cir. 1989) (Kozinski, J., concurring) – that, quite rationally, alters behavior in ways that can be economically and socially harmful.

The General Assembly had good reason to draw the line at those awards most likely to cause these problems. Whether or not North Carolina had ever experienced a gigantic punitive damages award, the legislature should not, and does not, have to wait for a large award to hit before addressing this risk and correcting the problem. The legislature here simply anticipated such awards and blocked them – and only them – before they could cause harm to the State's economy and its consumers.[3]

[3] Excessive punitive damages awards may cause economic harm to a company and its shareholders even if the awards are capable of being reduced on appeal. Appeal bonds are expensive and, if a bond cannot be obtained for a massive punitive exaction, no appeal may ever be taken. *See Appeals Court Says Judge Lacked Authority To Reduce $12 Billion Philip Morris Bond*, Associated Press Newswire, July 15, 2003 APWIRES 01:14:00 (vacating order that had reduced appeal bond in case involving verdict that included $3 billion punitive damages award); *see also Judges' Questions Jar Altria Stock; $12 Billion Bond Remains Possible*, Chicago Trib., July 10, 2003, at 3 (noting company's stock fell by nearly six percent in response to concerns that the Illinois appellate court might reinstate the $12 billion

3. Another reasonable basis for capping punitive damages awards is to alleviate the lack of predictability inherent in jury decision making. A leading study recently found that jury awards of punitive damages are "[d]istinctively unpredictable," "highly erratic," and "inconsisten[t] and random[]." Cass R. Sunstein *et al*., PUNITIVE DAMAGES: HOW JURIES DECIDE 237, 242 (2002); *see also Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 350 (1974) ("juries assess punitive damages in wholly unpredictable amounts bearing no necessary relation to the actual harm caused").

Moreover, juries award damages based on very limited information, derived from evidence presented in a single litigation pursuant to the rules of evidence. The entire proceeding in court is typically focused on specific claims by one or more plaintiffs against one or more defendants. For this reason, juries are simply not in the same position as the legislature to determine appropriate maximum levels of punishment given all relevant criteria and considerations, including the State's interest in punishment and the systemic effects of large awards. As one commentator has correctly noted, "[l]egislatures are in the best position to weigh and balance the many competing policy considerations involved. They have more complete access to

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bond).

information, including the ability to receive comments from persons representing a multiplicity of perspectives, and the ability to use the legislative process to obtain new information. . . . This process allows the legislature to engage in broad policy deliberations and to formulate policy carefully." Victor E. Schwartz, *Fostering Mutual Respect*, *supra*, at 11. Juries – "as a necessary consequence of their case-by-case existence," *Haslip*, 499 U.S. at 41 (Kennedy, J., concurring in the judgment) – may not be expected to consistently award damages that take into account a broader understanding of society's needs.[4]

Of course, every award – large and small – could be subject to this same general criticism, but the legislature *could* rationally decide to accept the risk of error where the costs of inaccuracy are low (*i.e.*, smaller awards), while rejecting that risk where the cost could run too high. As explained above, large punitive awards – even the *threat* of large punishments – can do serious damage to the State's economy. The State could reasonably favor the interests of its businesses and consumers (while

[4] Using predictions about systemic effects to constrain juror discretion, as the General Assembly did here, is hardly surprising or unreasonable; in fact, as Justice Breyer explained, it would be "anomalous . . . [to] grant greater power . . . to a single state jury than to state officials acting through state administrative or legislative lawmaking processes." *Medtronic, Inc.* v. *Lohr*, 518 U.S. 470, 504 (1996) (Breyer, J., concurring).

relying on other mechanisms for punishment and deterrence, *see* pages 24-25, *infra*) over a plaintiff's "fortuitous" interest in obtaining the windfall of a massive punitive damages award. *See Shepherd Components, Inc. v. Brice Petrides-Donohue & Assocs., Inc.*, 473 N.W.2d 612, 619 (Iowa 1991).

4. Finally, we note that the General Assembly's cap does *not*, as the Rhynes suggest, undermine the State's ability to punish and deter. *See* Rhynes Br. 76 ("The 'cap' forecloses an adequate remedy, because it enables businesses to calculate punitive damages within the cost of doing business, thus removing any incentive for K-Mart to change its aberrant behavior.").[5] The cap does nothing to impair the State's ability to pursue *other* means of punishing tort feasors and other wrongdoers by resorting to any number of additional regulatory mechanisms. Punitive damages, after all, are not the only way to punish or regulate behavior; the General Assembly could

[5] This argument overlooks that rational business enterprises will cease to engage in economically motivated conduct once the profit derived from the punished conduct is removed, and it assumes (incorrectly) that businesses are perfectly free to raise prices. It also ignores that rational businesses seek to avoid adverse reputational effects in the marketplace as well as the possibility of other penalties. *See generally* A. Mitchell Polinsky & Steven Shavell, *Punitive Damages: An Economic Analysis*, 111 HARV. L. REV. 869, 910-14 (1998); Kenneth S. Abraham & John C. Jeffries, *Punitive Damages and the Rule of Law: The Role of the Defendant's Wealth*, 18 J. LEGAL STUD. 415, 417 (1989); *Zazu Designs* v. *L'Oreal, S.A.*, 979 F.2d 499, 508 (7th Cir. 1992) (Easterbrook, J.).

rationally rely on punitive damages to a degree, capping them where they are likely to present a problem, then rely on the criminal law, civil fines, and administrative sanctions to make up any resulting gap in deterrence or punishment.

On the other hand, it is far more difficult to *undo* an excessive punishment. It may be possible for the General Assembly to grant subsidies or otherwise counteract the unnecessary portion of an excessive punishment imposed by a jury. But those options are less common, may be open to legal challenge (as, for example, in the case of a targeted subsidy), and in any event do nothing to alleviate the harms visited upon the overall economy by the *threat* of enormous punitive damages awards.

II. THE RHYNES HAVE NO "VESTED RIGHT" – "PROPERTY" OR OTHERWISE – TO UNCAPPED PUNITIVE DAMAGES BECAUSE THEIR CLAIMS ACCRUED AFTER N.C. GEN. STAT. § 1D-25 WAS ENACTED AND THUS WERE SUBJECT TO ITS LIMITS

In advancing several of their constitutional arguments, including those based on the takings clause and the right to a jury trial, the Rhynes maintain that the application of N.C. GEN. STAT. § 1D-25 in this case impaired a "vested claim for punitive damages" that had "accrued" because, under the scheme designed by the General Assembly, the cap is applied only *after* the jury reaches a preliminary determination of the amount of punitive damages. Rhynes Br. 49; *see also id.* at 47 (cap "contravenes the constitutional right to jury trial by overruling the jury's work"), 56

(separation of powers argument), 63-66 (takings argument). In rejecting the Rhynes' argument based on the right to a jury trial, the Court of Appeals held that no right to jury trial attached because punitive damages are simply not "property." *See Rhyne*, 149 N.C. App. at 679, 683; *accord Osborn v. Leach*, 135 N.C. 628, 47 S.E. 811, 813 (1904) ("The right to have punitive damages assessed is . . . not property"). Although the Chamber believes that this holding was correct, this Court need not reach that issue because, property or not, the Rhynes' supposed "right" to an uncapped punitive damages award in fact never existed and thus could not possibly have "vested." This simple fact dooms many of the Rhynes' constitutional claims.

The events giving rise to the Rhynes' claims occurred in 1998, several years *after* the 1995 statute took effect. Accordingly, at the time the Rhynes' claims for punitive damages "accrued," they were legally subject to – and therefore limited by – the cap contained in N.C. GEN. STAT. § 1D-25. Put differently, the only "right" to punitive damages the Rhynes have ever had is a right to an *award that is subject to the statutory caps*. Because the right to punitive damages is created in and regulated by the 1995 Act, it necessarily is subject to limitations placed on that right by the legislature. *See* N.C. GEN. STAT. § 1D-1 ("Punitive damages may be awarded, in an appropriate case and *subject to the provisions of this Chapter*. . . ."); *id.* § 1D-10; *see also Bagley v. Shortt*, 410 S.E.2d 738, 739 (Ga. 1991) (noting that if "punitive

damages lawfully may be eliminated, . . . then they may be circumscribed"); *Evans v. State*, 56 P.3d 1046, 1056 (Alaska 2002); *Robinson v. Charleston Area Med. Ctr., Inc.*, 414 S.E.2d 877, 888 (W. Va. 1991).

Thus, the Rhynes are simply wrong to say that they have a right to an uncapped punitive damages award – or that this right "accrued" when the jury rendered its decision that a $23 million punishment was warranted. Under the design of the statute, the jury's decision was necessarily both preliminary in nature and contingent upon staying within the statutory cap. *See Gordon v. State*, 608 So. 2d 800, 801-02 (Fla. 1992) (per curiam) ("[U]ntil a judgment is rendered, there is no vested right in a claim for punitive damages") (internal quotations omitted), *cert. denied*, 507 U.S. 1005 (1993). The Rhynes never possessed a "vested" right – or any right at all – to exceed the limits imposed by N.C. GEN. STAT. § 1D-25.

Nor does it matter that the cap, under the procedure adopted by the General Assembly, is applied *after* the jury makes its initial decision. The General Assembly was perfectly free to withhold from the jury the fact that punitive damages would be capped at $250,000 or three times the compensatory damages; this obviously ensured that juries would not circumvent the limits by awarding artificially high compensatory awards. For purposes of the constitutional analysis, however, this scheme is no different from one in which the jury is simply instructed that punitive damages above

$250,000 or three times the compensatory damages may not be awarded.

In such a scheme, it is clear that a plaintiff suffers no deprivation of a right to jury trial as a consequence of the $250,000 cap. Before the right to jury trial is implicated, there must be a triable issue of fact for the fact-finder to resolve. *See Raleigh & Gaston R.R. Co. v. Davis*, 19 N.C. (2 Dev. & Bat. Eq.) 451, 1837 WL 468, at *8 (1837) (constitutional guarantee of a "trial" by jury attached only where there is a "dispute and [an] *issue* of fact") (emphasis altered); *see also Galloway v. United States*, 319 U.S. 372, 389-96 (1943) (rejecting Seventh Amendment challenge to court's authority to direct a verdict). But under the hypothetical just given, there is no fact for the jury to find relating to punishment in excess of $250,000. The only question for the jury is whether punishment is warranted and, if so, what penalty, short of $250,000, may be imposed. So, too, here.

Moreover, the right to a jury determination applies *only* to questions that are *factual* in nature. The Rhynes have not demonstrated that the level of punishment qualifies as a factual issue, and there is exceedingly good reason to believe it does not. First, North Carolina courts have held that the constitutional guarantee of a "trial" by jury "applies only to factual determinations" and "not to an issue of law, *or inquisition of damages*." *Raleigh & Gaston R.R. Co.*, 19 N.C. (2 Dev. & Bat. Eq.) 451, 1837 WL 468, at *8 (1837) (emphasis altered). And second, federal law concerning the Seventh

Amendment is to the same effect, as the United State Supreme Court has recently made clear. *See Cooper Indus., Inc. v. Leatherman Tool Group, Inc.*, 532 U.S. 424, 432, 437 (2001) ("Unlike the measure of actual damages suffered, which presents a question of historical or predictive fact, . . . the level of punitive damages is not really a 'fact' 'tried' by the jury. Because the jury's award of punitive damages does not constitute a finding of 'fact,' appellate review . . . does not implicate the Seventh Amendment") (citations omitted). Because a jury's "imposition of punitive damages" resolves no issue of fact but instead "is an expression of [the jury's] moral condemnation" (*id.* at 432), the decision does not implicate the jury-trial right.

As if this were not enough, the right to a jury is a *procedural* right; it doesn't change the substance of a party's claims (only how those claims are decided). Here, the Rhynes' rights of recovery were defined and limited by Chapter 1D and its cap on punitive damages. Under this scheme, the jury simply determined, by awarding an amount in excess of the cap, that plaintiffs were entitled to the statutory maximum. This determination is no different from any other special verdict; the trial court didn't ignore what the jury said – it gave full legal effect to the jury's answer under the governing legal framework. *See*, *e.g.*, *Evans*, 56 P.3d at 1051 (holding that a damages cap does not "intrude on the jury's fact-finding function, because the cap was a 'policy decision' applied after the jury's determination"); *Pulliam v. Coastal*

Emergency Servs. of Richmond, Inc., 509 S.E.2d 307, 312 (Va. 1999) ("The medical malpractice cap . . . does nothing more than establish the outer limits of a remedy; remedy is a matter of law and not of fact; and a trial court applies the remedy's limitation only after the jury has fulfilled its fact-finding function."). Plaintiffs are no more entitled to the full award of punitive damages than to title to the entire K-Mart chain, if that is what the jury had awarded – neither the excess damages nor the transfer of title is a cognizable remedy. As the Maine Supreme Judicial Court explained, "Plaintiff does not have the right to have the jury determine any question he desires." *Peters v. Saft*, 597 A.2d 50, 53-54 (Me. 1991).

For many of the same reasons, the Rhynes' takings claim also fails. Even if a claim for punitive damages is "property" (and it is not), the scope of any "property" right is necessarily contingent upon and defined by state law. Here, North Carolina law created a right to seek punitive damages subject to the cap contained in N.C. GEN. STAT. § 1D-25. The legislature granted only this limited right to punitive damages. Even if the cap cuts down the jury's initial award, it left plaintiffs with the very rights and property they had from the start: the ability to seek up to $250,000 or three times the amount of compensatory damages. "[T]he very existence of an inchoate claim for punitive damages is subject to the plenary authority of the ultimate policymaker[:] the legislature." *Gordon v. State*, 608 So.2d 800, 801 (Fla. 1992) (per curiam), *cert.*

denied, 507 U.S. 1005 (1993). The plaintiffs thus never had a right to punitive damages above the statutory threshold.[6] The State cannot take what it did not grant.

CONCLUSION

For the foregoing reasons, this Court should uphold the Court of Appeals' ruling that the General Assembly did not exceed its constitutional authority in enacting N.C. GEN. STAT. § 1D-25.

Respectfully submitted, this the 18th day of July, 2003.

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[6] Put differently, plaintiffs fail to state a claim with respect to punitive damages above the statutory limit; they have not, and cannot, point to any legal authority that confers the *substantive* right to unlimited damages. The legislature, in essence, "has decided that as matter of law damages in excess of $750,000 are not relevant." *Boyd v. Bulala*, 877 F.2d 1191, 1196 (4th Cir. 1989).

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the MOTION AND BRIEF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES AS *AMICUS CURIAE* IN SUPPORT OF DEFENDANT-APPELLEE K-MART CORPORATION has been served upon all parties to this action by mailing a copy thereof, properly addressed with postage prepaid, United States first class mail, to the following:

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