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IN THE SUPREME COURT OF THE STATE OF OREGON

EVERGREEN WEST BUSINESS CENTER, LLC, an Oregon limited liability company,

Plaintiff-Respondent

Cross-Appellant,

Petitioner on Review,

v.

TERRY W. EMMERT,

Defendant-Appellant

Cross-Respondent,

Respondent on Review,

and

PREMIER WEST BANK,

Impartial.

S061049 (Control)

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Plaintiff-Respondent

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v.

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S061158

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RESPONDENT EVERGREEN WEST BUSINESS CENTER, LLC'S  
ANSWERING BRIEF ON THE MERITS

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On Review from a decision of the Court of Appeals on appeal from a judgment  
of the Circuit Court of Clackamas County, Honorable Jeffrey S. Jones

Opinion Filed December 27, 2012

Author of Opinion: Schuman, P.J.

Concurring Judge: Armstrong

Concurring and Dissenting (on other issue): Wolheim

(COUNSEL ON THE REVERSE)

August, 2013

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## **I. LEGAL QUESTION PRESENTED ON REVIEW**

When a party breaches his fiduciary duty by intentional misrepresentation and theft, and obtains a benefit of \$700,000, did the jury's award of \$600,000 in punitive damages, but only \$1.00 in actual damages, violate the Due Process Clause of the Constitution, considering:

- A. The egregious nature of the conduct;
- B. The potential harm of \$700,000;
- C. The \$700,000 profit obtained by the breaching party;
- D. The comparable criminal sanction of twice the amount of the benefit obtained, \$1,400,000; and
- E. That any lesser amount would not be a deterrent because the misconduct would still provide the breaching party with a profit?

## **II. PROPOSED RULE OF LAW<sup>1</sup>**

This Court should hold that in determining the amount of punitive damages constitutionally available, Due Process is not denied when a jury awards punitive damages A) taking into account the intentionally deceptive nature of the conduct and the financial vulnerability of the victim; B) that are less than the potential harm and less than the profit toriously obtained; C) that are less than the comparable criminal sanction; and D) which, if reduced, would not act as a deterrent because it would leave the wrongdoer with a profit from his misconduct.

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<sup>1</sup> If this Court reinstates Plaintiff's judgment for a constructive trust, Defendant's petition for review becomes moot. The trial court held that a court of equity could not award punitive damages. The Court of Appeals did not reach that issue on appeal.

### III. NATURE OF THE ACTION

Defendant Emmert was one of four members of Evergreen West Business Center, LLC. Its purpose was to construct and own a business park. One member, Carl Senour, was the owner of a cabinet shop and was to be the anchor tenant. A second member, Builders, Inc., was the contractor. A third member, Brad Taggart, was an owner of Builders, Inc., the force behind the development and the manager of Plaintiff. (By the time of trial Taggart no longer owned his share.) The fourth member, Defendant Terry Emmert, was invited to participate solely for his ability and willingness to provide financing.

When refinancing was difficult to obtain, and the acquisition lender began foreclosure on Plaintiff's property, Emmert advised Taggart that he, Emmert, would resolve and stop the foreclosure, and told Taggart to continue to obtain new financing from Emmert's banker. Emmert then secretly purchased the note and trust deed from the foreclosing lender, held the foreclosure sale of Plaintiff's property without notice and purported to buy the property at that unannounced sale, taking title in his own name.

Evergreen West Business Park, LLC sued Emmert for breach of fiduciary duty and the right to elect one of two alternative remedies -- damages or a constructive trust -- after trial.

#### **IV. RELIEF SOUGHT IN THE TRIAL COURT**

Plaintiff sought alternative remedies of monetary damages or the imposition of a constructive trust, and punitive damages.

#### **V. NATURE OF JUDGMENT**

The jury awarded Plaintiff only nominal damages of \$1.00, but awarded punitive damages of \$600,000. The trial court concluded that punitive damages could not exceed \$4.00, four times the nominal damages and reduced the punitive damage award to \$4.00. It also granted to Plaintiff in the alternative a constructive trust, with the right, as proposed by Plaintiff as the only practical remedy, to sell the property.

From the proceeds Emmert was to be repaid his actual out-of-pocket cost of acquiring the property of \$613,979.49. The trial court also ruled that equity could not award punitive damages and, therefore, refused to consider an award of punitive damages along with the constructive trust remedy.

The Court of Appeals reversed on appeal and cross-appeal. It ruled that Plaintiff was not entitled to a constructive trust because it had also sought damages as an alternative remedy for breach of fiduciary duty and had agreed to a sale of the property. The Court of Appeals also reinstated the jury's punitive damage award of \$600,000.



## **VI. STATEMENT OF MATERIAL FACTS.**

Defendant correctly states that the facts are to be stated in the light most favorable to Plaintiff, as it was the prevailing party. However, Defendant has failed to do so.

Emmert's rendition of the operative facts is incomplete and inaccurate. Plaintiff has set forth the facts, with a citation to the record in its Opening Brief in the companion Petition on Review. Emmert's net worth was \$161,580,691.26. Tr. 355. The facts as set forth by the Court of Appeals are accurate.

In trying to justify his conduct, Emmert testified falsely at trial about a number of matters. The jury clearly disbelieved him.<sup>2</sup>

## **VII. SUMMARY OF ARGUMENT**

The evidence established that Emmert received property worth \$1,390,000 by buying the note and trust deed and foreclosing on it. His cost was only \$613,979.49. Thus, the jury could believe that he received a windfall of about \$700,000. It assessed punitive damages of only \$600,000. Such an award does not implicate any failure of Due Process.

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<sup>2</sup> For instance, Emmert attempted to justify his conduct by falsely claiming that after the scheduled non-judicial foreclosure, he would be liable for any deficiency. That frivolous contention resulted in the need to prove to the contrary at trial through expert testimony. Yet he continues to incorrectly contend in his Opening Brief at 13 that he acted to protect himself on his guarantee. ORS 86.770(2)

The jury's award clearly met all three commonly cited standards for punitive damages: Emmert's theft of property by deception is especially egregious behavior; while the actual damages awarded were nominal, the potential damages and the benefit received by Emmert were \$700,000; and the comparable criminal statutory sanction for Emmert's misconduct was twice the benefit he received, or \$1,400,000, ORS 161.625(3)(a). Since Emmert received property worth \$1,390,000 and at a cost of \$613,979.49, any lesser sum would leave Emmert with a profit, and, therefore, not act as a deterrent at all.

The jury's implied goal was to take away Emmert's windfall, a rational outcome that does not violate Due Process. It is legitimate for a state to permit punitive damages that have a rational relationship to what is necessary to deter such misconduct.

### VIII. ARGUMENT

As Emmert admits, three guideposts are commonly stated to ascertain the reasonableness of the amount of punitive damages: 1) The degree of reprehensibility of the conduct; 2) the relationship between potential or actual harm suffered; and 3) the civil or criminal penalties for comparable misconduct. *BMW of North America, Inc. v. Gore*, 517 US 559, 116 S Ct 1589, 134 L Ed 2d 809 (1996). The punitive damage award here clearly satisfies all three criteria.

Another criteria that is discussed in the cases is the amount necessary to act as a deterrent, a primary purpose of punitive damages. The amount awarded by the jury is at the low end of what would be required to have a meaningful impact.

**A. Emmert's conduct was extremely reprehensible: Lying and stealing.**

It does not take paragraphs to explain why rich businessmen (Emmert claims a net worth of more than \$160,000,000) who gain their vast wealth by lying and stealing are the epitome of why punitive damages exist in the first place. The pernicious nature of Emmert's misconduct, and the need for punitive damages, is increased, when, as here, the perpetrator has no concern for the harm he is doing to third parties. Carl Senour lost over \$150,000, his entire investment, when all he wanted was to have a better cabinet shop. Builders, Inc.'s creditors lost over \$400,000, much of it belonging to taxing authorities.<sup>3</sup>

Scam artists destroy lives. When the wealthy get away with it, it sends two messages to all citizens: 1) It is applaudable to become wealthy by lying and cheating; and 2) The wealthy live by a different set of rules. In

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<sup>3</sup> The fact that the initial harm was economic and not physical does not result in Emmert's conduct not being egregious. Calculated financial fraud visited upon the financially vulnerable causes more harm than many physical insults.

this case the share of Emmert's wealth represented by the award was less than 4/1000ths. For Emmert such misconduct is sport, not economic need.

**B. The punitive damage award was less than the actual or potential harm or the windfall obtained by Emmert.<sup>4</sup>**

The evidence was that Emmert received a windfall of approximately \$700,000. The property at the time had an undisputed value of \$1,390,000. His investment was \$613,979.49. It is appropriate to consider both the potential harm and the benefit to Emmert concurrently.

Emmert's role in the LLC was to provide the needed financing. Emmert had the money to pay off the foreclosing bank, for that is what he did. But instead of 1) paying off the bank loan; 2) assisting Evergreen West in selling its property for its fair value; 3) paying its creditors first from the \$700,000 equity; and sharing the remainder with all of the members, he surreptitiously proceeded with the foreclosure and gave himself the \$700,000 benefit. Whether one views the lost equity as actual harm or potential harm, it is what the LLC lost, at least potentially, because Emmert did not do what he should have done.

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<sup>4</sup> When potential damages exceed actual damages, the former is used to calculate the maximum permissible punitive damages. See, e.g. *Williams v. Philip Morris, Inc.*, 340 Or 35, 60-61, 127 P3d 1165 (2006), vacated on other grounds, 549 US 346 (2007), reaffirmed on remand, 344 Or. 45, 176 P.3d 1255, (2008)

Emmert argued at trial that the LLC was in poor financial condition and therefore could not have reaped that benefit. The jury apparently recognized that, without Emmert's assistance, the LLC would have been hard pressed to realize on the equity. But it concluded that was not a reason to give Emmert a "free pass."

Also, the purpose of punitive damages is to deter crooks from benefiting from their dishonesty regardless of whether the complaining party could have reaped the benefits. Since Emmert's windfall was \$700,000, it was within the jury's prerogative to take away a crook's incentive to cheat: assess punitive damages so that there is no windfall. In *BMW of North America*, the Supreme Court expressly said that "[p]unitive damages may properly be imposed to further a State's legitimate interests in punishing unlawful conduct and deterring its repetition." Taking away the profit is the best deterrent.

**C. The punitive damages awarded are less than the potential statutory criminal sanction.**

It is not just the available civil penalties, but also criminal sanctions for comparable misconduct, that are to be considered. The Supreme Court in *BMW of North America* also said:

"Comparing the punitive damages award and the civil or criminal penalties that could be imposed for comparable misconduct provides a third indicium of excessiveness." *Id.* at 575

ORS 161.625(3)(a) provides as follows:

“If a person has gained money or property through the commission of a felony, then upon conviction thereof the court, in lieu of imposing the fine authorized for the crime under subsection (1) or (2) of this section, may sentence the defendant to pay an amount, fixed by the court, not exceeding double the amount of the defendant’s gain from the commission of the crime.”

Six hundred thousand dollars is less than Emmert’s gain of \$700,000, well within the statutory penalty of twice the amount of his gain. Theft of property, including by deception, having a value of \$700,000, is a class B felony. ORS 164.015; ORS 164.085 and ORS 164.057. (The alternate fine would have been up to \$250,000. ORS 161.625(1)(c)

**D. The actual damages awarded is of little significance in this case since any reduction in the punitive damage award would not deter, but reward, Emmert for his misconduct.**

This Court explored cases involving small actual damage awards and the role of punitive damages in deterring socially abhorrent behavior in *Hamlin v. Hampton Lumber Mills, Inc.*, 349 Or. 526, 246 P.3d 1121 (2011). In those cases what is permissible is more related to the legitimate goal of deterrence, which takes into consideration the character of the behavior. What is appropriate depends on the circumstances.

This Court in *Hamlin* cited with approval *Goff v. Elmo Gree & Sons Const. Co., Inc.*, 297 S.W.3d 175 (Tenn, 2009), *cert den*, \_\_\_\_\_ U.S.\_\_\_\_\_, 130 S.Ct. 1920 (2010), where a compensatory award of \$3,305

resulted in a punitive damage award of \$500,000 reduced from \$1,000,000.

There the defendant buried tires and other waste under several feet of compacted rock on a highway expansion project. That was a foolish lapse that saved little.

In comparison, in this case we have substantial evidence of an actor, Emmert, who intentionally constructed a scheme, carried out by him personally for the purpose of appropriating hundreds of thousands of dollars of equity. Given Emmert's worth in excess of \$160,000,000, the \$600,000 award barely amounts to a slap on the wrist and only requires that he give up most of his ill-gotten gains.

Where small or nominal damages are awarded, courts have uniformly concluded that ratios are not very relevant, and one has to look at the overall situation to ascertain what is reasonable in light of the goal of deterring and punishing fairly. As the United States Supreme Court observed in *Exxon Shipping Co. v. Baker*, 554 U.S. 471, 128 S. Ct. 2605, 171 L. Ed. 2d 570, (2008):

“Regardless of culpability, however, heavier punitive awards have been thought to be justifiable when wrongdoing is hard to detect (increasing chances of getting away with it), see, e.g., *BMW of North America, Inc. v. Gore*, 517 U.S. 559, 582, 116 S.Ct. 1589, 134 L.Ed.2d 809 (1996) (‘A higher ratio may also be justified in cases in which the injury is hard to detect’), or when the value of injury and the corresponding compensatory award are small (providing low incentives to sue), see, e.g., *ibid.* (‘[L]ow awards of compensatory damages may properly support a higher ratio ... if, for example, a

particularly egregious act has resulted in only a small amount of economic damages’); 4 Restatement § 908, Comment *c*, p. 465 (‘Thus an award of nominal damages ... is enough to support a further award of punitive damages, when a tort ... is committed for an outrageous purpose, but no significant harm has resulted’). And, with a broadly analogous object, some regulatory schemes provide by statute for multiple recovery in order to induce private litigation to supplement official enforcement that might fall short if unaided. See, *e.g.*, *Reiter v. Sonotone Corp.*, 442 U.S. 330, 344, 99 S.Ct. 2326, 60 L.Ed.2d 931 (1979) (discussing antitrust treble damages).” 554 U.S. at 494-495

Many federal appellate decisions involving small actual damage awards have approved punitive damages based on the entire picture and without focusing on the ratio of actual damages to punitive damages. See, *e.g.* *Romanski v. Detroit Entertainment, LLC*, 428 F3d 629 (6<sup>th</sup> Cir, 2005)(False imprisonment: \$279.05 actual damages; \$600,000 punitive damages); *Mathias v. Accor Economy Lodging, Inc.*, 347 F3d 672 (7<sup>th</sup> Cir, 2003)(Bed bugs: \$5,000 compensatory damages and \$186,000 punitive damages); *JCB, Inc. v. Union Planters Bank, N.A.*, 539 F3d 862 (8<sup>th</sup> Cir, 2008)(Trespass: \$1 nominal damages; \$108,750 punitive damages, combined with a companion punitive damage award for conversion of \$1,150,000); and *Saunders v. Branch Banking & Trust Co.*, 526 F3d 142(4<sup>th</sup> Cir, 2008)(\$1,000 statutory damages; \$80,000 punitive damages).


It is important to keep in mind that the temptation to cheat is greater whenever the potential for escaping punishment is high. Unless cases involving small actual damages can result in much larger punitive damages



there will be no system to deter such conduct. The award in this case, which amounts to merely giving up ill gotten gains, barely satisfies society's need.

### CONCLUSION

Should this Court reach the issue, the punitive damage award is far below the constitutional maximum, for it is less than Emmert's windfall and a pittance relative to his net worth. Any lesser amount would be no deterrent at all.

  
\_\_\_\_\_  
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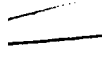
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Dated this August 26, 2013.

  
  
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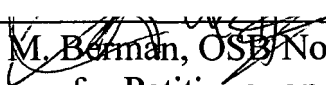
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