

IN THE SUPREME COURT OF THE STATE OF OREGON

EVERGREEN WEST BUSINESS,)	Supreme Court Nos.
CENTER, LLC, an Oregon limited)	S061049 (Control) & S061158
liability company,)	
)	Court of Appeals No. A146301
Plaintiff-Respondent,)	
Cross-Appellant,)	Clackamas County
Petitioner on Review,)	Circuit Court No. CV07020348
Respondent on Review,)	
)	
v.)	
)	
TERRY W. EMMERT,)	
)	
Defendant-Appellant,)	
Cross-Respondent,)	
Respondent on Review,)	
Petitioner on Review,)	
)	
and)	
)	
PREMIER WEST BANK,)	
)	
Impartial.)	

**BRIEF ON THE MERITS OF AMICUS CURIAE
OREGON TRIAL LAWYERS ASSOCIATION IN S061158**

On Petition for Review of the Decision of the Court of Appeals
On Appeal from a Judgment of the
Clackamas County Circuit Court
The Honorable Jeffrey S. Jones, Judge

Decision filed: December 27, 2012
Author of Opinion: Honorable David Schuman
Joining in Opinion: Honorable Rex Armstrong
Dissenting (in part): Honorable Robert Wollheim

September, 2013

Phil Goldsmith, OSB #782230
Law Office of Phil Goldsmith
1618 SW First Avenue, Suite 350
Portland, Oregon 97201
Ph. 503-224-2301
phil@lopglaw.com
Counsel for *Amicus Curiae*
Oregon Trial Lawyers Association

Cody Hoesly, OSB #052860
LARKINS VACURA LLP
621 SW Morrison St., Suite 1450
Portland, OR 97205
Ph: 503-222-4424
choesly@larkinsvacura.com
Counsel for *Amicus Curiae*
Oregon Trial Lawyers Association

John M. Berman, OSB #720248
J. Rion Bourgeois, OSB #760693
7175 SW Beveland St, Ste 210
Tigard, OR 97223
Ph. 503-670-1122
jberman976@aol.com
rion@att.net
Counsel for Plaintiff

Hollis K. McMilan, OSB #760195
Hollis K. McMilan PC
805 SW Broadway St, Ste 1900
Portland, OR 97205
Ph. 503-972-5092
hmcmlan@hkmlaw.com
Counsel for Defendant

TABLE OF CONTENTS

	Page
I. INTRODUCTION.....	1
II. THE PUNITIVES ARE PROPORTIONAL TO THE POTENTIAL HARM.	2
III. THE PUNITIVES ARE CONSISTENT WITH <u>HAMLIN</u>	5
CONCLUSION.	10

TABLE OF AUTHORITIES

CASES

Evergreen West Business Center, LLC v. Emmert, 254 Or App 361, 296 P3d 545 (2012).....	3-5, 7-9
Exxon Shipping Co. v. Baker, 554 US 471 (2008).....	5
Goddard v. Farmers Insurance Co., 344 Or 232, 179 P3d 645 (2008).....	4, 6
<u>Hamlin v. Hampton Lumber Mills, Inc.</u> , 222 Or App 230, 193 P3d 46 (2008).	2
Hamlin v. Hampton Lumber Mills, Inc., 349 Or 526, 246 P3d 1121 (2011).	<u>passim</u>
Pacific Mutual Life Insurance Co. v. Haslip, 499 US 1 (1991).	4
Romanski v. Detroit Entertainment, LLC, 428 F3d 629 (6th Cir 2005), cert. denied, 549 US 946 (2006).....	8, 9
State Farm Mutual Automobile Insurance Co. v. Campbell, 538 US 408 (2003).	7
TXO Production Corp. v. Alliance Resources Corp., 509 US 443 (1993)...	2-5

STATUTES AND RULES

ORS 86.770(2).....	7
--------------------	---

I.

INTRODUCTION

In S061158, Petitioner on Review Terry W. Emmert (“Emmert”) urges this Court to elevate mathematical certainty in calculation over the traditional punitive and deterrent functions of punitive damages. This approach is not required by prior United States Supreme Court interpretations of the federal due process clause. Further, it is contrary to this Court’s recent opinion in Hamlin v. Hampton Lumber Mills, Inc., 349 Or 526, 246 P3d 1121 (2011).

Emmert’s first proposed rule of law demonstrates how far he would go in pursuit of mathematical certainty:

“In a case where there is only economic damage and the amount of damages is \$1.00, the amount of punitive damages awarded may not exceed the 4:1 ratio unless the defendant’s conduct is ‘particularly egregious.’” Petitioner Terry W. Emmert’s Opening Brief on the Merits (“Emmert Br”), 2.

Perhaps this proposed rule would, as Emmert contends, remove “ambiguity and confusion [from] the punitive damages calculus.” Id., 11. Certainly, it would mean that a defendant which causes \$1 in nominal damages while engaging in the kind of behavior that warrants punishment would pay \$5, less than the cost of a bottle of decent wine, as long as that defendant’s behavior is not “particularly egregious.” That amount would deter no one.

Section II suggests how this Court can affirm the punitive damages award here without having to address the issues Emmert raises. Specifically, it explains how this punitive damage award can be upheld based on its relationship to the harm Emmert's conduct had the potential of causing.

In the event this Court concludes the record does not support the potential harm analysis, section III explains that this award is consistent with federal due process standards as recently interpreted by this Court in Hamlin.

II.

THE PUNITIVES ARE PROPORTIONAL TO THE POTENTIAL HARM

In Hamlin, this Court noted that the United States Supreme Court had “recognized that a state may be unable to achieve its goals of deterrence and retribution if awards of punitive damages must, in all instances, be closely proportional to compensatory damages.” 349 Or at 533. “To address that concern, the Supreme Court has suggested that reviewing courts may consider not only the compensatory damages awarded by the jury, but also the potential harm that could have resulted from the defendant's acts.”¹ Id. at 534.

In TXO Production Corp. v. Alliance Resources Corp., 509 US 443, 459-460 (1993), the United States Supreme Court approvingly quoted the following example:

¹ In Hamlin itself, the actual and potential damages were identical. Hamlin v. Hampton Lumber Mills, Inc., 222 Or App 230, 243, 193 P3d 46 (2008).

“[A] man wildly fires a gun into a crowd. By sheer chance, no one is injured and the only damage is to a \$10 pair of glasses. A jury reasonably could find only \$10 in compensatory damages, but thousands of dollars in punitive damages to teach a duty of care. We would allow a jury to impose substantial punitive damages in order to discourage future bad acts.” Internal quotations and citations omitted.²

TXO explains there are two components of potential harm. The first is the “harm that the defendant's conduct would have caused to its intended victim if the wrongful plan had succeeded.” Id. at 460, emphasis deleted. The second is “the possible harm to other victims that might have resulted if similar future behavior were not deterred.” Id.

In this case, “Evergreen did not seek damages in the amount of its own loss from Emmert's actions; rather, Evergreen sought damages measured by Emmert's gain.” Evergreen West Business Center, LLC v. Emmert, 254 Or App 361, 372, 296 P3d 545 (2012), emphasis deleted. Determining Evergreen’s actual loss is complicated by its financial circumstances which, at least in Emmert’s view, meant that it “could not possibly have redeemed the property from foreclosure status.” Emmert Br, 6.

But that is not a relevant consideration for a punitive damages calculation based on potential harm. “[S]tates * * * have a particular interest in deterring and punishing conduct that * * * takes advantage of [financial]

² This example was quoted in Hamlin, supra, 349 Or at 533.

vulnerability.” Hamlin, supra, 349 Or at 540. It would contravene this principle for Emmert’s punishment to be smaller because Evergreen’s finances meant that it suffered a smaller loss as a result of Emmert’s behavior.

Accordingly, a proper application in this case of the potential harm analysis requires determining the loss that would have been suffered by someone in Evergreen’s position who would not have lost the property to foreclosure. This represents the harm to the intended victim “‘likely to result from the defendant's conduct.’” TXO, supra, 509 US at 460, quoting Pacific Mutual Life Insurance Co. v. Haslip, 499 US 1, 21 (1991), emphasis deleted.

A month before the foreclosure sale, a bank appraisal valued the property at \$1,390,000. Evergreen West, supra, 254 Or App at 366. Emmert paid \$613,979.49 to acquire the property from the foreclosing bank. Id. In its constructive trust ruling, the trial court held that Emmert was entitled to be reimbursed for his acquisition costs, but not “for his expenditures on the property after he acquired it.” Evergreen West, supra, 254 Or App at 364, 368.

It thus appears the potential harm to Evergreen was about \$775,000, a sum greater than the \$600,000 punitive damages award. This ratio readily satisfies the holding of Goddard v. Farmers Insurance Co., 344 Or 232, 259-61, 179 P3d 645 (2008). In fact, the potential harm could be \$500,000 less and still fall within the limits permitted by Goddard.

TXO also permits consideration of the potential of future harm to

other victims. In TXO, there was evidence the wrongdoer “had engaged in similar nefarious activities in its business dealings in other parts of the country.” 509 US at 450-451. Thus, one basis for upholding the punitive damage award there was “the fact that the scheme employed * * * was part of a larger pattern of fraud, trickery and deceit.” Id. at 462.

So too here. The Court of Appeals correctly followed TXO when it held that, given Emmert’s behavior in this case and his “previous behavior in other business dealings,” the punitive damage award here furthers “the state’s interests in preventing future tortious conduct by Emmert.” Evergreen West, supra, 254 Or App at 386.

III.

THE PUNITIVES ARE CONSISTENT WITH HAMLIN

Hamlin has already rejected Emmert’s first proposed rule, which would limit punitive damages to four times a small amount of actual damages unless “the defendant’s conduct is ‘particularly egregious.’” Emmert Br, 2. Relying in part on Exxon Shipping Co. v. Baker, 554 US 471, 494 (2008), Hamlin held that, “when the compensatory damages award is small[,] * * * the ratio between punitive and compensatory damages * * * is of limited assistance in determining whether the amount of a jury’s punitive damages award meets or exceeds state goals of deterrence and retribution.” 349 Or at 535-537.

Emmert does not claim that a subsequent decision of the United

States Supreme Court requires this Court to reassess this interpretation.

OTLA's research confirms there is no such decision.

This Court's prior decisions also undermine Emmert's second proposed rule, which seeks in small actual damage cases "to tie the level of punitive damages to some known or knowable standard" by proposing certain formulaic ceilings. Emmert Br, 15. One of those formulas (capping the punitives available in all small actual damage cases) relies on a suggestion "by the dissent in Hamlin," Emmert Br, 16, which this Court expressly rejected. Hamlin, supra, 349 Or at 535 n8. The other (limiting punitives to what civil penalties or fines could be imposed) is contrary to this Court's conclusion that such sanctions are not "a direct predictor of the constitutional limits of an individual punitive damages award." Goddard, supra, 344 Or at 257.

More generally, such formulas are at odds with this Court's understanding "that the process of identifying due process limits demands flexibility and a consideration of the facts and circumstances that each case presents." Hamlin, supra, 349 Or at 537. See also id. at 533 (noting the United States Supreme Court's "refusal to set any 'rigid benchmark' beyond which a punitive damages award becomes unconstitutional" and the fact that Court had held "due process permits punitive damages that are reasonably necessary to vindicate the State's legitimate interests in punishment and deterrence," internal quotations and citation omitted). They also overlook the well-established

principle that the “reprehensibility” of a defendant’s behavior is “[t]he most important indicium of the reasonableness of a punitive damages award.”³ Id. at 539, quoting State Farm Mutual Automobile Insurance Co. v. Campbell, 538 US 408, 419 (2003).

The facts here illustrate the flaws in Emmert’s proposed approach. “Emmert had a net worth of approximately \$160,000,000.” Evergreen West, supra, 254 Or App at 386. There was evidence that he had acquired a portion of that wealth through improper business dealings. Id. There was evidence as well “that he made a calculated decision to breach his duties to [Evergreen West] in pursuit of” what he perceived as “potentially large profits.” Id.

Formulaic limits on punitive damages allow such people to calculate whether the potential benefit of engaging in reprehensible behavior is worth the cost. That is to say, if they know their maximum exposure to

³ Emmert seeks to minimize the reprehensibility of his behavior by arguing that “he was motivated to act not to enrich himself at the expense of [Evergreen West], but rather to protect himself from having to pay on the guarantee he signed to enable [Evergreen West] to get the loan in the first place.” Emmert Br, 13. The law forecloses this argument.

The Court of Appeals opinion makes clear this was a non-judicial foreclosure. E.g., Evergreen West, supra, 254 Or App at 366 (“Emmert’s attorney, as trustee, held a foreclosure sale”). ORS 86.770(2) provides in relevant part: “after a trustee’s sale * * *, an action for a deficiency may not be brought or a judgment entered against the grantor, the grantor’s successor in interest or another person obligated on: (a) The note, bond or other obligation secured by the trust deed for the property that was subject to the trustee’s sale * * *.” In plain English, if the foreclosing bank had conducted the sale, Emmert’s guarantee would have been extinguished as a matter of law.

punitive damages, they can estimate the likelihood that a financial vulnerable entity like Evergreen West cannot find counsel and sustain litigation to a jury verdict. They can then compare their potential liability discounted by the chances of never being held accountable against the potential profit, and decide if the benefit is worth the risk. So much for what the Court of Appeals properly called “the state's interests in **preventing** future tortious conduct by Emmert.” Evergreen West, supra, 254 Or App at 386, emphasis added.

Finally, the reasoning of this Court’s opinion in Hamlin undermines Emmert’s proposed third rule of law, that “a ratio of punitive damages to actual damages of 600,000:1” can never been justified. Emmert Br, 2. Hamlin explained that “the proportionality aspect of the due process analysis [i]s a continuum — the lower the compensatory damages, the higher the permitted ratio and, conversely, the higher the compensatory damages, the lower the permitted ratio.” 349 Or at 538 n11. Thus, for example, if “conduct caus[ing] \$11,000 in compensatory damages * * * justified” a particular amount of “punitive damages[,] * * * similar conduct that resulted in compensatory damages of \$12,000 could * * * justify a similar punitive damages award.” Id.

Later, the Hamlin opinion catalogued appellate decisions which had “approved punitive damages in amounts and in ratios greater than * * * those present in” that case. Id. at 542. One such case was Romanski v. Detroit

Entertainment, LLC, 428 F3d 629, 649 (6th Cir 2005), cert. denied, 549 US 946 (2006). This Court summarized the result in Romanski as “punitive damages of \$600,000; economic damages of \$279.05, for 2,150:1 ratio, for false arrest and confiscation of lunch voucher by casino security officer.” Hamlin, supra, 349 Or at 542-543.

Had this Court been presented with the Romanski facts and a \$1 award of damages, two conclusions follow from Hamlin, supra, 349 Or at 538 n11. Because \$1 is less than \$279.05, this Court would have approved a higher ratio. And because the two figures are within \$1,000 of each other, this Court would have approved a similar punitive damages award.⁴

A \$600,000 punitive damage award is not constitutionally permissible in every small damages case. But the Court of Appeals carefully explained the facts which demonstrate how the state’s interests in deterrence and punishment warrant that sanction here. Evergreen West, supra, 254 Or App at 383-384, 386.

Emmert concedes that “[t]he Court of Appeals’ decision correctly states the historical * * * facts.” Cross Petition for Review of Defendant Terry

⁴ Another way to demonstrate the fallacy of Emmert’s proposed third rule is to suppose a jury awards nominal damages of \$.01 and \$6,000 in punitive damages. That too results in a ratio of 600,000 to 1. But even the dissent in Hamlin would have considered a \$6,000 punitive damages award sufficiently small that it would “not implicate substantive due process concerns.” 349 Or at 550-551 (Gillette, J pro temp, dissenting).

W. Emmert, 5. He proposes a variety of mathematical straitjackets on punitive damages in an attempt to avoid the punishment warranted by his actions. His arguments are contrary to this Court's decision in Hamlin and should be rejected.

CONCLUSION

For two reasons, the federal due process clause permits the amount of punitive damages awarded by the jury in this case. That amount is supported by the potential harm to Evergreen West from Emmert's actions as well as the potential harm to others if Emmert's future behavior were not deterred. Even without considering potential harm, the punitive damage award here is fully consistent with this Court's reasoning in Hamlin.

Dated this 13th day of September, 2013.

Respectfully submitted,

LAW OFFICE OF PHIL GOLDSMITH
LARKINS VACURA LLP

By: /s/ Phil Goldsmith
Phil Goldsmith, OSB No. 782230
Of Attorneys for Amicus Curiae
Oregon Trial Lawyers Association

**CERTIFICATE OF FILING, SERVICE &
COMPLIANCE WITH ORAP 5.05(2)(d)**

I certify that (1) the size of the type in this brief is not smaller than 14 point for both the text of the brief and footnotes as required by ORAP 5.05(4)(f); (2) this brief complies with the word-count limitation in ORAP 5.05(2)(b); and (3) the word-count of this brief as described in ORAP 5.05(2)(a) is 2317 words.

I further certify that on September 13, 2013, I filed the foregoing BRIEF ON THE MERITS OF OREGON TRIAL LAWYERS ASSOCIATION IN S061158 with the State Court Administrator through the court's electronic filing system and that, on the same date, I served the same document on the party or parties listed below in the following manner:

BY E-FILING: For each party, I caused a copy of the document(s) to be sent by electronic mail via the court's electronic filing system to the e-mail address(es) indicated below.

John M. Berman, OSB #720248
J. Rion Bourgeois, OSB #760693
7175 SW Beveland St, Ste 210
Tigard, OR 97223
Ph. 503-670-1122
jberman976@aol.com
rion@att.net
Counsel for Plaintiff

Hollis K. McMilan, OSB #760195
Hollis K. McMilan PC
805 SW Broadway St, Ste 1900
Portland, OR 97205
Ph. 503-972-5092
hmcmlan@hkmlaw.com
Counsel for Defendant

/s/ Phil Goldsmith
Phil Goldsmith, OSB #782230