No. 05-

In the Supreme Court of the United States

PHILIP MORRIS USA,

Petitioner,

v.

MAYOLA WILLIAMS,

Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of Oregon

PETITION FOR A WRIT OF CERTIORARI

KENNETH S. GELLER
EVAN M. TAGER
Mayer, Brown, Rowe & Maw LLP
1909 K Street, NW
Washington, DC 20006
(202) 263-3000

WILLIAM F. GARY
SHARON A. RUDNICK
Harrang Long Gary Rudnick
360 East 10th Avenue
Eugene, OR 97401
(541) 485-0220

ANDREW L. FREY
Counsel of Record
ANDREW H. SCHAPIRO
LAUREN R. GOLDMAN
Mayer, Brown, Rowe & Maw LLP
1675 Broadway
New York, New York 10019
(212) 506-2500

Counsel for Petitioner

QUESTIONS PRESENTED

In this case brought by the widow of a smoker, the jury held Philip Morris liable for fraud and awarded $79.5 million in punitive damages – 97 times the compensatory damages awarded by the jury. On remand from this Court for reconsideration in light of *State Farm Mutual Automobile Insurance Co.* v. *Campbell*, 538 U.S. 408 (2003), the Oregon Supreme Court upheld the trial court's refusal to instruct the jury that it could not punish Philip Morris for harms to non-parties, concluding that a jury may punish for such harms so long as the conduct that caused those harms is similar to the conduct that harmed the plaintiff. Then, construing the evidence in the light most favorable to the plaintiff, the court proceeded to hold that the punitive award was not unconstitutionally excessive, despite concluding that the punitive award was not reasonably related to the harm to the plaintiff. The questions presented, each of which is the subject of a conflict in the lower courts, are:

1. Whether, in reviewing a jury's award of punitive damages, an appellate court's conclusion that a defendant's conduct was highly reprehensible and analogous to a crime can "override" the constitutional requirement that punitive damages be reasonably related to the plaintiff's harm.

2. Whether due process permits a jury to punish a defendant for the effects of its conduct on non-parties.

3. Whether, in reviewing a punitive award for excessiveness, an appellate court is permitted to give the plaintiff the benefit of all conceivable inferences that might support a finding of high reprehensibility even if the jury made no such specific factual findings.

RULE 29.6 STATEMENT

Petitioner Philip Morris USA's corporate parent is Altria Group, Inc. Altria Group, Inc. is the only publicly held company that owns ten percent or more of Philip Morris USA's stock.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Philip Morris USA ("Philip Morris") respectfully petitions for a writ of certiorari to review the judgment of the Supreme Court of Oregon in this case.

OPINIONS BELOW

The decision of the Oregon Supreme Court (App., *infra*, 1a-34a) is reported at 127 P.3d 1165. The decision of the Oregon Court of Appeals (App., *infra*, 35a-75a) is reported at 92 P.3d 126.

JURISDICTION

The judgment of the Oregon Supreme Court was entered on February 2, 2006. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).

STATEMENT

1. The Trial. Jesse Williams began smoking cigarettes in 1950 while in the Army in Korea, because other soldiers told him that the smoke would keep mosquitoes away. After 1955, Williams smoked Marlboros, manufactured and marketed by petitioner Philip Morris. App., *infra*, 36a. Williams eventually smoked three packs of cigarettes a day.

Williams had been taught as a child that smoking is unhealthy. He and his wife taught their children not to smoke. Citing the dangers of tobacco, his wife and children, in turn, repeatedly urged Williams to stop smoking. So did his physician. Although Williams referred to cigarettes as "cancer sticks," he reacted angrily when confronted with the risks of smoking. His wife frequently pointed to the warning labels on cigarette packages and told him that cigarettes would kill him. Williams reportedly responded: "Phooey. * * * This is what the Surgeon General says, it's not what [the] tobacco company says." According to his wife, Williams said that "cigarettes are not going to kill you, because I just heard this

so-and-so guy on TV, and he said that tobacco doesn't cause you cancer!" Williams' wife testified that in 1996, when Williams was diagnosed with lung cancer, he said: "Those darn cigarette people finally did it. They were lying all the time." Williams died in March 1997. App, *infra*, 36a. Williams's widow ("plaintiff") sued Philip Morris, alleging negligence and fraud.

At trial, plaintiff mounted a wide-ranging attack on 50 years of Philip Morris's conduct, introducing evidence relating not only to the company's statements concerning smoking and health (none of which plaintiff was shown to have heard or seen), but also to its research practices, its litigation positions, and its dealings with competitors. In closing arguments, plaintiff explicitly and repeatedly urged the jury to punish Philip Morris not only for the harm caused to Williams, but also for the alleged harms suffered by masses of other, unidentified people who were not before the court – people whose individual circumstances were never presented to any finder of fact. Plaintiff urged the jury to award punitive damages based on the supposition that ten out of every hundred smokers in Oregon would get cancer, and three or four of those ten would be Marlboro smokers:

> In Oregon, how many people do we see outside, driving home, coming to work, over the lunch hour smoking cigarettes? For every hundred cigarettes that they smoke are going to kill ten through lung cancer. And of those ten, four of them, or three of them I should say, because the market share of Marlboros is one-third * * *.
>
> When you determine the amount of money to award in punitive damages against Philip Morris * * * [i]t's fair to think about how many other Jesse Williams[es] in the last 40 years in the State of Oregon there have been. It's more than fair to think about how many more are out there in the future.

Philip Morris sought an instruction that would have told the jury that any punitive award must bear a reasonable relationship to the harm caused to the plaintiff and that it was not permitted to punish Philip Morris for alleged harms suffered by non-parties. The trial court refused to give this instruction, choosing instead to tell the jury that it was free to award any amount of punitive damages up to $100 million, the amount arbitrarily requested in plaintiff's complaint.

The jury found for plaintiff on both her fraud and product design claims and awarded $821,485 in compensatory damages (reduced to $521,485 pursuant to Oregon's statutory cap on wrongful death damages). The jury also awarded $79.5 million in punitive damages for fraud but refused to award any punitive damages on the claims relating to the design of Philip Morris's cigarettes.

On post-trial motions, the trial court held that the punitive award was "excessive under federal standards." Accordingly, it reduced the punitive damages to $32 million – still 39 times the compensatory damages verdict.

2. Appeal and GVR. On appeal, the Oregon Court of Appeals rejected Philip Morris's contention that the jury should have been given Philip Morris's proposed instruction that any award of punitive damages had to be reasonably related to the harm caused to Williams himself (as opposed to non-parties), ruling that the proposed instruction misstated the applicable law. *Williams* v. *Philip Morris*, 48 P.3d 824 (Or. App. 2002). It further concluded that the jury's verdict had not been excessive and accordingly reinstated the jury's $79.5 million award. *Id.* at 843.[1]

After the Oregon Supreme Court denied review, Philip Morris petitioned for a writ of certiorari, raising both the "punishment for harm to others" issue and an excessiveness

[1] Including interest, the award now amounts to nearly $130 million.

claim. This Court granted the petition, vacated the judgment, and remanded to the Oregon Court of Appeals for reconsideration in light of *State Farm Mutual Automobile Insurance Co.* v. *Campbell*, 538 U.S. 408 (2003). *Philip Morris USA, Inc.* v. *Williams*, 540 U.S. 801 (2003).

3. Proceedings On Remand. On remand, the Oregon Court of Appeals once again upheld the $79.5 million award. It rejected Philip Morris's claims of instructional error, expressly holding that it was both permissible and appropriate for the jury to punish for harms to non-parties. App., *infra*, 75a. The Court of Appeals then held that the award was not excessive, again relying primarily on unproven harms to non-parties to justify the jury's massive award.

The Oregon Supreme Court affirmed. It stated that, in applying the excessiveness analysis set forth in *BMW of North America, Inc.* v. *Gore*, 517 U.S. 559 (1996), it would "state all facts in the light most favorable to plaintiff." *Id.* at 2a; see also *id*. at 23a ("[W]e construe all facts in favor of plaintiff, the party in whose favor the jury ruled.").

Proceeding on that basis, the court stated that the jury could have found that Philip Morris had "deceived other smokers in Oregon" besides Mr. Williams and that Philip Morris's products "caused a significant number of deaths each year in Oregon during the pertinent time period * * * ." *Id.* at 7a-8a. Although no evidence had been introduced at trial to show whether any Oregon smoker other than Williams smoked and sustained injuries in reliance on the alleged fraud, the court held that widespread reliance and injury could be inferred. *Id.* at 8a n.1.

The court then addressed Philip Morris's contention that the jury should have been instructed not to punish the company for alleged harms suffered by non-parties. The court rejected the argument "that *Campbell* prohibits the state, acting through a civil jury, from using punitive damages to punish a defendant for harm to non-parties." *Id.* at 18a. Indeed,

in considering the text of the proposed instruction – which would have permitted the jury to "consider," but not "punish" for, harm to others – the court stated: "It is unclear to us how a jury could 'consider' harm to others, yet withhold that consideration from the punishment calculus. If a jury cannot punish for the conduct, then it is difficult to see why it may consider it at all." *Id.* at 18a n.3.

The court then considered the three *BMW* "guideposts" for determining whether a punitive award is unconstitutionally excessive: (i) the degree of reprehensibility of the misconduct; (ii) the ratio of punitive to compensatory damages; and (iii) any relevant legislatively established penalties for comparable conduct. 517 U.S. at 574-575.

Taking the evidence in the "light most favorable to the plaintiff," the court concluded that the record supported a finding that Philip Morris's conduct was "extraordinarily reprehensible." App., *infra*, 23a. As the court interpreted the evidence, the jury could have found that Philip Morris's misconduct affected "many Oregonians" who kept smoking and became ill or died. *Ibid*. The court further reasoned that the jury could have concluded that the misconduct harmed "a much broader class of Oregonians": those who "kept buying cigarettes – taking money out of their pockets and putting it into the hands of Philip Morris and other tobacco companies." *Ibid.* Therefore, the court concluded, "the first *Gore* guidepost favors a very significant punitive damage award."

The court similarly held that the third *BMW* factor – the legislatively established penalties for comparable misconduct – supported a large punitive award: "Viewing the facts in the light most favorable to plaintiff, Philip Morris's actions, under the criminal statutes in place at the beginning of its scheme in 1954, would have constituted manslaughter." *Id.* at 27a.

Addressing the relationship between the compensatory and punitive awards, the court recognized that "the second

Gore guidepost is not met." *Id.* at 31a. It acknowledged that "[a]ll arguable versions of the ratios substantially exceed the single-digit ratio (9:1) that the [U.S. Supreme] Court has said ordinarily will apply in the usual case." *Ibid.*[2] Nevertheless, the court explained, "the other two guideposts – reprehensibility and comparable sanctions – can provide a basis for overriding the concern that may arise from a double-digit ratio." *Id.* at 33a.

REASONS FOR GRANTING THE PETITION

This case, which involves a massive punitive award to a single individual, presents three important constitutional questions bearing on the administration of punitive damages: whether a determination that a punitive award is excessive under the reasonable-relationship guidepost may be trumped by a determination that the other two guideposts support a large punitive award; whether punitive damages may be imposed to punish for harms to non-parties; and whether a reviewing court permissibly may assume that the jury drew every inference urged upon it by the plaintiff merely because it awarded the plaintiff a large amount of punitive damages.

Each of these questions is important, each recurs with regularity in punitive damages litigation, each has perplexed and divided the lower courts, and each was resolved incorrectly by the Oregon Supreme Court.

First, by holding that the ratio guidepost may be overridden by a finding of high reprehensibility, the court below provided courts throughout the country with a roadmap for evading this Court's efforts to bring predictability and discipline to punitive damages jurisprudence. Under the Oregon Supreme Court's approach, a court need only express the subjective conclusion that the defendant's conduct was

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[2] Indeed, if the statutorily capped amount of compensatory damages is used as the denominator, the ratio in this case rises from 97:1 to 152:1.

highly reprehensible and it then can uphold any punitive award no matter how disproportionate to the compensatory damages it may be. But this Court has never treated the three *BMW* guideposts as independent factors to be traded off against one another. Instead, it has established a range of constitutionally permissible ratios and suggested that the degree of reprehensibility (and the amount of compensatory damages) will determine where within that range the constitutional cut-off falls in a particular case. The Ninth Circuit has expressly so held; there thus exists a square conflict between a federal circuit court and the supreme court of a state within that circuit on this question.

Second, the Oregon Supreme Court's holding that a jury may punish a defendant for harms to similarly situated non-parties is a dangerous misreading of *State Farm*. A jury may never punish a defendant for harms to non-parties because doing so would inevitably expose the defendant to the risk of unconstitutional duplicative punishments. The California Supreme Court has expressly construed *State Farm* to bar punishment on this basis, so once again a square conflict exists.

Finally, by presuming that the jury resolved every factual dispute against petitioner notwithstanding the absence of any specific factual findings by the jury, the Oregon Supreme Court rendered *de novo* review completely toothless. Here, too, a clear conflict exists. As the California Supreme Court recognized in rejecting precisely this approach to post-verdict review, to defer to "findings" not necessarily made by the jury merely because the jury returned a large punitive verdict is to allow the punitive award to "indirectly justify itself," which is "inconsistent with de novo review."

Because the Oregon Supreme Court's various holdings collectively defy a decade of this Court's punitive damages jurisprudence and because each conflicts with decisions of

other state supreme courts or federal courts of appeals, review is both warranted and necessary.

I. THE OREGON SUPREME COURT'S RULING THAT THE RATIO GUIDEPOST MAY BE "OVERRIDDEN" VIOLATES THIS COURT'S PRECEDENTS AND CREATES A CONFLICT AMONG THE LOWER COURTS

A. The Framework Adopted And Applied By The Oregon Supreme Court Conflicts With This Court's Decisions In *BMW* And *State Farm*.

The Oregon Supreme Court acknowledged that the massive judgment under review did not satisfy the requirements of the *BMW* ratio guidepost. App., *infra*, 31a. It nevertheless affirmed the $79.5 million penalty, which yielded a ratio of almost 100:1, because "the other two guideposts – reprehensibility and comparable sanctions – can provide a basis for overriding the concern that may arise from a double-digit ratio." *Id.* at 33a.

That approach directly conflicts with the decisions of this Court. In explaining why "few awards exceeding a single-digit ratio between punitive and compensatory damages, to a significant degree, will satisfy due process" (538 U.S. at 425), the Court specifically enumerated the circumstances that could permissibly give rise to double-digit ratios. Far from creating an exception for all "high reprehensibility" cases, as the Oregon Supreme Court believed, this Court stated that a double-digit ratio was permissible only when "a particularly egregious act has resulted in only a *small amount* of economic damages." *Ibid*. (emphasis added). That, of course, is not the case here.

The presence of aggravating reprehensibility factors alone does not override the ratio guidepost or even remove a case from the single-digit-ratio framework described in *State Farm* (much less justify the 97:1 ratio at issue here). To the

contrary, the degree of reprehensibility, among other factors, helps the court to determine which single-digit multiplier is appropriate. In *State Farm*, this Court explained that normally a punitive award of four times compensatory damages "might be close to the line of constitutional impropriety." *Ibid*. However, the absence of aggravating reprehensibility factors renders any punitive damages award "suspect." *Id*. at 419. *State Farm* itself involved at least two aggravating reprehensibility factors – intentional deceit and a financially vulnerable victim. See *id*. at 419, 420. Nevertheless, the Court suggested that any award producing a ratio of more than 1:1 would be unconstitutionally excessive on the facts of the case. *Id*. at 429.[3]

It makes no sense to consider each guidepost as an independent and sufficient factor that can "override" one or more of the others, as the Oregon Supreme Court did. Rather than "competitive tools," as the Oregon Supreme Court described them (App., *infra*, 32a), the guideposts are constructs that must be considered together in assessing the excessiveness of a punitive award. Reprehensibility may move the acceptable ratio up the single-digit range; it does not render the ratio guidepost inapplicable. By treating the ratio guidepost as an abstract inquiry that could be overridden by high reprehensibility, the Oregon Supreme Court's decision sets punitive damages free of any concrete "reasonable relationship" requirement and conflicts with this Court's punitive damages jurisprudence.

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[3] On remand, the Utah Supreme Court held that a 9:1 ratio was permissible after finding all five reprehensibility sub-factors to have been established. *Campbell* v. *State Farm Mut. Auto. Ins. Co*., 98 P.3d 409 (Utah), cert. denied, 543 U.S. 874 (2004).

B. The Oregon Supreme Court's Approach Conflicts With That Of The Ninth Circuit And Deepens The Division Among The Lower Courts.

The Oregon Supreme Court's ruling conflicts with the far different approach taken by the Ninth Circuit, which assesses the *BMW* guideposts in tandem with one another. That court recently explained:

> Although the Supreme Court has eschewed any specific formula, we discern from *BMW* and its progeny a rough framework for evaluating whether there is a reasonable relationship between the punitive damages award and the actual or likely harm associated with the wrongful conduct. In cases where there are significant economic damages and punitive damages are warranted but behavior is not particularly egregious, a ratio of up to 4 to 1 serves as a good proxy for the limits of constitutionality. See, *e.g.*, *State Farm*, 538 U.S. at 425, 123 S.Ct. 1513 (acts of bad faith and fraud warranted something closer to a 1 to 1 ratio). In cases with significant economic damages and more egregious behavior, a single-digit ratio greater than 4 to 1 might be constitutional. See, *e.g.*, *Zhang* [v. *Am. Gem Seafoods, Inc.*, 339 F.3d 1020, 1043-1044 (9th Cir. 2003)] (post-*State Farm* case upholding 7 to 1 ratio where the wrongful conduct involved significant racial discrimination); *Bains LLC* v. *ARCO Prods. Co.*, 405 F.3d 764, 776-777 (9th Cir. 2005) (post-*State Farm* case indicating that ratio between 6 to 1 and 9 to 1 would be constitutional where underlying wrongful conduct was racial discrimination). And in cases where there are insignificant economic damages but the behavior was particularly egregious, the single-digit ratio may not be a good proxy for constitutionality. See, *e.g.*, *Mathias* v. *Accor Econ. Lodging, Inc.*, 347 F.3d 672, 677 (7th Cir. 2003) (upholding a

> punitive damage award with a 37 to 1 ratio of punitive damages to compensatory damages as constitutional because defendant's behavior was outrageous but the compensable harm" was nominal and difficult to quantify).

Planned Parenthood of the Columbia/Willamette, Inc. v. *American Coalition of Life Activists*, 422 F.3d 949, 962 (9th Cir. 2005). The Ninth Circuit's approach, with its appreciation that the reprehensibility analysis operates within limits set by the ratio guidepost, is irreconcilable with Oregon's, which simply tosses out the ratio consideration when high reprehensibility is found.

The existence of a conflict such as this one, between a federal appellate court and the high court of one of its constituent states, is a compelling reason to grant review. See *Baldwin* v. *Alabama*, 472 U.S. 372, 374 (1985). That is because such conflicts may lead to forum shopping and will produce different results based on nothing more than whether a particular lawsuit is removable.

A number of other courts agree with the Oregon Supreme Court that reprehensibility (a highly subjective criterion) may trump the ratio guidepost. These courts have expressly disregarded the single-digit limitation in cases in which none of the exceptions identified in *State Farm* was present, on the theory that high reprehensibility suffices to break the single-digit barrier.

In *Mission Resources, Inc.* v. *Garza Energy Trust*, 166 S.W.3d 301 (Tex. Ct. App. 2005), for example, the Texas Court of Appeals upheld a $10 million punitive award for trespass where the compensatory damages were $543,667. The court "[a]dmitted[]" that the ratio "of approximately 20 to 1 * * * exceeds the 'single-digit multipliers,' which, according to the Supreme Court, 'are more likely to comport with due process.'" *Id.* at 319. It nevertheless upheld the award because the trespass was "highly unlawful." *Ibid.*

Similarly, in *Superior Federal Bank* v. *Jones & Mackey Construction Co.*, 2005 WL 3307074 (Ark. Ct. App. Dec. 7, 2005), the Arkansas Court of Appeals upheld a $3.08 million punitive damages award for defamation that was 17.6 times the $175,000 compensatory damages awarded on that claim. The court recognized that "this ratio is greater than the single-digit ratio mentioned in *Campbell*," and therefore was "constitutionally suspect." *Id.* at 6-7. But it upheld the award simply because "a 17.6-to-1 ratio is not breathtaking." *Id.* at 7. And in *White* v. *Ford Motor Co.*, Slip Op., No. CV-N-95-279-DWH-(PHA) (D. Nev. Mar. 15, 2005), the district court upheld a $52 million punitive damages award that was 22.6 times the $2.3 million compensatory award on the ground that "a single-digit multiplier does not necessarily form an appropriate limitation upon a punitive damages award" in a "malicious-conduct wrongful death action." Slip Op. at 42.[4] The majority of lower courts, on the other hand, have heeded this Court's admonition that "few awards exceeding a single-digit ratio between punitive and compensatory damages, to a significant degree, will satisfy due process." 538 U.S. at 425.[5]

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[4] See also, *e.g.*, *Phelps* v. *Louisville Water Co.*, 103 S.W.3d 46, 55 (Ky. 2003) (upholding $2 million punitive award for wrongful death that was 11.3 times the $176,361.64 compensatory award); *Action Marine, Inc.* v. *Continental Carbon, Inc.*, 2006 WL 173653, at *8 n.6 (M.D. Ala. Jan. 23, 2006) (upholding $17.5 million punitive award for release of carbon black resulting in property damages of $1.9 million; noting that "the facts of this case could have supported an even higher multiplier [than 9.14:1]" because "a strong state interest in deterrence of a particular wrongful act may justify ratios higher than might otherwise be acceptable").

[5] See, *e.g.*, *Clark* v. *Chrysler Corp.*, 436 F.3d 594, 596, 612 (6th Cir. 2006) (reducing $3 million punitive award to $471,258.26, the amount of compensatory damages); *Conseco Fin. Servicing Corp.* v. *North Am. Mortgage Co.*, 381 F.3d 811, 825 (8th Cir. 2004) (reducing $18 million punitive award to $7 million, for a ratio of 2:1);

The courts are also in conflict as to how to apply the guideposts when the misconduct is especially reprehensible (militating in favor of a high ratio) and the amount of compensatory damages is substantial (militating in favor of a low ratio). In such circumstances, some courts have held that a ratio at the lower end of the single-digit range is appropriate. See, *e.g.*, *Boerner* v. *Brown & Williamson Tobacco Co.*, 394 F.3d 594, 598 (8th Cir. 2005) ("approximately 1:1") and *Ceimo* v. *General Am. Life Ins. Co.*, 137 Fed. Appx. 968, 970 (9th Cir. 2005) (affirming reduction to approximately 1:1) with *Grefer* v. *Alpha Technical*, 901 So. 2d 1117, 1152 (La. Ct. App. 2005) (reducing 18:1 ratio to 2:1); *Eden Elec., Ltd.* v. *Amana Co.*, 370 F.3d 824, 829 (8th Cir. 2004) (affirming reduction to 4.5:1 ratio). Other courts, however, have upheld awards at the upper end of that range even where the compensatory award is in seven figures. See, *e.g.*, *Boeken* v. *Philip Morris Inc.*, 26 Cal. Rptr. 3d 638, 687 (Cal. Ct. App. 2005) (reducing 18:1 ratio to 9:1), cert. denied, __ S. Ct. __

Bach v. *First Union Nat'l Bank*, 149 Fed. Appx. 354, 366 (6th Cir. 2005) (6.6:1 ratio was "alarming" where compensatory damages were $400,000); *Stogsdill* v. *Healthmark Partners, L.L.C.*, 377 F.3d 827, 834 (8th Cir. 2004) (in wrongful death case, remitting $5 million punitive award to $2 million, for a ratio of 4:1); *Fresh* v. *Entm't U.S.A. of Tenn., Inc.*, 340 F. Supp.2d 851, 860 (W.D. Tenn. 2003) (holding that 4:1 ratio was constitutional maximum in assault case); *Young* v. *DaimlerChrysler Corp.*, 2004 WL 2538639, at *4 (S.D. Ind. Oct. 19, 2004) (holding that 3:1 was maximum permissible ratio in discrimination case); *Roth* v. *Farner-Bocken Co.*, 667 N.W.2d 651, 671 (S.D. 2003) (vacating punitive award that was 20 times the $25,000 compensatory award and suggesting that 1:1 ratio was constitutional maximum); *Cass* v. *Stephens*, 156 S.W.3d 38, 77 (Tex. Ct. App. 2004) (holding, in fraud and malicious conversion case involving $200,082 in compensatory damages, that 4:1 ratio was constitutional limit); *Diamond Woodworks, Inc.* v. *Argonaut Ins. Co.*, 135 Cal. Rptr. 2d 736, 760-761 (Ct. App. 2003) (holding that 4:1 was maximum ratio in insurance bad-faith case).

(Mar. 20, 2006); *Planned Parenthood*, 422 F.3d at 962 (holding that 9:1 was constitutional maximum).

The Constitution does not require a "one size fits all" approach to assessing the ratio guidepost. But the current level of conflict and confusion on the ratio question in the lower courts is intolerable. The bottom line is that the guidepost is not being applied in any principled or predictable manner. The Oregon Supreme Court's doctrinal holding – that the reasonable-relationship requirement can be "overridden" whenever the conduct is highly reprehensible – promises to exacerbate that disarray and to undermine the constitutional principles established in *BMW* and *State Farm*. The importance of this issue could not be greater, and the need for review could not be more pressing.

II. THE OREGON SUPREME COURT'S APPROVAL OF THE IMPOSITION OF PUNISHMENT FOR HARMS SUFFERED BY NON-PARTIES VIOLATES *STATE FARM* AND CREATES A CONFLICT WITH DECISIONS OF OTHER COURTS

The jury returned an enormous punitive award because it was urged and permitted to punish Philip Morris for the harms suffered by every Oregonian who smoked the company's cigarettes. Philip Morris asked the trial court to instruct the jury that it could not punish Philip Morris for the effects of its conduct on non-parties. The proposed instruction stated:

> The size of any punishment should bear a reasonable relationship to the harm caused to Jesse Williams by the defendant's punishable conduct. Although you may consider the extent of harm suffered by others in determining what that reasonable relationship is, you are not to punish the defendant for the impact of its alleged misconduct on other persons, who may bring lawsuits of their own in

> which other juries can resolve their claims and award punitive damages for those harms, as those other juries see fit.

App., *infra*, 17a-18a. The trial court refused to give the instruction, and plaintiff's counsel exploited that ruling by repeatedly urging the jury to punish Philip Morris for harms suffered by anyone in Oregon who smoked Philip Morris's cigarettes. See page 2, *supra*.

The Oregon Supreme Court held that *State Farm* does not prohibit punishing for harms to similarly situated non-parties. Accordingly, it rejected the claim of instructional error:

> Philip Morris's proposed jury instruction would have prohibited the jury from 'punishing the defendant for the impact of its alleged misconduct on other persons,' even if those other persons were Oregonians who were harmed by the conduct that had harmed Williams, and in the same way. As we noted, that is not correct as an independent matter of Oregon law respecting the conduct of jury trials and instructions that are given to juries. Neither, as we read in [*sic*] *Campbell*, does it correctly state federal due process law.

App., *infra*, 20a-21a.

The Oregon Supreme Court's holding that punitive damages may properly be awarded to punish for harms to non-parties conflicts with *State Farm* and decisions of the California Supreme Court and the Eighth Circuit. It is a recipe for multiple punishments for the same harms, and it will spawn confusion in future punitive damages litigation. Review is needed to resolve the split and prevent the further erosion of the principles enunciated in *State Farm*.

A. The Oregon Supreme Court's Holding Conflicts With This Court's Decision In *State Farm* And With Decisions Of Other Appellate Courts.

In *State Farm*, this Court held that juries could consider the effect of the defendant's conduct on persons other than the plaintiff for purposes of assessing the *reprehensibility* of that conduct, but may not impose punitive damages to *punish* the defendant for harms to non-parties. See 538 U.S. at 422-423. This distinction is not new in the law, but in fact is applied by courts every day in implementing recidivism statutes. See, *e.g.*, *Nichols* v. *United States*, 511 U.S. 738, 747 (1994) (repeat-offender laws "penalize only the last offense committed by the defendant").

The Oregon Supreme Court did not understand the distinction between punishing the defendants for harm to non-parties and considering such harm for purposes of assessing reprehensibility. The court stated that "[i]t is unclear to us how a jury could 'consider' harms to others, yet withhold that consideration from the punishment calculus. If a jury cannot punish for the conduct, then it is difficult to see why it may consider it at all." App., *infra*, 18a n.3.

The distinction between gauging reprehensibility and imposing punishment, however, is central to this Court's punitive damages jurisprudence. It is a critical protection against duplicative punishment. The Court made clear in *State Farm* that a defendant may be punished only for the harm to the plaintiff before the court – and not for harms that may have been suffered by non-parties. The Oregon Supreme Court's contrary position is identical to the Utah Supreme Court's rationale for upholding the $145 million punitive award that this Court found grossly excessive in *State Farm*. See 538 U.S. at 423 (quoting Utah Supreme Court's statement that "[e]ven if the harm to the Campbells can be appropriately characterized as minimal, the trial court's assessment of the situation is on target: 'The harm is minor to the individual

but massive in the aggregate'"). This Court expressly *rejected* the aggregate approach to assessing punitive damages, explaining:

> Due process does not permit courts, in the calculation of punitive damages, to adjudicate the merits of other parties' hypothetical claims against a defendant under the guise of the reprehensibility analysis. Punishment on these bases creates the possibility of multiple punitive damages awards for the same conduct; for in the usual case nonparties are not bound by the judgment some other plaintiff obtains.

Ibid.

At the same time, the Court in *State Farm* explained that, under certain circumstances, evidence of a defendant's similar wrongs might nevertheless be admissible to assist the jury in assessing the degree of reprehensibility of the defendant's conduct. *Id.* at 422. Due process allows a range of permissible punishments in any given case – a range that is generally limited by the ratio guidepost. According to this Court, in most cases, the maximum allowable penalty will run from zero to nine times the amount of compensatory damages (depending upon the reprehensibility of the defendant's misconduct, the size of the compensatory award, and other factors). *Id.* at 423-425. In determining where within the permissible range a punitive damages award should fall, juries can appropriately take into account whether the specific conduct that injured the plaintiff is more blameworthy because it also endangered others. And in deciding what the outer limit is in a particular case, a reviewing court too can weigh the character of the defendant's conduct, including the magnitude of the harms to which it exposed the public. However, both jury

and court may *punish* the defendant only for the harm that its misconduct inflicted on the plaintiff in the case before it.[6]

While the court below claimed to be baffled by this distinction, it is commonplace in other areas of the law. For example, evidence of similar wrongs in punitive damages cases plays a role akin to the role of other uncharged criminal conduct in sentencing. A defendant's entire course of conduct may be relevant in determining where, within a range of potential sentences, the penalty for the particular conviction should fall. But the defendant cannot be *punished* for past or contemporaneous uncharged offenses, or indeed for anything other than the offense of conviction. See, *e.g.*, *United States* v. *Watts*, 519 U.S. 148, 154 (1997) ("sentencing enhancements do not punish a defendant for crimes of which he was not convicted, but rather increase his sentence because of the manner in which he committed the crime of conviction").[7]

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[6] The Court drew a similar distinction in *BMW* when addressing the role of evidence of conduct affecting individuals outside of the forum state. See 517 U.S. at 574 n.21 ("Of course, the fact that the Alabama Supreme Court correctly concluded that it was error for the jury to use the number of sales in other States as a multiplier in computing the amount of its punitive sanction does not mean that evidence describing out-of-state transactions is irrelevant in a case of this kind. To the contrary, * * * such evidence may be relevant to the determination of the degree of reprehensibility of the defendant's conduct.").

[7] See also *Witte* v. *United States*, 515 U.S. 389, 401-403 (1995) ("[C]onsideration of information about the defendant's character and conduct at sentencing does not result in 'punishment' for any offense other than the one of which the defendant was convicted." Rather, the defendant is "punished only for the fact that the *present* offense was carried out in a manner that warrants increased punishment * * *.") (emphasis in original); *Johnson* v. *Ford Motor Co.*, 113 P.3d 82, 92 n.6 (2005) ("An enhanced punishment for recidivism does not directly punish the earlier offense; it is, rather, a stiffened penalty for the last crime, which is considered to be an

By the same token, the degree of wantonness reflected in the defendant's conduct may warrant an enhanced penalty for that conduct, but that is fundamentally different from punishing the defendant for harms to other people. The former weighs the degree of reprehensibility of a defendant's conduct; the latter runs a significant risk of "double count[ing] by including in the punitive damages award some of the compensatory, or punitive, damages that subsequent plaintiffs would also recover." *BMW*, 517 U.S. at 593 (Breyer, J., concurring).

The Oregon Supreme Court's ruling not only is contrary to *State Farm*, it also conflicts with the holdings of the California Supreme Court and the Eighth Circuit. In *Johnson* v. *Ford Motor Co.*, 113 P.3d 82 (Cal. 2005), the California Supreme Court ruled that in an individual action, punitive damages cannot be used to punish a defendant for alleged harm to non-parties because such an award would allow the individual plaintiff to recover without ever proving the specifics of those "hypothetical claims." *Id.* at 95. As the California Supreme Court explained in *Johnson*, the jury, and a reviewing court, may consider "[t]he scale and profitability of a course of wrongful conduct" in assessing reprehensibility, but only within the framework established by the other two guideposts; the defendant cannot be *punished* for harms to anyone other than the plaintiff before the court. *Id.* at 93. Similarly, the Eighth Circuit has held that "[p]unishing systematic abuses by a punitive damages award in a case brought by an individual plaintiff * * * deprives the defendant of the safeguards against duplicative punishment that inhere in the class action procedure." *Williams* v. *ConAgra Poultry Co.*, 378 F.3d 790, 797 (8th Cir. 2004).

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aggravated offense because a repetitive one.") (quoting *Gryger* v. *Burke*, 334 U.S. 728, 732 (1948)) (internal quotation marks omitted).

The issue of how to deal with harm to non-parties has engendered confusion among other courts as well. Compare, *e.g.*, *University Med. Assoc. of the Med. Univ. of South Carolina* v. *UNUMProvident Corp*., 335 F. Supp. 2d 702, 711 (D.S.C. 2004) (relying on subsequent wrongful conduct to enhance punitive award because such conduct "would result in precisely the type of repetitive harm contemplated in *State Farm* as ripe for larger punitive damage awards") with *Gober* v. *Ralph's Grocery Co.*, 127 Cal. App. 4th 204, 223 (Cal. Ct. App. Mar. 5, 2006) (refusing to consider defendant's subsequent wrongful conduct as evidence of recidivism or in comparable penalties analysis because the victims of that conduct could sue in their own right) and *Wohlwend* v. *Edwards*, 796 N.E.2d 781, 783 (Ind. Ct. App. 2005) (trial court erred in admitting evidence of subsequent wrongful conduct because relevance of that evidence was substantially outweighed by the danger that the jury would use it to punish defendant for his subsequent conduct rather than for the act that gave rise to plaintiff's actual damages). This Court's guidance is plainly needed.

B. The Oregon Supreme Court's Holding Will Have Significant Negative Consequences If Permitted To Stand.

The Oregon Supreme Court's determination that the Constitution permits a jury in one case to punish for injuries presumed to have been suffered by non-parties will have substantial, negative repercussions if not corrected. It subjects defendants to all the risks of a class action, while affording them none of the safeguards required by due process.[8] It

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[8] See, *e.g.*, Thomas B. Colby, *Beyond the Multiple Punishment Problem: Punitive Damages as Punishment for Individual, Private Wrongs* 87 MINN. L. REV. 583, 654-656 (2003) ("Because punitive damages are properly recoverable for each individual injury only if all of the elements of the underlying cause of action are present and there are no affirmative defenses, the defendant must be per-

creates a grave risk of excessive, multiple punishment.[9] It also works as a one-way ratchet that guarantees that corporate defendants will continue to be exposed to the risk of massive penalties for a course of conduct no matter how many times they are exonerated by courts and juries. See *Johnson*, 113 P.3d at 94-95 (imposing punitive damages for harms to others would "present a problem of 'successive prosecution' in which a defendant that loses a single case would also lose the benefit of all previous victories against the same claim of misconduct"). Indeed, the Oregon Supreme Court's approach threatens to turn every case into a "bet-the-company" event, thereby distorting the legal system by creating inordinate pressure to settle even weak cases.[10]

In addition, a defendant in an individual case cannot reasonably be expected to fend off allegations of misconduct affecting individuals who are not before the court. This case

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mitted to contest causation and other elements of the alleged tort on an individual basis with respect to each victim and to raise all affirmative defenses that it might have against particular victims.").

[9] See *Roginsky* v. *Richardson-Merrell, Inc.*, 378 F.2d 832, 839-840 (2d Cir. 1967) (Friendly, J.) (describing multiple-punishment problem).

[10] See, *e.g.*, *In re Rhone-Poulenc Rorer, Inc.*, 51 F.3d 1293, 1298 (7th Cir. 1995) (observing that aggregating the claims of multiple alleged victims in a single case can place a defendant that has won the lion's share of individual cases "under intense pressure to settle" rather than "roll these dice" and risk potentially bankrupting liability); *Castano* v. *Am. Tobacco Co.* 84 F.3d 734, 746 (5th Cir. 1996) ("[a]ggregation of claims * * * makes it more likely that a defendant will be found liable and results in significantly higher damage awards," which in turn "creates insurmountable pressure on defendants to settle" because the prospect of "an all-or-nothing verdict presents too high a risk, even when the probability of an adverse judgment is low").

perfectly illustrates the problem. The record here contains no evidence whatsoever regarding the extent to which other smokers were induced by any Philip Morris misconduct to begin or continue smoking. Yet both the arguments of counsel and the opinions of the Oregon courts rested on the facile assumption that Philip Morris could properly be punished for the injuries of everyone in Oregon who became ill as a result of smoking its cigarettes. That assumption is indefensible: It is entirely lawful to sell cigarettes, notwithstanding the known dangers to health; and people who smoke knowing the risks have no claim to have been unlawfully injured.[11] The position of the courts below not only invites, it ultimately rests on, impermissible speculation about the circumstances of all other potential "victims" as to whom there is no evidence one way or another.

There thus are important practical reasons, in addition to the conflicts with decisions of this and other courts, to grant review on this issue. This Court should do so and should reverse the decision below.

III. THE OREGON SUPREME COURT'S USE OF A SUFFICIENCY-OF-THE-EVIDENCE STANDARD IN ASSESSING THE CONSTITUTIONALITY OF A PUNITIVE DAMAGES AWARD IS CONTRARY TO THIS COURT'S PRECEDENTS AND CONFLICTS WITH A DECISION OF THE CALIFORNIA SUPREME COURT.

This case raises a third critical issue that arises in virtually every punitive damages appeal and is the subject of a split of authority: whether, when reviewing a punitive award for excessiveness, a court is permitted to assume that the jury decided all disputed facts in favor of the plaintiff. This is a threshold question that arises whenever an appellate court is

[11] For that reason (among others), most of the juries that have heard cases against Philip Morris have found for the defense.

tasked with evaluating an excessiveness challenge to a punitive award but lacks the benefit of specific fact-findings by the jury or the trial court.

In *Cooper Industries, Inc.* v. *Leatherman Tool Group*, 532 U.S. 424 (2001), the Court held that appellate courts must conduct a *de novo* review of trial courts' application of the three *BMW* excessiveness guideposts. 532 U.S. at 436. The Court reiterated that mandate in *State Farm*, observing that "[e]xacting appellate review ensures that an award of punitive damages is based upon an application of law, rather than a decisionmaker's caprice." 538 U.S. at 418 (internal quotation marks omitted). In neither *Cooper Industries* nor *State Farm*, however, did the Court instruct lower courts how to implement this *de novo* review when the jury has not rendered any specific factual findings. This Court should resolve the issue once and for all.

A. The Lower Courts Are Divided As To The Proper Implementation Of *De Novo* Review.

In *Simon* v. *San Paolo U.S. Holding Co.*, 113 P.3d 63, 70 (Cal. 2005), the California Supreme Court ruled that, when the jury has made "no * * * express finding" on a particular issue bearing on application of the *BMW* guideposts, an appellate court should not simply assume that all relevant facts were resolved by the jury in the plaintiff's favor. It explained that to infer a factual finding unfavorable to the defendant "from the size of the award would be inconsistent with de novo review, for the award's size would thereby indirectly justify itself." *Ibid.* Accordingly, "[w]hile [courts must] defer to express jury findings supported by the evidence, in the absence of an express finding on the question [they] must independently decide" whether the fact at issue has been established. *Id.* at 72.[12]

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[12] See also *Wolf* v. *Wolf*, 690 N.W.2d 887, 894 (Iowa 2005) (assessing reprehensibility on the basis of a "de novo review of the

Many other courts, however, including the Oregon Supreme Court, have taken a fundamentally different position, choosing instead to apply a sufficiency-of-the-evidence standard. Under traditional sufficiency analysis, reviewing courts assume the existence of any fact necessary to support liability so long as the record contains "substantial evidence" from which a reasonable jury could have made the required finding. The Oregon Supreme Court adopted this approach for assessing punitive damages awards in *Parrott* v. *Carr Chevrolet, Inc.*, 17 P.3d. 473, 485 (Or. 2001), a decision that predates *Cooper Industries*.

Drawing all inferences in favor of the prevailing party makes perfect sense in addressing evidentiary sufficiency questions. However, the rationale for the practice simply does not apply to the fundamentally different context of excessiveness analysis. When the jury renders a liability verdict, the reviewing court should presume that the jury made all factual findings necessary to uphold that verdict, provided sufficient evidence exists for those findings in the record. By contrast, when the jury awards punitive damages, no particular factual findings are "necessary" to its assessment of the amount. See *Cooper Industries*, 532 U.S. at 437 (the amount of punitive damages that will punish and deter is "not really a 'fact' tried by the jury"). It is erroneous to infer from the size of the award findings of fact that the jury did not make – thereby, in the words of the California Supreme Court, allowing the punitive award to "indirectly justify itself" (*Simon*, 113 P.3d at 70).

The decision below is emblematic of this circular approach. The Oregon Supreme Court repeatedly emphasized that, in performing its excessiveness review, it would "con-

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record"); *Park* v. *Mobil Oil Guam, Inc.*, 2004 WL 2595897, at *13-14 (Guam Nov. 16, 2004) (evaluating the record *de novo* in excessiveness analysis); *Aken* v. *Plains Elec. Generation & Transmission Co-Op, Inc.*, 49 P.3d 662, 668 (N.M. 2002).

strue all facts in favor of plaintiff, the party in whose favor the jury ruled."[13] App., *infra*, 23a; see also *id.* at 2a; *ibid.*[14]

The Oregon Supreme Court is not alone in deferring to the plaintiff's version of events in assessing the degree of reprehensibility of the punishable conduct. See, *e.g.*, *Stogsdill* v. *Healthmark, L.L.C.*, 377 F.3d 827, 831 (8th Cir. 2004) ("viewing the evidence in the light most favorable to the plaintiffs" as part of state and federal excessiveness review); *Hangarter* v. *Provident Life & Accident Ins. Co.*, 373 F.3d 998, 1014 (9th Cir. 2004) (same); *Staskal* v. *Symons Corp.*, 706 N.W.2d 311, 333 (Wis. App. 2005) (same); *Union Pac. R.R. Co.* v. *Barber*, 149 S.W.3d 325, 346 (Ark.) (same), cert. denied, 543 U.S. 940 (2004); *Bogle* v. *McClure*, 332 F.3d 1347, 1361 (11th Cir. 2003) (reprehensibility analysis rested on what "a reasonable jury could have concluded from the evidence"); *Chu* v. *Hong*, 2005 WL 2692464, at *6 (Tex.

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[13] This characterization of the jury verdict is itself debatable. The jury awarded $79.5 million in punitive damages on plaintiff's fraud claim but it unanimously chose not to award punitive damages on plaintiff's product-design-based claims. Although defendant "prevailed" on the latter claim, the Oregon Supreme Court nevertheless viewed evidence of the defendant's product-design conduct in the light most favorable to plaintiff in order to justify the punitive award. See, *e.g.*, App., *infra*, 6a; *id.* at 8a.

[14] The opinion is replete with instances in which the court stated that the jury "could have found" for plaintiff on a hotly disputed issue, rather than making an independent determination on that issue. See, *e.g.*, App., *infra*, 5a; *id.* at 6a; *id.* at 7a.

The Oregon Supreme Court's statement that "the parties do not dispute the way that the Court of Appeals framed the facts" (App., *infra*, 2a) is flatly inaccurate. Philip Morris expressly stated in its brief that it "adopt[ed] and incorporate[d] by reference the Statement of Facts in its opening brief in the Court of Appeals," which sharply contested the version of the record put forth by plaintiff and ultimately adopted by the Court of Appeals.

App. Oct. 20, 2005) ("[A] reviewing court must assume that the factfinder resolved disputed facts in favor of its finding if a reasonable factfinder could do so.").

B. The Circular Approach Employed By The Court Below Cannot Be Squared With This Court's Precedents.

The practice of lower courts simply to assume from the size of the punitive award that the jury has found the defendant's conduct to be highly reprehensible, and then to assume that the jury supported that finding with factual conclusions that the jury nowhere expressed, cannot be reconciled with this Court's punitive damages jurisprudence.

In *BMW*, for example, the plaintiff's theory was that "BMW was palming off damaged, inferior-quality goods as new and undamaged, so that BMW could pocket 10 percent more than the true value of each car." Brief of Respondent at 17, *BMW of N. Am., Inc.* v. *Gore*, No. 94-896, 1995 WL 330613, at *17 (May 30, 1995). Had a sufficiency-of-the-evidence standard been applicable, the Court would have had to accept this inference as one that the jury reasonably could have reached. Instead, the Court reviewed the record for itself and, in the course of concluding that the case implicated "none of the aggravating factors associated with particularly reprehensible conduct," found "no evidence that BMW acted in bad faith when it sought to establish the appropriate line between presumptively minor damage and damage requiring disclosure to purchasers." 517 U.S. at 576, 579.

In *Cooper Industries*, the Court observed that "the level of punitive damages is not really a 'fact' 'tried' by the jury," but instead "is an expression of [the jury's] moral condemnation." 532 U.S. at 432, 437 (internal quotation marks omitted). The Court accordingly held that appellate review of a trial court's application of the *BMW* guideposts is *de novo*. In the course of so holding, it indicated that reviewing courts must accept "*specific* findings of fact" by the jury (*id.* at 439

n.12 (emphasis added)), thereby implying that, in the absence of such findings, reviewing courts must resolve for themselves factual issues bearing on the application of the three guideposts. The Court then did just that, expressly rejecting the plaintiff's assertion that, for purposes of the second guidepost, the potential harm was $3 million. *Id.* at 441-442.

And in *State Farm*, after reiterating the importance of "[e]xacting appellate review" (538 U.S. at 418), the Court gave no deference to findings that the jury could have made but did not *necessarily* make, instead concluding from its own review of the record that there was "scant evidence of repeated misconduct of the sort that injured [the plaintiffs]." *Id.* at 423. The fact that the jury had seen fit to award the plaintiff $145 million in punitive damages did not persuade this Court that State Farm's conduct had in fact been highly reprehensible.

The present case demonstrates that the concern about phantom factual determinations is not hypothetical. Philip Morris's net worth was a focal point of the punitive damages phase of the trial. The trial court instructed the jury – in reliance on the complaint's *ad damnum* – that it could award up to $100 million in punitive damages. It is simply impossible to tell from the bare fact of the jury's $79.5 million verdict which if any of the inferences urged by plaintiff was accepted by the jury. The jury may well have believed, especially on the record before it, that Philip Morris had not done most of what the plaintiff had accused it of doing (see note 13, *supra*), but that $79.5 million was an appropriate award in view of the plaintiff's exhortation to exact punishment for every Oregon smoker who ever has or ever will become ill from smoking, as well as Philip Morris's substantial financial resources. Indeed, the one thing that we *do* know is that the jury decided that it did not need to award the full amount that the plaintiff had requested.

The bottom line is that when – as here – the jury has not been asked to respond to special interrogatories bearing on the degree of reprehensibility of the defendant's conduct and other considerations relevant to setting the amount of punitive damages, reviewing courts may not simply assume that every relevant factual dispute was resolved against the defendant and indulge every inference urged by the plaintiff. Instead, reviewing courts must independently assess the disputed factual issues before applying the three *BMW* guideposts.

This is, as previously noted, an issue that arises in every punitive damages appeal – as well as one on which there is a clear split of authority. This Court should grant review to address this highly important, frequently recurring issue.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

KENNETH S. GELLER
EVAN M. TAGER
Mayer, Brown, Rowe & Maw LLP
1909 K Street, NW
Washington, DC 20006
(202) 263-3000

WILLIAM F. GARY
SHARON A. RUDNICK
Harrang Long Gary Rudnick
360 East 10th Avenue
Eugene, OR 97401
(541) 485-0220

ANDREW L. FREY
Counsel of Record
ANDREW H. SCHAPIRO
LAUREN R. GOLDMAN
Mayer, Brown, Rowe & Maw LLP
1675 Broadway
New York, NY 10019
(212) 506-2500

MARCH 2006

APPENDIX A

OREGON SUPREME COURT OPINION

340 Ore. 35, 127 P.3d 1165

Supreme Court of Oregon.

MAYOLA WILLIAMS, PERSONAL REPRESENTATIVE OF THE ESTATE OF JESSE D. WILLIAMS,
Deceased, Respondent on Review,

v.

PHILIP MORRIS INCORPORATED, NKA PHILIP MORRIS USA INC.,
Petitioner on Review,

and

RJ REYNOLDS TOBACCO COMPANY, FRED MEYER, INC., AND PHILIP MORRIS COMPANIES, INC.,
Defendants.

(CC 9705-03957; CA A106791; SC S51805).

Argued and Submitted May 10, 2005.
Decided Feb. 2, 2006.

This tort case arose out of the death of Jesse Williams, a smoker, who died of lung cancer. Plaintiff Mayola Williams is the widow of Jesse Williams and personal representative of his estate. Plaintiff sued defendant Philip Morris Inc. for, *inter alia*, negligence and fraud, asserting a causal connection between Jesse Williams's smoking habit and his death. A jury found for plaintiff on both causes of action. The jury awarded both economic and noneconomic damages; it also awarded plaintiff punitive damages of $79.5 million. The issue before us is whether that punitive damage award violates the Due Process Clause of the Fourteenth Amendment to the United States Constitution. The Court of Appeals concluded that it did not. *Williams v. Philip Morris Inc.*, 182 Or.App. 44, 48 P.3d 824 (2002) (*Williams I*), *adh'd to on re-*

cons., 183 Or.App. 192, 51 P.3d 670, *rev. den.*, 335 Or. 142, 61 P.3d 938 (2002), *vac'd and rem'd*, 540 U.S. 801, 124 S.Ct. 56, 157 L.Ed.2d 12 (2003), *on remand*, 193 Or.App. 527, 92 P.3d 126 (2004) (*Williams II*). For the reasons that follow, we agree.

I. FACTS

Because the jury ruled in favor of plaintiff, we state all facts in the light most favorable to plaintiff. *See Parrott v. Carr Chevrolet, Inc.*, 331 Or. 537, 556, 17 P.3d 473 (2001) ("[W]hen reviewing a punitive damages award for excessiveness, the reviewing court must view the facts in the light most favorable to the jury's verdict if there is evidence in the record to support them."). Because the parties do not dispute the way that the Court of Appeals framed the facts, we quote extensively from that court's opinions.

Jesse Williams was a lifelong smoker who eventually died of lung cancer. The cancer was caused by Williams's smoking.

> "From the early 1950s until his death from a smoking-related lung cancer in 1997, Williams smoked [Philip Morris]'s cigarettes, primarily its Marlboro brand, eventually developing a habit of three packs a day. At that point, he spent half his waking hours smoking and was highly addicted to tobacco, both physiologically and psychologically. Although, at the urging of his wife and children, he made several attempts to stop smoking, each time he failed, in part because of his addiction. Despite the increasing amount of information that linked smoking to health problems during that 40-year period, Williams resisted accepting or attempting to act on it. When his family told him that cigarettes were dangerous to his health, he replied that the cigarette companies would not sell them if they were as dangerous as his family claimed. When one of his sons tried to get him to read articles about the dangers of smoking, he responded by finding

> published assertions that cigarette smoking was not dangerous. However, when Williams learned that he had inoperable lung cancer he felt betrayed, stating 'those darn cigarette people finally did it. They were lying all the time.' He died about six months after his diagnosis."

Williams II, 193 Or.App. at 530-31, 92 P.3d 126.

Plaintiff based her fraud claim against Philip Morris on a 40-year publicity campaign by Philip Morris and the tobacco industry to undercut published concerns about the dangers of smoking. *Id*. at 531, 92 P.3d 126. Philip Morris and the tobacco industry had known for most of those 40 years, if not all of them, that smoking was dangerous. *Id*. Nevertheless, they tried to create in the public mind the impression that there were legitimate reasons to doubt the danger of smoking. *Id*. Philip Morris and the tobacco industry did so to give smokers a reason to keep smoking (or, perhaps more accurately, to undermine one of the main incentives for smokers to stop smoking). *Id*.

The Court of Appeals summarized the evidence regarding the campaign as follows:

> "The industry established its strategy and began developing its public image in response to a decline in cigarette sales in 1953 that was the apparent result of studies that showed that cigarette tar could cause cancer in mice and that established the existence of statistical correlations between smoking and lung cancer. The first public joint effort by the industry occurred in January 1954, when [Philip Morris] and other tobacco companies published a joint statement in 448 newspapers throughout the country. In that statement, among other things, they announced the creation of the Tobacco Industry Research Committee (TIRC), one of whose stated goals was to conduct research into 'all phases of tobacco use and health.' In 1964, the year of the Surgeon General's report on the hazard of smoking to health, the industry divided

the TIRC into two parts, one of which, the Council on Tobacco Research (CTR), continued to support scientific research. The other part, named the Tobacco Institute, focused on public relations and lobbying.

"Between 1954 and the 1990s, those organizations developed and promoted an extensive campaign to counter the effects of negative scientific information on cigarette sales. The individual tobacco companies, including [Philip Morris], were part of the organizations and acted in cooperation with them. At first, the industry publicly denied that there was a problem; for example, in the 1950s and early 1960s, [Philip Morris]'s officials told the public that [Philip Morris] would 'stop business tomorrow' if it believed that its products were harmful. For most of that period, however, the industry did not attempt to refute the scientific information directly; rather, it tried to find ways to create doubts about it. The industry's goal was to create the impression that scientists disagreed about whether cigarette smoking was dangerous, that the industry was vigorously conducting research into the issue, and that a definitive answer would not be possible until that research was complete. As one of [Philip Morris]'s vice-presidents explained in an internal memo, the purpose was to give smokers a psychological crutch and a self-rationale that would encourage them to continue smoking. A Tobacco Institute internal memorandum similarly described the industry's purpose to provide smokers 'ready-made credible alternatives' to the evidence of the dangers of smoking.

"Both the industry as a whole and [Philip Morris] acted consistently with those purposes. Among other things, they avoided developing contradictory information. Despite the industry's nominal emphasis on the need for further research, the CTR designed its research program to avoid studying the biological effects of tobacco use, the very question that, according to the industry's statements,

required more research. To the extent that [Philip Morris] conducted research on that issue independently of the CTR, it did so in a European laboratory that it purchased, and it was careful to avoid preserving records of the results in this country. [Philip Morris]'s director of research in the late 1970s and 1980s explained to a subordinate that his job was to attack outside research that was inconsistent with the industry's position by casting doubt on it. The jury could also have found that there was a 'gentleman's agreement' not to conduct research beyond what the CTR did. The primary purpose of the CTR's research was to provide expert witnesses for congressional hearings and lawsuits, not to determine the relationship between smoking and disease. The CTR's lawyers, rather than its scientists, established its research priorities; developing accurate information on the biological effects of smoking was not one of the lawyers' priorities.

"The jury could have found that, throughout this period of time, [Philip Morris] and the other tobacco companies actually had little doubt that cigarette smoking was causally related to a number of diseases. In 1958, three British researchers found that the American tobacco scientists with whom they spoke believed that cigarette smoke could cause cancer. In 1961, [Philip Morris]'s director of research stated that cigarette smoke contained so many carcinogens that the best that the company could do was to reduce their amounts. Internal company memoranda agreed and suggested that it could not admit those facts publicly because of adverse legal consequences. At least by the 1970s, there was absolutely no scientific basis for denying the connection between cigarette smoking and cancer and other diseases. However, [Philip Morris] continued to assert that the hazard of cigarette smoking to health was uncertain when it actually knew that there was no legitimate controversy about that subject.

> "The jury could also have found that [Philip Morris] recognized both that nicotine was addictive and that its addictive effect was the primary reason that people continued to smoke. [Philip Morris] spent considerable effort discovering ways to deliver the optimal dose of nicotine in each cigarette without actually adding nicotine to its product. It also concluded that, because of nicotine's addictive effect, smoking cessation programs and technologies would be unlikely to work without significant behavioral therapy. In its view, providing smokers a reason to believe that there were serious doubts that tobacco was harmful would discourage smokers from making the effort that was necessary to quit smoking.
>
> "Also, the jury could have found that [Philip Morris] and the industry used a large number of methods to create the public impression of a legitimate controversy, despite the lack of supporting scientific evidence. They issued press releases, influenced the content of apparently neutral articles, cultivated opinion leaders, attempted to use their advertising power to get favorable treatment from the print media, and appeared on commercial and public television to put forth that message. Those individuals who spoke for [Philip Morris] and the industry emphasized that the evidence concerning the dangers of smoking was primarily based on statistical relationships, and they argued that there was no proof that a specific component of tobacco smoke caused a specific disease. Even after the early 1990s, when the industry finally had to admit that tobacco could be a risk factor associated with a number of diseases, it argued that there was a long chain of intervening events before a disease actually arose from cigarette smoking. The industry, including [Philip Morris], also continued to deny that cigarette smoking was addictive and publicized that message throughout the country, including Oregon."

Id. at 531-34, 92 P.3d 126.

Philip Morris and the tobacco industry intended to deceive smokers like Williams, and it did in fact deceive him.

> "As a smoker, Williams was one of the intended recipients of the industry's message, and, in fact, the jury could have found that he received its message and relied on its representations. [The jury further could have found that t]hose representations affected his decision to continue smoking and not to make greater efforts to overcome his addiction. When his family urged him to stop smoking, he responded that he had learned from watching television that smoking did not cause lung cancer. After his diagnosis, he blamed the 'cigarette people' for betraying him—which, given his exclusive use of [Philip Morris]'s products, must at least have included [Philip Morris]. The jury could have found on the evidence before it that, as a result of [Philip Morris]'s representations, Williams suffered his fatal lung cancer. The jury also could have found that Williams was one of thousands of Oregonians who received [Philip Morris]'s message, acted on it, and, like him, suffered cancer or other diseases as a result."

Id. at 534, 92 P.3d 126.

Furthermore, Philip Morris also deceived other smokers in Oregon:

> "Although a tobacco industry survey indicated that 85 percent of smokers wished that they had never started smoking, [Philip Morris] concealed information that the addictive effects of nicotine made it difficult for them to stop without significant assistance. The fraudulent statements from [Philip Morris] and the rest of the industry reinforced those addictive effects by giving smokers a reason not to make the necessary effort to break the addiction. The jury could [have found] on this record that [Philip Morris]'s public relations campaign had precisely the effect that [Philip Morris] intended it to have and that it affected large numbers of tobacco consumers in Oregon

> other than Williams. It is also reasonably inferable from the evidence that [Philip Morris]'s products, used as [Philip Morris] intended them to be used, caused a significant number of deaths each year in Oregon during the pertinent time period, together with other serious but nonfatal health problems with their attendant economic consequences."

Williams I, 182 Or.App. at 66-67, 48 P.3d 824.[1]

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[1] These last statements reflect the one real disagreement between the parties over the record. Philip Morris claims repeatedly that the record does not show that its fraud injured any party other than Williams. However, its opening brief indicates that Philip Morris does not contest how the Court of Appeals summarized the record. Rather, it argues that plaintiff did not put on any *specific* evidence to show that any *particular* person (other than Williams) continued smoking because of the fraud.

> "There is nothing in the record that supports the Court of Appeals' assumption that any Oregon smoker other than Williams smoked and sustained injuries *in reliance on the alleged fraud*. At most, plaintiff introduced evidence that smoking per se injured non-parties. However, the mere act of selling cigarettes is lawful conduct. Plaintiff never connected the injuries of non-parties to the fraud alleged in this case."

(Emphasis in original.)

In essence, Philip Morris is claiming that one cannot reasonably infer that anyone was actually fooled by its 40-year advertising campaign directed to thousands of Oregonians. Yet even the simplest assessment of human nature, viewed in light of the designedly addictive properties of cigarettes, tells any reasonable person that those lies would have been very persuasive. We think that such an appreciation of human nature fairly may be attributed to jurors, including the ones who heard this case. Moreover, Philip Morris's own conduct belies its protestations. As a for-profit corporation, it would not spend over 40 years of time, effort, and money to deceive people, unless it thought it was succeeding.

II. PROCEDURAL POSTURE

At trial, the jury found in favor of plaintiff on both the negligence and fraud claims, and it awarded compensatory damages of $821,485.50—$21,485.80 in economic damages and $800,000 in noneconomic damages.

As to the negligence claim, the jury found Williams 50% responsible for the damages. The jury declined to award any punitive damages respecting that claim. As to the fraud claim, however, the jury awarded punitive damages of $79.5 million.

The trial court significantly reduced the amounts awarded to the plaintiff. The court "capped" the noneconomic damages at $500,000 pursuant to *former* ORS 18.560 (1999), *renumbered as* ORS 31.710 (2003), thereby producing a total compensatory damage award of $521,485.80.[2] The court also reduced the punitive damage award. The court did conclude that $79.5 million "was within the range a rational juror could assess based on the record as a whole and applying the Oregon common law and statutory factors." Nevertheless, the court concluded, the $79.5 million punitive damage award "was excessive under federal standards." The trial court therefore reduced the punitive damage award to $32 million.

Both plaintiff and Philip Morris appealed to the Court of Appeals. In *Williams I*, the Court of Appeals reversed the trial court on plaintiff's appeal and reinstated the $79.5 million punitive damage award. 182 Or.App. at 72, 48 P.3d 824. It affirmed on Philip Morris's cross-appeal. *Id.* at 47, 48 P.3d 824. The court later adhered to its opinion on reconsideration. *Williams*, 183 Or.App. at 197, 51 P.3d 670. This court denied review. 335 Or. 142, 61 P.3d 938 (2002).

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[2] There is no issue in this case as it comes before us respecting the propriety of the trial court's application of *former* ORS 18.560.

The United States Supreme Court then granted certiorari, vacated the Court of Appeals' judgment, and remanded the case to the Court of Appeals for that court to reconsider the amount of the punitive damages award in light of *State Farm Mut. Automobile Ins. Co. v. Campbell*, 538 U.S. 408, 123 S.Ct. 1513, 155 L.Ed.2d 585 (2003). *Philip Morris USA Inc. v. Williams*, 540 U.S. 801, 124 S.Ct. 56, 157 L.Ed.2d 12 (2003). The Court of Appeals did so in *Williams II*, again reversing on plaintiff's appeal and affirming on Philip Morris's cross-appeal. We allowed review.

III. ISSUES ON REVIEW

On review, Philip Morris asks us to consider four issues, which it states as follows:

> "A. Is a defendant entitled to have the jury instructed that any award of punitive damages must bear a reasonable relationship to the harm caused to the plaintiff and that punitive damages cannot be imposed for alleged harm to non-parties?
>
> "B. Are the punitive damages assessed in this case unconstitutionally excessive in violation of the Due Process Clause of the Fourteenth Amendment to the United States Constitution?
>
> "C. Must a plaintiff prove receipt of and reliance upon the defendant's allegedly fraudulent communications when he or she claims that a defendant committed fraud by communicating a false impression to the general public through mass media?
>
> "D. Does the Federal Cigarette Labeling and Advertising Act, 15 USC §§ 1331 *et seq.*, preempt the 'false impression' theory relied upon by the Court of Appeals, which is based in part upon a defendant's failure to disclose information beyond that prescribed by the congressionally mandated warnings?"

We will not consider the third and fourth issues. This court earlier declined review of all the issues decided in *Williams I*. The appeal remained alive only because of, and to the extent that, the United States Supreme Court later directed the Court of Appeals to reconsider its decision respecting the amount of punitive damages in light of *Campbell*. The Court of Appeals performed that limited function in *Williams II*, and we allowed review of that decision. We decline to go beyond the Supreme Court's mandate, and the Court of Appeals' opinion in *Williams II*, to consider issues that this court previously determined were not review-worthy. *See* ORAP 9.20(2) (this court's opinion need not address every question presented on review).

The Supreme Court's decision in *Campbell* clearly relates to the second issue presented by Philip Morris. Philip Morris asserts that *Campbell* also relates to the first issue, regarding jury instructions. Because of that, and because the Court of Appeals addressed both issues in *Williams II*, we will consider those issues here.

IV. DISCUSSION

A. *Overview of State Farm v. Campbell*

We begin by reviewing the United States Supreme Court's opinion in *Campbell*.

The punitive damage award at issue in *Campbell* arose from an insured's action against an insurer for bad faith, fraud, and intentional infliction of emotional distress. 538 U.S. at 414, 123 S.Ct. 1513. Campbell, the insured, had caused an automobile accident that killed one person and permanently disabled another. *Id*. at 412-13, 123 S.Ct. 1513. When Campbell was sued, Campbell's insurer, State Farm, chose to contest liability. *Id*. at 413, 123 S.Ct. 1513. It refused settlement offers that were within policy limits and took the case to trial despite the advice of one of its own investigators, in the process assuring Campbell and his wife

that they would face no personal liability. *Id*. When the jury returned a verdict substantially above the policy limits, State Farm initially refused to cover the excess, telling the Campbells to put "for sale" signs on their property. *Id*. State Farm also refused to post a supersedeas bond to appeal the verdict. *Id*.

In their action against State Farm, the Campbells introduced evidence that State Farm's decision to try the case was part of a nationwide effort to limit payouts on insurance claims. *Id*. at 415, 123 S.Ct. 1513. The evidence "concerned State Farm's business practices for over 20 years in numerous States. Most of these practices bore no relation to third-party automobile insurance claims, the type of claim underlying the Campbells' complaint against the company." *Id*. The jury awarded the Campbells $2.6 million in compensatory damages and $145 million in punitive damages. *Id*. The trial court reduced the compensatory damages to $1 million and the punitive damages to $25 million. *Id*. On appeal, the Utah Supreme Court reinstated the $145 million punitive damage award. *Id*. The United States Supreme Court granted certiorari. *Id*. at 416, 123 S.Ct. 1513.

The Court first noted that compensatory damages are intended to compensate for a loss, while punitive damages "are aimed at deterrence and retribution." *Id*. However, the Court noted, the Fourteenth Amendment's Due Process Clause prohibits imposing "grossly excessive or arbitrary punishments" on a tortfeasor. *Id*. A person must have fair notice, not just *that* the state will punish certain conduct, but also how severely it will do so. *Id*. at 417, 123 S.Ct. 1513.

The Court identified two risks peculiar to punitive damages. First, although punitive damage awards are similar to criminal sanctions, defendants do not receive the procedural protections required of criminal trials. *Id*. Second, vague jury instructions can leave the jury with too much discretion in choosing the amount of punitive damages, allowing it to ex-

press preexisting biases or to rely too much on tangential or inflammatory evidence. *Id*. at 417-18, 123 S.Ct. 1513. For those reasons, the Court had directed "[e]xacting appellate review" of a jury's punitive damage award, considering three "guideposts" identified in *BMW of North America, Inc. v. Gore*, 517 U.S. 559, 116 S.Ct. 1589, 134 L.Ed.2d 809 (1996):

> "(1) the degree of reprehensibility of the defendant's misconduct; (2) the disparity between the actual or potential harm suffered by the plaintiff and the punitive damages award; and (3) the difference between the punitive damages awarded by the jury and the civil penalties authorized or imposed in comparable cases."

Campbell, 538 U.S. at 418, 123 S.Ct. 1513.

The Court then applied those guideposts. The first guidepost, the reprehensibility of defendant's conduct, represents " '[t]he most important indicium of the reasonableness of a punitive damages award.' " *Id*. at 419, 123 S.Ct. 1513 (quoting *Gore*, 517 U.S. at 575, 116 S.Ct. 1589). In analyzing reprehensibility, courts should consider whether

> "the harm caused was physical as opposed to economic; the tortious conduct evinced an indifference to or a reckless disregard of the health or safety of others; the target of the conduct had financial vulnerability; the conduct involved repeated actions or was an isolated incident; and the harm was the result of intentional malice, trickery, or deceit, or mere accident."

Id. (citing *Gore*, 517 U.S. at 576-77, 116 S.Ct. 1589).

In analyzing that guidepost in *Campbell*, however, the Court did not itself focus on those five considerations. Instead, it concentrated on how evidence of out-of-state conduct and dissimilar conduct had skewed the reprehensibility analysis against State Farm. The state wrongly relied on such conduct, the Court ruled, because a state cannot punish

a defendant for its lawful conduct in another state, or for conduct that "occurred outside [the state] to other persons." *Id*. at 421, 123 S.Ct. 1513. In *Campbell*, most of the out-of-state conduct was lawful where it took place, and it was not connected to the harm to the Campbells. *Id*. at 422, 123 S.Ct. 1513. Furthermore, the Court held, a state cannot punish a defendant for "dissimilar acts": "A defendant should be punished for the conduct that harmed the plaintiff, not for being an unsavory individual or business." *Id*. at 423, 123 S.Ct. 1513. In sum, the Court held that, because the Campbells showed "no conduct by State Farm similar to that which harmed them, the conduct that harmed them is the only conduct relevant to the reprehensibility analysis." *Id*. at 424, 123 S.Ct. 1513.

The second *Gore* guidepost examines the ratio between the punitive damage award and the actual or potential harm to the plaintiff. *Campbell*, 538 U.S. at 424, 123 S.Ct. 1513. The ratio, however, is no mechanical formula. *Id*. ("we have been reluctant to identify concrete constitutional limits on the ratio"); *id*. at 425, 123 S.Ct. 1513 ("[w]e decline again to impose a bright-line ratio"); *id*. ("there are no rigid benchmarks that a punitive damage award may not surpass").

That said, the Court proceeded to give some guidance regarding the second guidepost. Twice in the past, the Court noted, it had suggested that a punitive damage award more than four times compensatory damages "might be close to the line of constitutional impropriety." *Id*. at 425, 123 S.Ct. 1513 (citing *Gore*, 517 U.S. at 581, 116 S.Ct. 1589, and *Pacific Mutual Life Insurance Co. v. Haslip*, 499 U.S. 1, 23-24, 111 S.Ct. 1032, 113 L.Ed.2d 1 (1991)). The Court also had noted previously that, for 700 years, legislatures had authorized double, treble, or quadruple damages as a sanction. *Campbell*, 538 U.S. at 425, 123 S.Ct. 1513 (citing *Gore*, 517 U.S. at 581 & n. 33, 116 S.Ct. 1589). The Court concluded that, "in practice, few awards exceeding a single-digit ratio between punitive and compensatory damages, to a significant

degree, will satisfy due process." 538 U.S. at 425, 123 S.Ct. 1513.

> "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 ratios in [the] range of 500 to 1, or, in this case, of 145 to 1."

Id. (citation omitted).

The Court did acknowledge, however, that even those tentative ratios might be adjusted up or down. A greater ratio might comport with due process if " 'a particularly egregious act has resulted in only a small amount of economic damages,' " if " 'the injury is hard to detect,' " or if " 'the monetary value of noneconomic harm might have been difficult to determine.' " *Id*. at 425, 123 S.Ct. 1513 (quoting *Gore*, 517 U.S. at 582, 116 S.Ct. 1589). With a "substantial" compensatory damage award, however, due process might require "a lesser ratio, perhaps only equal to compensatory damages." *Id*. But "[t]he precise award * * * must be based upon the facts and circumstances of the defendant's conduct and the harm to the plaintiff." *Id*.

In applying the second *Gore* guidepost, the Court stated that there is "a presumption against an award that has a 145-to-1 ratio." *Id*. at 426, 123 S.Ct. 1513. The Campbells had received a substantial compensatory damage award; they were injured economically, not physically; and State Farm paid the excess verdict before the Campbells sued them, so their economic injuries were minor. *Id*. Additionally, the outrage and humiliation that State Farm caused the Campbells may have been considered twice—once in the compensatory damage award and again in the punitive damage award. *Id*.

The Court also rejected several other factors that the Utah Supreme Court had identified in support of the punitive damage award. For example, the Utah Supreme Court had

pointed to State Farm's wealth. The Court concluded that wealth should not have been considered:

> "While States enjoy considerable discretion in deducing when punitive damages are warranted, each award must comport with the principles set forth in *Gore*. * * * The wealth of a defendant cannot justify an otherwise unconstitutional punitive damages award. *Gore*, 517 U.S., at 585, 116 S.Ct. 1589 ('The fact that BMW is a large corporation rather than an impecunious individual does not diminish its entitlement to fair notice of the demands that the several States impose on the conduct of its business'); see also *id*., at 591, 116 S.Ct. 1589 (Breyer, J., concurring) ('[Wealth] provides an open-ended basis for inflating awards when the defendant is wealthy * * *. That does not make its use unlawful or inappropriate; it simply means that this factor cannot make up for the failure of other factors, such as "reprehensibility," to constrain significantly an award that purports to punish a defendant's conduct')."

Id. at 427-28, 123 S.Ct. 1513.

The third guidepost compares the punitive damage award to comparable civil and criminal penalties. *Id*. at 428, 123 S.Ct. 1513. Criminal penalties, however, do not help as much in determining "the dollar amount of the award":

> "Great care must be taken to avoid use of the civil process to assess criminal penalties that can be imposed only after the heightened protections of a criminal trial have been observed, including, of course, its higher standards of proof. Punitive damages are not a substitute for the criminal process, and the remote possibility of a criminal sanction does not automatically sustain a punitive damages award."

Id.

The comparable civil sanctions in *Campbell* fell well below the punitive damage award. The Court identified only one, a $10,000 fine for fraud. *Id*. The Utah Supreme Court had pointed to other, more substantive penalties, but they were all based on evidence of out-of-state and dissimilar conduct. *Id*.

In all, the Court in *Campbell* found the case "neither close nor difficult," *id*. at 418, 123 S.Ct. 1513, and concluded that $145 million in punitive damages violated due process, *see id*. at 429, 123 S.Ct. 1513 (concluding award was "irrational and arbitrary deprivation" of property). The Court suggested that the guideposts,

> "especially in light of the substantial compensatory damages awarded (a portion of which contained a punitive element), likely would justify a punitive damages award at or near the amount of compensatory damages."

Id. However, the Court concluded, Utah state courts should calculate punitive damages in the first instance. *Id*. at 429, 123 S.Ct. 1513.

With the foregoing principles in mind, we turn to the questions presented on review.

B. *The Trial Court's Refusal to Give Philip Morris's Proposed Jury Instruction No. 34*

Philip Morris first argues that the trial court erred in refusing to give its proposed jury instruction number 34. That instruction stated, in part:

> "The size of any punishment should bear a reasonable relationship to the harm caused to Jesse Williams by the defendant's punishable misconduct. Although you may consider the extent of harm suffered by others in determining what that reasonable relationship is, you are not to punish the defendant for the impact of its alleged misconduct on other persons, who may bring lawsuits of

> their own in which other juries can resolve their claims and award punitive damages for those harms, as such other juries see fit."

In *Williams I*, the Court of Appeals concluded that that instruction was incorrect under state law. 182 Or.App. at 63-64, 48 P.3d 824. We agree. *See Parrott*, 331 Or. at 563, 17 P.3d 473 (evaluating punitive damage award; "Because defendant's tortious conduct was a routine part of its business practice that it was unwilling to change, we also consider the potential injury that its misconduct may have caused to past, present, and future customers."). That is, the jury could consider whether Williams and his misfortune were merely exemplars of the harm that Philip Morris was prepared to inflict on the smoking public at large.

Philip Morris, however, contends that *Campbell* overrules state rules like the one set out in *Parrott*. Specifically, Philip Morris asserts that *Campbell* prohibits the state, acting through a civil jury, from using punitive damages to punish a defendant for harm to nonparties.[3] In support of that argument, Philip Morris quotes the following from Campbell:

> "Due process does not permit courts, in the calculation of punitive damages, to adjudicate the merits of other parties' hypothetical claims against a defendant under the guise of the reprehensibility analysis * * *. * * * Punishment on these bases creates the possibility of multiple punitive damages awards for the same conduct; for in the usual case nonparties are not bound by the judgment some other plaintiff obtains. *Gore*, *supra*, [517 U.S.] at 593 (Breyer, J., concurring) ('Larger damages might also

[3] Philip Morris does not explain how its instruction summarizes its interpretation of *Campbell*. It is unclear to us how a jury could "consider" harm to others, yet withhold that consideration from the punishment calculus. If a jury cannot punish for the conduct, then it is difficult to see why it may consider it at all.

> "double count" by including in the punitive damages award some of the compensatory, or punitive, damages that subsequent plaintiffs would also recover')."

538 U.S. at 423, 123 S.Ct. 1513.

We think that Philip Morris takes the foregoing quoted material from *Campbell* out of context. The quote referred only to *dissimilar* acts and dissimilar claims; the Court intended to prohibit a punitive damage award from becoming a referendum on a corporate defendant's general behavior as a citizen. The full paragraph in *Campbell* states:

> "For a more fundamental reason, however, the Utah courts erred in relying upon this and other evidence: The courts awarded punitive damages to punish and deter *conduct that bore no relation to the Campbells' harm.* A defendant's *dissimilar acts, independent from the acts upon which liability was premised*, may not serve as the basis for punitive damages. *A defendant should be punished for the conduct that harmed the plaintiff, not for being an unsavory individual or business.* Due process does not permit courts, in the calculation of punitive damages, to adjudicate the merits of other parties' hypothetical claims against a defendant under the guise of the reprehensibility analysis, but we have no doubt the Utah Supreme Court did that here. [*Campbell v. State Farm Mut. Auto. Ins. Co.*,] 65 P.3d [1134], at 1149 [(Utah 2001)] ('Even if the harm to the Campbells can be appropriately characterized as minimal, the trial court's assessment of the situation is on target: "The harm is minor to the individual but massive in the aggregate" '). Punishment on these bases creates the possibility of multiple punitive damages awards for the same conduct; for in the usual case nonparties are not bound by the judgment some other plaintiff obtains. *Gore, supra*, [517 U.S.] at 593, 116 S.Ct. 1589 (Breyer, J., concurring) ('Larger damages might also "double count" by including in the

> punitive damages award some of the compensatory, or punitive, damages that subsequent plaintiffs would also recover')."

538 U.S. at 422-23, 123 S.Ct. 1513 (emphasis added).

Considering the foregoing material as a whole, we conclude that evidence of *similar* conduct against other parties may be relevant to a punitive damage award. The Court criticized the Utah courts only for allowing in evidence of *dissimilar* conduct:

> "The Campbells have identified scant evidence of repeated misconduct *of the sort that injured them*. * * * Although *evidence of other acts need not be identical to have relevance in the calculation of punitive damages*, the Utah court erred here because evidence pertaining to claims that had nothing to do with a third-party lawsuit was introduced at length. * * * The reprehensibility guidepost *does not permit courts to expand the scope of the case so that a defendant may be punished for any malfeasance*, which in this case extended for a 20-year period. In this case, because the Campbells have shown no conduct by State Farm *similar to that which harmed them*, the conduct that harmed them is the only conduct relevant to the reprehensibility analysis."

Id. at 423-24, 123 S.Ct. 1513 (emphasis added). *See also id*. at 427, 123 S.Ct. 1513 ("The failure of the company to report the Texas award is out-of-state conduct that, *if the conduct were similar*, might have had some bearing on the degree of reprehensibility, subject to the limitations we have described." (emphasis added)).

Philip Morris's proposed jury instruction would have prohibited the jury from "punish[ing] the defendant for the impact of its alleged misconduct on other persons," even if those other persons were Oregonians who were harmed by the same conduct that had harmed Williams, and in the same

way. As we noted, that is not correct as an independent matter of Oregon law respecting the conduct of jury trials and instructions that are given to juries. Neither, as we read in *Campbell*, does it correctly state federal due process law. Because the proposed jury instruction did not accurately reflect the law, the trial court did not commit reversible error when it refused to give it. *See Hernandez v. Barbo Machinery Co.*, 327 Or. 99, 106, 957 P.2d 147 (1998) (trial court's refusal to give requested jury instruction "is no[t] error if the requested instruction is not correct in all respects").

Philip Morris also claims that the trial court committed reversible error because the jury instructions that *were* given did not accurately reflect some aspects of *Campbell's* holding. But Philip Morris did not preserve that argument before the Court of Appeals. *See* ORAP 5.45(1) ("No matter claimed as error will be considered on appeal unless the claimed error * * * is assigned as error in the opening brief * * *."); *Ailes v. Portland Meadows, Inc.*, 312 Or. 376, 380, 823 P.2d 956 (1991) (to preserve error, "the adversely affected party must have * * * raised the issue on appeal by an assignment of error in its opening brief"). Fairly read, Philip Morris's assignment of error in the Court of Appeals claimed only that the trial court erred in refusing to give requested instruction number 34. That narrow assignment of error did not give the Court of Appeals notice that it needed to consider any challenge to the instructions actually given.

Based on the foregoing discussion, we affirm the Court of Appeals on the first issue.

C. *The Punitive Damage Award and Federal Due Process*

On review of a punitive damage award under the Due Process Clause of the Fourteenth Amendment, a court must determine whether the punitive damage award is " 'grossly excessive'." *Parrott*, 331 Or. at 554, 17 P.3d 473 (emphasis deleted; citing *Gore*, 517 U.S. at 568, 116 S.Ct. 1589).

Whether the verdict exceeds the gross excessiveness standard is a question of law. *Id*. at 555, 17 P.3d 473.

In *Parrott*, this court identified five factors to be considered to determine whether a punitive damage award is grossly excessive:

> "[T]he range that a rational juror would be entitled to award depends on the following: (1) the statutory and common-law factors that allow an award of punitive damages for the specific kind of claim at issue; (2) the state interests that a punitive damages award is designed to serve; (3) the degree of reprehensibility of the defendant's conduct; (4) the disparity between the punitive damages award and the actual or potential harm inflicted; and (5) the civil and criminal sanctions provided for comparable misconduct."

Id. (citations omitted). *Parrott* has been superseded somewhat by *Campbell*, but the last three *Parrott* factors are, of course, the *Gore* guideposts as they have been further elucidated by *Campbell*. We consider only those guideposts in the following analysis.

The first guidepost directs us to consider, based on the facts contained in the record, how reprehensible Philip Morris's conduct was. As noted, we consider whether:

> "the harm caused was physical as opposed to economic; the tortious conduct evinced an indifference to or a reckless disregard of the health or safety of others; the target of the conduct had financial vulnerability; the conduct involved repeated actions or was an isolated incident; and the harm was the result of intentional malice, trickery, or deceit, or mere accident."

Campbell, 538 U.S. at 419, 123 S.Ct. 1513 (citing *Gore*, 517 U.S. at 576-77, 116 S.Ct. 1589). And, as we have explained, the jury, in assessing the reprehensibility of Philip Morris's

actions, could consider evidence of similar harm to other Oregonians caused (or threatened) by the same conduct.

Again, we construe all facts in favor of plaintiff, the party in whose favor the jury ruled. Doing so, there can be no dispute that Philip Morris's conduct was extraordinarily reprehensible. Philip Morris knew that smoking caused serious and sometimes fatal disease, but it nevertheless spread false or misleading information to suggest to the public that doubts remained about that issue. It deliberately did so to keep smokers smoking, knowing that it was putting the smokers' health and lives at risk, and it continued to do so for nearly half a century.

Philip Morris's fraudulent scheme would have kept many Oregonians smoking past the point when they would otherwise have quit. Some of those smokers would eventually become ill; some would die. Philip Morris's deceit thus would, naturally and inevitably, lead to significant injury or death.

Although it weighs less in our analysis, we also note that Philip Morris harmed a much broader class of Oregonians. Every smoker tricked by its scheme, even those who never got ill, kept buying cigarettes—taking money out of their pockets and putting it into the hands of Philip Morris and other tobacco companies. And every one of those smokers *risked* serious illness or death for as long as they remained deceived.

Of the five reprehensibility factors listed in *Gore* and recited—if not precisely used—in *Campbell*, four certainly are met here. The harm to Williams was physical—lung cancer cost Williams his life. Philip Morris showed indifference to and reckless disregard for the safety not just of Williams, but of countless other Oregonians, when it knowingly spread false or misleading information to keep smokers smoking. Philip Morris's actions were no isolated incident, but a carefully calculated program spanning decades. And Philip Mor-

ris's wrongdoing certainly involved trickery and deceit.[4] We conclude, then, that the first *Gore* guidepost favors a very significant punitive damage award.

We also conclude that the third *Gore* guidepost—comparable civil or criminal sanctions—favors plaintiff. In examining that guidepost, however, we believe that it is important to correct two errors that the Court of Appeals committed in applying it.

In *Williams I*, the Court of Appeals suggested that, because the comparable sanctions guidepost was about notice to a prospective defendant, "the established Oregon law of punitive damages, including ORS 30.925(2)," gave Philip Morris adequate notice here. 182 Or.App. at 72, 48 P.3d 824. That was not correct.

Courts consider comparable sanctions for two reasons. First, comparable sanctions suggest a legislative determination about what constitutes an appropriate sanction for the conduct, a determination that is entitled to "substantial deference." *Gore*, 517 U.S. at 583, 116 S.Ct. 1589 (internal quotation marks and citation omitted). Second, comparable sanctions may give a defendant fair notice of the penalties that the conduct may carry. *Id*. at 584, 116 S.Ct. 1589 ("None of these statutes would provide an out-of-state distributor with fair notice that the first violation—or, indeed the

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[4] Only one factor arguably is not met: There is no evidence that Williams was especially financially vulnerable. Plaintiff argues that Williams was vulnerable in another way, because he was addicted to cigarettes and so more susceptible to Philip Morris's deceptive message. *Gore* indirectly suggests that reprehensibility may include other sorts of vulnerability than financial. *See* 517 U.S. at 576, 116 S.Ct. 1589 (suggesting that higher punitive damages are appropriate, even though the injury is *solely economic*, if "the target is financially vulnerable"). However, as we will discuss, we would affirm this punitive damage award even if that factor was not met.

first 14 violations—of its provisions might subject an offender to a multimillion dollar penalty.").

Those reasons explain why we conclude that the Court of Appeals misunderstood the guidepost. Neither Oregon law generally, nor ORS 30.925(2) specifically,[5] suggest how severely the state may choose to punish Philip Morris's conduct. Thus, they do not independently provide a legislative standard entitled to substantial deference. If the Court of Appeals' analysis were correct, then the third *Gore* guidepost would always support *any* punitive damage award, *i.e.*, the mere existence of the award would justify itself automati-

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[5] ORS 30.925 provides, in part:

> "(2) Punitive damages, if any, shall be determined and awarded based upon the following criteria:
>
> "(a) The likelihood at the time that serious harm would arise from the defendant's misconduct;
>
> "(b) The degree of the defendant's awareness of that likelihood;
>
> "(c) The profitability of the defendant's misconduct;
>
> "(d) The duration of the misconduct and any concealment of it;
>
> "(e) The attitude and conduct of the defendant upon discovery of the misconduct;
>
> "(f) The financial condition of the defendant; and
>
> "(g) The total deterrent effect of other punishment imposed upon the defendant as a result of the misconduct, including, but not limited to, punitive damage awards to persons in situations similar to the claimant's and the severity of criminal penalties to which the defendant has been or may be subjected."

Of course, those criteria were established without the benefit of the *Campbell* decision, and may be applied only to the extent that they comport with that decision.

cally, regardless of the amount awarded. That reasoning is circular, and we reject it.

In *Williams I*, the Court of Appeals also suggested that the comparable sanctions guidepost does not "play[ ] a major role one way or the other," because it concluded that there were no comparable civil penalties and that criminal penalties were not truly comparable. 182 Or.App. at 72, 48 P.3d 824. Although it is not clear to us that the foregoing statement correctly interprets and applies the law as *Campbell* now explicates that law, we need not pursue that issue definitively here. That is true, because applying the comparable sanctions guidepost involves more than just asking whether the dollar amount of the sanction equals or exceeds the punitive damage award. *Campbell* proves that. There, the most relevant civil sanction was $10,000; the Court found that civil sanction was "dwarfed" by the $145 million punitive damage award. 538 U.S. at 428, 123 S.Ct. 1513. Yet the Court approved a punitive damage award "at or near the amount of compensatory damages," *id*. at 429, 123 S.Ct. 1513, *i.e.*, an award somewhere around $1 million. And a $1 million punitive damage award was still 100 times the comparable sanction.

So far as we can discern from *Campbell*, then, the "comparable sanctions" guidepost requires three steps. First, courts must identify comparable civil or criminal sanctions. Second, courts must consider how serious the comparable sanctions are, relative to the universe of sanctions that the legislature authorizes to punish inappropriate conduct. Third, courts must then evaluate the punitive damage award in light of the relative severity of the comparable sanctions. The guidepost may militate against a significant punitive damage award if the state's comparable sanctions are mild, trivial, or nonexistent. However, the guidepost will support a more significant punitive damage award when the state's comparable sanctions are severe.

We turn, then, to consider the facts of this case, in light of the guideposts and the Fourteenth Amendment. If there are comparable civil sanctions, the parties did not cite them to us and we have not found them by independent investigation.

There are what we consider to be comparable criminal sanctions, but we must exercise care when relying on them. As the Court took pains to caution in *Campbell*:

> "The existence of a criminal penalty does have [a] bearing on the seriousness with which a State views the wrongful action. When used to determine the dollar amount of the award, however, the criminal penalty has less utility. Great care must be taken to avoid use of the civil process to assess criminal penalties that can be imposed only after the heightened protections of a criminal trial have been observed, including, of course, its higher standards of proof. Punitive damages are not a substitute for the criminal process, and the remote possibility of a criminal sanction does not automatically sustain a punitive damages award."

538 U.S. at 428, 123 S.Ct. 1513. That admonition is important, of course. But the basis for holding that Philip Morris's actions in this case compare to a familiar crime is not speculative or remote. Viewing the facts in the light most favorable to plaintiff, Philip Morris's actions, under the criminal statutes in place at the beginning of its scheme in 1954, would have constituted manslaughter. *See* ORS 163.040 (1953).[6] Today, its actions would constitute at least second-

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[6] In 1953, that statute provided, in part:

> "(2) Any person who, in the commission of * * * a lawful act without due caution or circumspection, involuntarily kills another, is guilty of manslaughter. * * *
>
> "(3) Every killing of a human being by the act, procurement or culpable negligence of another, when the killing is not murder in the first or second degree, or is not justifiable or excusable

degree manslaughter, a Class B felony. *See* ORS 163.125(1)(a).[7] Individuals who commit Class B felonies may face up to 10 years in prison and a fine of up to $250,000. ORS 161.605(2) (term of imprisonment); ORS 161.625(1)(c) (fine). Corporations that commit a felony of any class may be fined up to $50,000, or required to pay up

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> or negligent homicide as provided in ORS 163.090 [negligent homicide by operation of motor vehicle], is manslaughter."

[7] The Oregon statutes generally define criminal homicide as follows:

> "A person commits criminal homicide if, without justification or excuse, the person intentionally, knowingly, recklessly or with criminal negligence causes the death of another human being."

ORS 163.005(1).

Second-degree manslaughter is a specific category of criminal homicide:

> "(1) Criminal homicide constitutes manslaughter in the second degree when:
>
> "(a) It is committed recklessly[.]
>
> " * * * * *
>
> "(2) Manslaughter in the second degree is a Class B felony."

ORS 163.125.

Reckless conduct is defined in ORS 161.085(9):

> " 'Recklessly,' when used with respect to a result or to a circumstance described by a statute defining an offense, means that a person is aware of and consciously disregards a substantial and unjustifiable risk that the result will occur or that the circumstance exists. The risk must be of such nature and degree that disregard thereof constitutes a gross deviation from the standard of care that a reasonable person would observe in the situation."

to twice the amount that the corporation gained by committing the offense. ORS 161.655(1)(a) and (3). Thus, the possibility of severe criminal sanctions, both for any individual who participated and for the corporation generally, put Philip Morris on notice that Oregon would take such conduct very seriously.[8] We conclude that the third guidepost, like the first, supports a very significant punitive damage award.

The same cannot be said of the second *Gore* guidepost. As noted, that guidepost considers the ratio between the punitive damage award and the compensatory damage award. The numerator of the ratio is fixed by the punitive damage award: $79.5 million.

To determine the denominator of the ratio, we consider not only the harm actually suffered by plaintiff, but also the potential harm to plaintiff. *See Campbell*, 538 U.S. at 418, 123 S.Ct. 1513 ("actual or potential harm suffered by the plaintiff"); *id*. at 424, 123 S.Ct. 1513 (ratio "between harm, or potential harm, to the plaintiff and the punitive damages award"). Plaintiff suffered relatively small economic damages for Williams's wrongful death—less than $25,000. However, that low figure occurred only because Williams died shortly after being diagnosed with cancer. If Williams had lived long enough to incur substantial medical bills, for example, economic damages could easily have been 10 or more times the amount awarded here. Only chance saved

[8] The fines and periods of imprisonment have changed over the many years that Philip Morris carried out its scheme. In 1953, for example, manslaughter carried a much longer prison term (15 years), but a much lower fine ($5,000). ORS 163.080 (1953). The point, however, is that reckless conduct like Philip Morris's, when it resulted in death (as it did here), always has constituted a criminal act to which attached a severe potential criminal penalty.

Philip Morris from a much higher compensatory damage award.[9]

In analyzing the ratio of punitive to compensatory damages, the Court of Appeals also added to the compensatory damages calculus the estimated harm to others. *Williams II*, 193 Or.App. at 562, 92 P.3d 126 (estimating that 100 Oregonians had been harmed by Philip Morris's scheme, and so concluding ratio was less than 4:1).

Using harm to others as part of the ratio may have been correct under the plurality opinion in *TXO Production Corp. v. Alliance Resources Corp.*, 509 U.S. 443, 460, 113 S.Ct. 2711, 125 L.Ed.2d 366 (1993) (Stevens, J., joined by Rehnquist, C. J., and Blackmun, J.) (relationship between actual and punitive damages should consider "the possible harm to other victims that might have resulted if similar future behavior were not deterred"). However, it no longer ap-

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[9] One sentence in *Campbell* suggested that a small award of " '*economic damages*' " might, when combined with particularly egregious conduct, justify a higher ratio. 538 U.S. at 425, 123 S.Ct. 1513 (quoting *Gore*, 517 U.S. at 582, 116 S.Ct. 1589; emphasis added).

We conclude, however, that the Court meant compensatory damages generally, not economic damages specifically. *See id.* ("The converse is also true, however. When *compensatory* damages are substantial, then a lesser ratio * * * can reach the outermost limit of the due process guarantee." (emphasis added)); *see also id.* at 426, 123 S.Ct. 1513 (expressing concern that compensatory damages might have included outrage or humiliation component duplicated in punitive damage award). That accords with *Gore*, 517 U.S. at 582, 116 S.Ct. 1589 ("[L]ow awards of *compensatory* damages may properly support a higher ratio than high compensatory awards, if, for example, a particularly egregious act has resulted in only a small amount of economic damages." (emphasis added)).

pears to be permissible (if it ever was) to factor in that consideration. Although *Campbell* held that similar acts could bear on reprehensibility (discussed above), it now appears that harm to others should not be considered as part of the ratio guidepost. *See* 538 U.S. at 426-27, 123 S.Ct. 1513 ("Since the Supreme Court of Utah discussed the Texas award when applying the ratio guidepost, we discuss it here. The Texas award, however, should have been analyzed in the context of the *reprehensibility guidepost only*." (emphasis added)); *see also id*. at 427, 123 S.Ct. 1513 (had Texas award involved similar conduct, it "might have had some bearing on the degree of reprehensibility"); *Gore*, 517 U.S. at 582-83, 116 S.Ct. 1589 (Court used 500:1 as ratio, although Court noted in 35 that ratio would have been 35:1 if damages to other Alabama consumers had been included). From the foregoing, we conclude that the ratio guidepost considers only harm to the plaintiff. *See Campbell*, 538 U.S. at 425, 123 S.Ct. 1513 (precise award must be based on "the defendant's conduct and the harm *to the plaintiff*" (emphasis added)); *id*. at 426, 123 S.Ct. 1513 (punishment must be "reasonable and proportionate to the amount of *harm to the plaintiff* and to the general damages recovered" (emphasis added)).

There also is some imprecision regarding what amount we should use for noneconomic damages—is it the $800,000 awarded by the jury, or the $500,000 awarded by the trial court after applying the statutory cap? We need not decide between the "capped" or "uncapped" figure, however, because it makes no difference here. Either way, the second *Gore* guidepost is not met. All arguable versions of the ratios substantially exceed the single-digit ratio (9:1) that the Court has said ordinarily will apply in the usual case. *See Campbell*, 538 U.S. at 425, 123 S.Ct. 1513 (so stating).

In *Williams II*, the Court of Appeals also relied on Philip Morris's wealth to conclude that the jury's punitive damage award did not violate due process. 193 Or.App. at 563, 92

P.3d 126. Philip Morris objects that *Campbell* prohibits using wealth in that way. We agree. Wealth "cannot justify an otherwise unconstitutional punitive damages award." *Campbell*, 538 U.S. at 427, 123 S.Ct. 1513. If a punitive damage award is grossly excessive under *Gore* and *Campbell*, then the defendant's wealth will not make it constitutional. In short, wealth is not a fourth *Gore* guidepost.

However, *Campbell* did not otherwise remove wealth from the punitive damage equation, as Philip Morris asserts. A jury still may levy a higher punitive damage award against a wealthy defendant, as long as the final punitive damage award does not exceed the constitutional limits established by the three *Gore* guideposts. *Id*. at 427, 123 S.Ct. 1513 (wealth "cannot justify an *otherwise unconstitutional* punitive damages award," indicating that punitive damage award could be constitutional even though jury considered wealth (emphasis added)); *see id*. at 428, 123 S.Ct. 1513 (wealth is not " 'unlawful or inappropriate' "factor (quoting *Gore*, 517 U.S. at 591, 116 S.Ct. 1589 (Breyer, J., concurring))). Consistently with the foregoing, Oregon law specifically permits a jury to consider a defendant's financial condition when it imposes a punitive damage award. ORS 30.925(2)(f).

Of the three *Gore* guideposts, then, two support a very significant punitive damage award. One guidepost—the ratio—cuts the other way. In the end, we are left to use those competitive tools to assess whether the jury's punitive damage award was not "grossly excessive" and therefore should be reinstated.

The *Gore* guideposts are not bright-line tests. *See, e.g.*, *Campbell*, 538 U.S. at 425, 123 S.Ct. 1513 ("there are no rigid benchmarks that a punitive damages award may not surpass"); *see also Gore*, 517 U.S. at 582, 116 S.Ct. 1589 ("we have consistently rejected the notion that the constitutional line is marked by a simple mathematical formula"). In other words, the guideposts are only that—guideposts. *Gore*

also referred to them as indicia. 517 U.S. at 575, 116 S.Ct. 1589 (reprehensibility is "most important indicium"); *id*. at 580, 116 S.Ct. 1589 (ratio is "second and perhaps most commonly cited indicium"); *id*. at 583, 116 S.Ct. 1589 (comparable sanctions "provides a third indicium for excessiveness"). *Campbell* specifically contemplated that *some* awards exceeding single-digit ratios would satisfy due process. *See id*. at 425, 123 S.Ct. 1513 ("in practice, few awards exceeding a single-digit ratio between punitive and compensatory damages, to a significant degree, will satisfy due process"). Single-digit ratios may mark the boundary in ordinary cases, but the absence of bright-line rules necessarily suggests that the other two guideposts—reprehensibility and comparable sanctions—can provide a basis for overriding the concern that may arise from a double-digit ratio.

And this is by no means an ordinary case. Philip Morris's conduct here was extraordinarily reprehensible, by any measure of which we are aware. It put a significant number of victims at profound risk for an extended period of time. The State of Oregon treats such conduct as grounds for a severe criminal sanction, but even that did not dissuade Philip Morris from pursuing its scheme.

In summary, Philip Morris, with others, engaged in a massive, continuous, near-half-century scheme to defraud the plaintiff and many others, even when Philip Morris always had reason to suspect—and for two or more decades absolutely knew—that the scheme was damaging the health of a very large group of Oregonians—the smoking public—and was killing a number of that group. Under such extreme and outrageous circumstances, we conclude that the jury's $79.5 million punitive damage award against Philip Morris comported with due process, as we understand that standard to relate to punitive damage awards. It follows that the Court of Appeals correctly held that the trial court should have entered judgment against Philip Morris for the full amount of the jury's punitive damage award.

The decision of the Court of Appeals is affirmed. The judgment of the circuit court is reversed, and the case is remanded to the circuit court for further proceedings.

APPENDIX B

OREGON COURT OF APPEALS OPINION

193 Ore. App. 527, 92 P.3d 126

Court of Appeals of Oregon.

MAYOLA WILLIAMS, PERSONAL REPRESENTATIVE OF THE ESTATE OF JESSE D. WILLIAMS,
Deceased, Appellant-Cross-Respondent,

v.

PHILIP MORRIS INCORPORATED,
Respondent-Cross-Appellant,

and

RJ REYNOLDS TOBACCO COMPANY, FRED MEYER, INC., AND PHILIP MORRIS COMPANIES, INC.,
Defendants.

9705-03957; A106791.

Submitted on Remand Nov. 17, 2003.

Decided June 9, 2004.

Before EDMONDS, Presiding Judge, and ARMSTRONG and WOLLHEIM, Judges.

EDMONDS, P.J.

This case comes to us on remand from the United States Supreme Court. *Philip Morris USA Inc. v. Williams*, 540 U.S. 801, 124 S.Ct. 56, 157 L.Ed.2d 12 (2003). We previously reversed the trial court's reduction of the jury's award of punitive damages on plaintiff's fraud claim and remanded the case with instructions to enter judgment on the verdict. We affirmed on defendant's cross-appeal. *Williams v. Philip Morris Inc.*, 182 Or.App. 44, 48 P.3d 824, *adh'd to on recons.*, 183 Or.App. 192, 51 P.3d 670, *rev. den.*, 335 Or. 142, 61 P.3d 938 (2002). The Court thereafter granted defen-

dant's petition for a writ of *certiorari*, vacated our decision, and remanded the case for reconsideration in light of its recent decision in *State Farm Mut. Automobile Ins. Co. v. Campbell*, 538 U.S. 408, 123 S.Ct. 1513, 155 L.Ed.2d 585 (2003) (*State Farm*). On remand, we reach the same result that we reached in our previous decision.

We readopt our previous opinion in all respects that are not superseded by our discussion in this opinion, including our statement of the facts and our resolution of issues of Oregon and federal law. Our failure to discuss any issue that defendant raises on remand indicates that we are satisfied with our previous resolution of that issue. We begin by summarizing the facts that we described in our previous opinion, again construing the evidence most favorably to plaintiff because of the verdict in her favor. These then are the facts that the jury could have found on the evidence before it.

Plaintiff is the widow of Jesse D. Williams (Williams) and the personal representative of his estate. Defendant is a leading manufacturer of cigarettes and currently has about half of the domestic market for that product. From the early 1950s until his death from a smoking-related lung cancer in 1997, Williams smoked defendant's cigarettes, primarily its Marlboro brand, eventually developing a habit of three packs a day. At that point, he spent half his waking hours smoking and was highly addicted to tobacco, both physiologically and psychologically. Although, at the urging of his wife and children, he made several attempts to stop smoking, each time he failed, in part because of his addiction. Despite the increasing amount of information that linked smoking to health problems during this period, Williams resisted accepting or attempting to act on it. When his family told him that cigarettes were dangerous to his health, he replied that the cigarette companies would not sell them if they were as dangerous as his family claimed. When one of his sons tried to get him to read articles about the dangers of smoking, he responded by finding published assertions that cigarette smok-

ing was not dangerous. However, when Williams learned that he had inoperable lung cancer he felt betrayed, stating "those darn cigarette people finally did it. They were lying all the time." He died about six months after his diagnosis.

In resisting the information about the dangers of smoking, Williams was responding to a campaign that defendant, together with the rest of the tobacco industry, created and implemented for the purpose of undercutting the effect of that information. During most of that campaign, the industry did not expressly assert that cigarettes were safe because it knew that it could never prove their safety. Instead, defendant and the industry attempted to make it appear that the evidence against cigarettes was sufficiently uncertain so that smokers would find a reason to justify their continued smoking. To achieve that result, defendant and the rest of the industry worked together for more than 40 years to create a public impression that there was a legitimate controversy about whether cigarettes were dangerous to a smoker's health and that resolving that health issue would require further research. Although defendant and the other companies knew throughout most, if not all, of that 40-year period that cigarette smoking was in fact dangerous, they intended that smokers rely on the false impression that the industry created.

The industry established its strategy and began developing its public image in response to a decline in cigarette sales in 1953 that was the apparent result of studies that showed that cigarette tar could cause cancer in mice and that established the existence of statistical correlations between smoking and lung cancer. The first public joint effort by the industry occurred in January 1954, when defendant and other tobacco companies published a joint statement in 448 newspapers throughout the country. In that statement, among other things, they announced the creation of the Tobacco Industry Research Committee (TIRC), one of whose stated goals was to conduct research into "all phases of tobacco use

and health." In 1964, the year of the Surgeon General's report on the hazard of smoking to health, the industry divided the TIRC into two parts, one of which, the Council on Tobacco Research (CTR), continued to support scientific research. The other part, named the Tobacco Institute, focused on public relations and lobbying.

Between 1954 and the 1990s, those organizations developed and promoted an extensive campaign to counter the effects of negative scientific information on cigarette sales. The individual tobacco companies, including defendant, were part of the organizations and acted in cooperation with them. At first, the industry publicly denied that there was a problem; for example, in the 1950s and early 1960s, defendant's officials told the public that defendant would "stop business tomorrow" if it believed that its products were harmful. For most of that period, however, the industry did not attempt to refute the scientific information directly; rather, it tried to find ways to create doubts about it. The industry's goal was to create the impression that scientists disagreed about whether cigarette smoking was dangerous, that the industry was vigorously conducting research into the issue, and that a definitive answer would not be possible until that research was complete. As one of defendant's vice-presidents explained in an internal memo, the purpose was to give smokers a psychological crutch and a self-rationale that would encourage them to continue smoking. A Tobacco Institute internal memorandum similarly described the industry's purpose to provide smokers "ready-made credible alternatives" to the evidence of the dangers of smoking.

Both the industry as a whole and defendant acted consistently with those purposes. Among other things, they avoided developing contradictory information. Despite the industry's nominal emphasis on the need for further research, the CTR designed its research program to avoid studying the biological effects of tobacco use, the very question that, according to the industry's statements, required more research.

To the extent that defendant conducted research on that issue independently of the CTR, it did so in a European laboratory that it purchased, and it was careful to avoid preserving records of the results in this country. Defendant's director of research in the late 1970s and 1980s explained to a subordinate that his job was to attack outside research that was inconsistent with the industry's position by casting doubt on it. The jury could also have found that there was a "gentleman's agreement" not to conduct research beyond what the CTR did. The primary purpose of the CTR's research was to provide expert witnesses for congressional hearings and lawsuits, not to determine the relationship between smoking and disease. The CTR's lawyers, rather than its scientists, established its research priorities; developing accurate information on the biological effects of smoking was not one of the lawyers' priorities.

The jury could have found that, throughout this period of time, defendant and the other tobacco companies actually had little doubt that cigarette smoking was causally related to a number of diseases. In 1958, three British researchers found that the American tobacco scientists with whom they spoke believed that cigarette smoke could cause cancer. In 1961, defendant's director of research stated that cigarette smoke contained so many carcinogens that the best that the company could do was to reduce their amounts. Internal company memoranda agreed and suggested that it could not admit those facts publicly because of adverse legal consequences. At least by the 1970s, there was absolutely no scientific basis for denying the connection between cigarette smoking and cancer and other diseases. However, defendant continued to assert that the hazard of cigarette smoking to health was uncertain when it actually knew that there was no legitimate controversy about that subject.

The jury could also have found that defendant recognized both that nicotine was addictive and that its addictive effect was the primary reason that people continued to smoke. De-

fendant spent considerable effort discovering ways to deliver the optimal dose of nicotine in each cigarette without actually adding nicotine to its product. It also concluded that, because of nicotine's addictive effect, smoking cessation programs and technologies would be unlikely to work without significant behavioral therapy. In its view, providing smokers a reason to believe that there were serious doubts that tobacco was harmful would discourage smokers from making the effort that was necessary to quit smoking.

Also, the jury could have found that defendant and the industry used a large number of methods to create the public impression of a legitimate controversy, despite the lack of supporting scientific evidence. They issued press releases, influenced the content of apparently neutral articles, cultivated opinion leaders, attempted to use their advertising power to get favorable treatment from the print media, and appeared on commercial and public television to put forth that message. Those individuals who spoke for defendant and the industry emphasized that the evidence concerning the dangers of smoking was primarily based on statistical relationships, and they argued that there was no proof that a specific component of tobacco smoke caused a specific disease. Even after the early 1990s, when the industry finally had to admit that tobacco could be a risk factor associated with a number of diseases, it argued that there was a long chain of intervening events before a disease actually arose from cigarette smoking. The industry, including defendant, also continued to deny that cigarette smoking was addictive and publicized that message throughout the country, including Oregon.

As a smoker, Williams was one of the intended recipients of the industry's message, and, in fact, the jury could have found that he received its message and relied on its representations. Those representations affected his decision to continue smoking and not to make greater efforts to overcome his addiction. When his family urged him to stop smoking,

he responded that he had learned from watching television that smoking did not cause lung cancer. After his diagnosis, he blamed the "cigarette people" for betraying him—which, given his exclusive use of defendant's products, must at least have included defendant. The jury could have found on the evidence before it that, as a result of defendant's representations, Williams suffered his fatal lung cancer. The jury also could have found that Williams was one of thousands of Oregonians who received defendant's message, acted on it, and, like him, suffered cancer or other diseases as a result.

In our previous opinion, we described the requirements for proving a fraud claim in Oregon and explained why the jury could have found that plaintiff had proven fraud in this case. In short, the jury could have found that defendant, by itself and through the industry effort of which it was a part, intentionally made the false representation that there was a legitimate controversy about the health effects of cigarette smoking, that defendant knew that that representation was false, that Williams relied on it, that he thereafter continued to smoke, and that he suffered his fatal lung cancer as a result of that reliance. *Williams*, 182 Or.App. at 49-70, 48 P.3d 824. Based on the evidence, the jury awarded plaintiff compensatory damages of $21,485.80 in economic damages and $800,000 in noneconomic damages on that claim. In accordance with *former* ORS 18.560(1) (1999), *renumbered as* ORS 31.710(1) (2003), the trial court reduced the amount of noneconomic damages to $500,000 when it entered judgment.

In addition to compensatory damages, the jury awarded plaintiff punitive damages of $79.5 million, which the trial court reduced to $32 million. In our previous opinion, we reinstated the jury's verdict on those damages. The issue before us on remand is the extent to which that award of punitive damages is consistent with the Due Process Clause of the Fourteenth Amendment, particularly as the Court interpreted it in *State Farm*. In our previous opinion, we followed the

Oregon Supreme Court's decision in *Parrott v. Carr Chevrolet, Inc.*, 331 Or. 537, 17 P.3d 473 (2001), in deciding the federal constitutional issue. Now, on remand from the United States Supreme Court, we determine whether our earlier decision is consistent with the Supreme Court's discussion in *State Farm*. We begin that analysis by reviewing earlier United States Supreme Court cases on punitive damages, cases that provide the context for understanding the Court's decision in *State Farm*.

Pacific Mutual Life Insurance Co. v. Haslip, 499 U.S. 1, 111 S.Ct. 1032, 113 L.Ed.2d 1 (1991), is the first case in which the Court considered the effect of the Due Process Clause on the size of an award of punitive damages.[10] In *Haslip*, the defendant Ruffin, an agent and employee of the defendant insurance company, sold life insurance issued by the defendant company, together with health insurance issued by an unrelated company, to an Alabama municipality of which the plaintiffs were employees. Ruffin had the municipality send the premiums for the insurance to him at the company's branch office, rather than to the insurers directly, but he did not forward the premiums to either insurer. As a result of its failure to receive premiums, the health insurer sent notices that the insurance had lapsed for nonpayment to the plaintiffs, in care of Ruffin at the defendant company's branch office. Ruffin did not forward those notices to the plaintiffs. When the plaintiff Haslip sought medical services, she learned that she was uninsured and that she was personally liable for the charges that she had incurred. She was unable to pay her medical bills, and her physician placed her account with a collection agency. The agency obtained a

[10] The Court had previously rejected challenges to punitive damages under the Excessive Fines Clause of the Eighth Amendment. In several other cases, it had noted the possibility of a due process challenge but concluded that the issue was not properly raised. *See Haslip*, 499 U.S. at 9-12, 111 S.Ct. 1032.

judgment against her, adversely affecting her credit. *Haslip*, 499 U.S. at 4-5, 111 S.Ct. 1032.

The plaintiffs sued Ruffin and the defendant company for fraud. The jury returned general verdicts for damages for all plaintiffs. The verdict for Haslip was $1,040,000, which, the Court assumed, consisted of $200,000 in compensatory damages (the maximum amount that Haslip's attorney requested in his closing argument) and $840,000 in punitive damages. The Alabama Supreme Court affirmed the award, and the United States Supreme Court granted *certiorari*. *Haslip*, 499 U.S. at 5-8, 111 S.Ct. 1032. In its opinion, the Court first held that the Alabama common-law rule that made the company vicariously liable for punitive damages for its employee's fraud did not violate due process. *Id*. at 12-15, 111 S.Ct. 1032. It then turned to the constitutionality of the award of punitive damages.

The Court began by concluding that the common-law method of assessing punitive damages—initially by a jury that is instructed to consider the gravity of the wrong and the need to deter similar wrongful conduct, followed by trial and appellate court review—is consistent with due process. *Haslip*, 499 U.S. at 15-18, 111 S.Ct. 1032. It then evaluated whether the award to Haslip was constitutionally acceptable. It observed that, although it is not possible to draw a mathematical bright line between the constitutionally acceptable and the unacceptable, the reasonableness of the award and whether the jury received adequate guidance from the court are significant considerations. The trial court had expressly instructed the jury on the purposes of punitive damages—not to compensate but to punish and to deter future conduct. That instruction operated to limit the jury's discretion. In addition, under Alabama law, the jury did not receive evidence of the defendant's wealth, and the court told the jury that whether to award punitive damages at all was within its discretion. Thus, the jury's discretion in determining punitive

damages was no greater than it would have been in many other areas of law. *Id*. at 18-20, 111 S.Ct. 1032.

Alabama had also provided significant judicial review of the jury's award. Before *Haslip*, the Alabama Supreme Court had established procedures for a trial court to evaluate a jury award of punitive damages, including requiring the court to place the reasons for its decision in the record. In addition, Alabama provided appellate review of the criteria that it had previously established to ensure that punitive damage awards were reasonable in amount and rational in light of their purpose. *Haslip*, 499 U.S. at 20-21, 111 S.Ct. 1032. The Court concluded that those criteria imposed a sufficiently definite and meaningful constraint on the discretion of Alabama factfinders in awarding punitive damages. It especially noted that factfinders who are asked to award punitive damages must be guided by more than the defendant's net worth. The Court said, "Alabama plaintiffs do not enjoy a windfall because they have the good fortune to have a defendant with a deep pocket." *Id*. at 22, 111 S.Ct. 1032.

After concluding that the defendant had received the full panoply of protections that Alabama provided, the Court mentioned that the award was more than four times the compensatory damages, more than 200 times Haslip's out-of-pocket expenses, and considerably in excess of a fine for insurance fraud. However, it concluded that, although "the monetary comparisons are wide and, indeed, may be close to the line, the award here did not lack objective criteria." *Haslip*, 499 U.S. at 23, 111 S.Ct. 1032. The Court therefore affirmed the judgment for the plaintiff. *Id*. at 23-24, 111 S.Ct. 1032.

The next case that the Court considered, *TXO Production Corp. v. Alliance Resources Corp.*, 509 U.S. 443, 113 S.Ct. 2711, 125 L.Ed.2d 366 (1993) (TXO), arose out of a property dispute between two energy companies. TXO, the defendant, agreed to purchase rights to develop gas and oil on

property where the plaintiff Alliance Resources controlled the major share of the rights. The agreement was subject to TXO's attorney determining that Alliance's title to the property was valid. In the process of making that determination, TXO discovered a 1958 deed that conveyed the coal mining rights on the property to another party. Although both the wording of the deed and interviews with the parties involved made it clear that the grantor had not conveyed oil and gas rights, TXO paid for a quitclaim deed from the owner of the coal rights and attempted to renegotiate its agreement with Alliance. It also unsuccessfully attempted to induce the grantor of the 1958 deed to execute a false affidavit to the effect that the deed included oil and gas rights. *Id*. at 447-49, 113 S.Ct. 2711.

When its other efforts failed, TXO filed an action to quiet title based on the quitclaim deed, although it knew at the time that its action was frivolous. TXO's real reason for filing the action was to reduce its royalty payments under its agreement with Alliance. The trial court dismissed TXO's action based on the wording of the 1958 deed alone, holding that that deed made the quitclaim deed a nullity. On Alliance's counterclaim for slander of title, the jury awarded it $19,000 in actual damages—the cost of defending the quiet title action—and $10 million in punitive damages. There was evidence that TXO was a large company in its own right, that it was a wholly owned subsidiary of an even larger company, that the amount of royalties that it sought to renegotiate was substantial, and that it had engaged in similar nefarious activities in its business dealings in other parts of the county. *TXO*, 509 U.S. at 449-51, 113 S.Ct. 2711. The trial court refused to reduce the amount of punitive damages, and the West Virginia Supreme Court affirmed. *Id*. at 452, 113 S.Ct. 2711.

On *certiorari*, the United States Supreme Court affirmed the judgment, with Justice Stevens writing the plurality opinion. Chief Justice Rehnquist and Justice Blackmun joined in full, and Justice Kennedy did so in part. Justice Kennedy also

wrote a concurrence, as did Justice Scalia, with whom Justice Thomas joined. The remaining justices joined Justice O'Connor's dissent. The plurality first noted that, assuming that the lower courts followed fair procedures, a judgment that is a product of that process is entitled to a strong presumption of validity. It also noted that comparisons with other awards of punitive damages are difficult because no two cases are truly identical. *TXO*, 509 U.S. at 456-57, 113 S.Ct. 2711. It quoted the Court's statement in *Haslip* that it is not possible to draw a mathematical bright line between acceptable and unacceptable awards but that a general concern for reasonableness certainly enters into the calculation. *Id*. at 458, 113 S.Ct. 2711.

In evaluating whether the award in *TXO* was grossly excessive, the plurality first rejected the defendant's emphasis on the fact that the award was 526 times the amount of the actual damages that the jury awarded. Although the plurality agreed that punitive damages should bear a reasonable relationship to compensatory damages, it agreed with a previous West Virginia Supreme Court case in which that court pointed out that the ratio between the dollar amounts of compensatory and punitive damages is only one of several factors for evaluating that relationship. Among the other factors that the West Virginia court identified was the relationship between the harm that was likely to occur from the defendant's conduct as well as the harm that actually occurred. *TXO*, 509 U.S. at 459-60, 113 S.Ct. 2711.

The jury could have found in *TXO* that the defendant would have avoided millions of dollars in royalty payments if it had successfully attacked the plaintiff's title. The plurality said that, even if the amount of savings were only $1 million, the award of punitive damages would not jar its sensibilities. *TXO*, 509 U.S. at 461-62, 113 S.Ct. 2711. It reasoned:

> "The punitive damages award in this case is certainly large, but in light of the amount of money potentially at

> stake, the bad faith of petitioner, the fact that the scheme employed in this case was part of a larger pattern of fraud, trickery and deceit, and petitioner's wealth, we are not persuaded that the award was so 'grossly excessive' as to be beyond the power of the State to allow."

Id. at 462, 113 S.Ct. 2711 (footnote omitted). In its instructions to the jury, the trial court also authorized it to take into account the defendant's wealth in assessing punitive damages, recognizing that deterrence may require a larger fine for a defendant of larger means than it would for a defendant of ordinary means. The *TXO* plurality recognized that emphasizing the wealth of the wrongdoer increased the risk that the award would be influenced by prejudice against a large corporation, especially one from outside the state. However, it noted that in *Haslip* it had referred to the financial condition of the defendant as a factor in assessing punitive damages. *Id*. at 463-64, 113 S.Ct. 2711.

In his concurrence, Justice Kennedy objected to the plurality's reliance on general reasonableness as the basis for evaluating the constitutionality of the award. He thought that it was more manageable to focus not on the amount of the award but on the jury's reasons for making the award:

> "The Constitution identifies no particular multiple of compensatory damages as an acceptable limit for punitive awards; it does not concern itself with dollar amounts, ratios, or the quirks of juries in specific jurisdictions. Rather, its fundamental guarantee is that the individual citizen may rest secure against arbitrary or irrational deprivations of property. When a punitive damages award reflects bias, passion, or prejudice on the part of the jury, rather than a rational concern for deterrence and retribution, the Constitution has been violated, no matter what the absolute or relative size of the award."

TXO, 509 U.S. at 467, 113 S.Ct. 2711 (Kennedy, J., concurring). He did not agree with the plurality that a rational rela-

tionship between the size of the award and the harm that the defendant's conduct threatened was an adequate basis for concluding that the award was rational because the record did not indicate that that was the basis on which the case was presented to the jury. He was concerned that the record suggested, as the dissent argued, that the verdict was the result of redistributionist impulses arising from antipathy to a wealthy, out-of-state corporation. Justice Kennedy concluded, however, that the verdict was permissible, primarily because the defendant acted with malice; the evidence of "deliberate, wrongful conduct" was sufficient to show that the jury was motivated by a legitimate concern to punish and deter the defendant. *Id*. at 468-69, 113 S.Ct. 2711 (Kennedy, J., concurring). Justice Kennedy observed:

> "There was ample evidence of willful and malicious conduct by TXO in this case; the jury heard evidence concerning several prior lawsuits filed against TXO accusing it of similar misdeeds; and respondents' attorneys informed the jury of TXO's vast financial resources and argued that TXO would suffer only as a result of a large judgment."

Id. at 469, 113 S.Ct. 2711 (Kennedy, J., concurring).

Justice Scalia, joined by Justice Thomas, concurred on the ground that due process required only that there be fair procedures for making and reviewing an award of punitive damages. Because the West Virginia courts properly instructed the jury and properly reviewed its verdict for reasonableness, he agreed that it should be affirmed.[11] *TXO*, 509 U.S. at 470-72, 113 S.Ct. 2711 (Scalia, J., concurring).

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[11] The Court subsequently followed Justice Scalia's suggestions concerning procedural requirements. In *Honda Motor Co. v. Oberg*, 512 U.S. 415, 114 S.Ct. 2331, 129 L.Ed.2d 336 (1994), it held that the Due Process Clause requires post-verdict review of punitive damage awards for excessiveness. In *Cooper Industries,*

In her dissent, Justice O'Connor argued that the record showed that the verdict was based on prejudice against a wealthy outside corporation and constituted a windfall to the plaintiff based on the jury's desire to redistribute that wealth. *TXO*, 509 U.S. at 490-91, 113 S.Ct. 2711 (O'Connor, J., dissenting). She did not argue, however, that consideration of a defendant's wealth is impermissible. Rather, she said that courts simply need to recognize the special dangers involved when they review jury verdicts. *Id*. at 491-92, 113 S.Ct. 2711 (O'Connor, J., dissenting).

TXO was followed by *BMW of North America, Inc. v. Gore*, 517 U.S. 559, 116 S.Ct. 1589, 134 L.Ed.2d 809 (1996) (*Gore*), a 5-4 decision. It became the first case in which the Court held that an award of punitive damages was excessive. In *Gore*, the jury awarded Gore, the plaintiff, $4,000 in actual damages and $4 million in punitive damages for BMW's conduct in representing that the car that it sold to him was new despite presale damage that required repainting the car at a cost of $601. BMW had a policy of not telling purchasers about presale repairs that cost less than three percent of the value of the vehicle. Gore produced evidence that the repair reduced the value of his car by $4,000, which was ten percent of its cost as new. He also produced evidence that between 1983 and the time of trial, the defendant had sold 983 cars, including 14 in Alabama, representing them to be new cars without disclosing that they had been repainted at a cost of more than $300 per vehicle. Gore calculated his request for punitive damages of $4 million by multiplying his $4,000 actual damages by the approximately 1,000 cars that

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Inc. v. Leatherman Tool Group, Inc., 532 U.S. 424, 121 S.Ct. 1678, 149 L.Ed.2d 674 (2001), it required appellate courts to determine whether an award of punitive damage is excessive without giving any deference to the trial court's decision on that issue. Our review of the award in this case is consistent with those procedural decisions.

the defendant had sold. *Gore*, 517 U.S. at 563-65, 116 S.Ct. 1589.

On appeal, the Alabama Supreme Court applied the criteria that the United States Supreme Court had approved in *Haslip* and held that the award was not excessive. However, the Alabama court concluded that the jury improperly included BMW's conduct in other jurisdictions in calculating the amount of punitive damages. It therefore reduced the amount of those damages to $2 million. The court based its conclusion on a belief that that amount was a constitutionally reasonable amount based on its comparative analysis both of other Alabama cases and of cases from other jurisdictions that involved a seller's misrepresentation of the condition of an automobile. *Gore*, 517 U.S. at 566-67, 116 S.Ct. 1589.

The United State Supreme Court first agreed with the Alabama court that the state had no authority to penalize a defendant for conduct in other jurisdictions that was legal where it occurred and that had no effect on Alabama residents. *Gore*, 517 U.S. at 568-73, 116 S.Ct. 1589. It did recognize, however, that evidence of out-of-state conduct may be relevant for determining the reprehensibility of a defendant's conduct. *Id*. at 574 n. 21, 116 S.Ct. 1589. The Court then concluded that the punitive damages award, even with the Alabama court's reductions, was grossly excessive. The Court's focus in evaluating the award was on whether the defendant received fair notice, not only of the conduct that could subject it to punishment but also of the severity of the penalty. *Id*. at 574, 116 S.Ct. 1589. It relied on three guideposts for deciding that issue:

> "[T]he degree of reprehensibility of the nondisclosure; the disparity between the harm or potential harm suffered by Dr. Gore and his punitive damages award; and the difference between this remedy and the civil penalties authorized or imposed in comparable cases."

Id. at 575, 116 S.Ct. 1589.

According to the *Gore* Court, the reprehensibility of the defendant's conduct is the most important indication of the reasonableness of an award of punitive damages; some wrongs are more blameworthy than others. Trickery and deceit or repeated misconduct, for example, are more reprehensible than mere negligence. *Gore*, 517 U.S. at 575-76, 116 S.Ct. 1589. In *Gore*, however, none of the factors associated with particularly reprehensible conduct was present. The harm that BMW inflicted was purely economic in nature. Although Gore argued that BMW's actions were part of a nationwide pattern of tortious conduct, the Court concluded that there was no reason for BMW to know that its actions violated applicable statutes or common-law rules in other states. In addition, there was no evidence that BMW had acted in bad faith when it predetermined the amount of repairs to a new car that, in its view, required disclosure before sale. Also, there was no evidence that it had made deliberate false statements, committed affirmative misconduct, or had concealed evidence of an improper motive. Thus, the Court concluded that no circumstances existed that are ordinarily associated with egregiously improper conduct. *Id*. at 576-80, 116 S.Ct. 1589.

Although it said that reprehensibility is the most important factor in assessing of the reasonableness of an award, the Court commented that the second guidepost, the ratio between the award and the actual harm inflicted on the plaintiff, is probably the most often cited. It noted that early English statutes often provided for double, treble, or quadruple damages for particular wrongs and that, in *Haslip*, it had suggested that an award that was more than four times the compensatory damages might be close to a constitutional violation. It then pointed out that the plurality in *TXO* had refined the issue by holding that the proper inquiry is the ratio between the punitive damages award and the harm likely to

result from the defendant's conduct, not simply the harm that had occurred.[12] *Gore*, 517 U.S. at 580-81, 116 S.Ct. 1589.

In contrast to prior cases, the $2 million award in *Gore* was 500 times the amount of Gore's actual harm, and there was no indication that he was threatened with any additional potential harm. Assuming that the other 13 Alabama consumers suffered the same loss, the award was 35 times the total loss suffered by Alabama consumers. However, the Court rejected the idea that the constitutional line is marked by a simple mathematical formula, even one that compared actual and potential damages with the punitive award. For example, low awards of compensatory damages might support a higher ratio than high compensatory awards, particularly when a particularly egregious act resulted in relatively low economic damages or when injury is hard to detect or the monetary value of noneconomic harm is difficult to determine. *Gore*, 517 U.S. at 582-83, 116 S.Ct. 1589. Nevertheless, a ratio of 500 to 1 at least raised "a suspicious judicial eyebrow" for the Court. *Id*. at 583, 116 S.Ct. 1589 (citation omitted).

The third guidepost for determining excessiveness involves comparing the award of punitive damages to the civil or criminal penalties that are available for the defendant's conduct. The purpose of this guidepost is to allow the reviewing court to give substantial deference to the legislative judgment about appropriate sanctions. The $2 million award in *Gore* was substantially greater than fines in Alabama or elsewhere for similar misconduct. None of those sanctions gave BMW notice that the first violation—or even the first 14 violations—could lead to a multimillion dollar penalty. There was also no reason to assume that a penalty of that size was necessary in order to motivate the defendant to change

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[12] The Court treated that portion of the plurality opinion in *TXO* as stating the holding of the Court.

its policy, as it did after the verdict in this case. The Court assumed that the undisclosed damage and repainting affected the value of Gore's car and of the 13 other similar BMWs in Alabama and that those cars would lose their attractive appearance more rapidly than other BMWs, but it was not willing to accept the Alabama court's conclusion that BMW's conduct was sufficiently egregious to justify a punitive sanction that was equivalent to a severe criminal penalty. Moreover, the fact that BMW was a large corporation did not diminish its entitlement to fair notice of the demands that the several states imposed on it; indeed, its status implicated the federal interest in preventing undue burdens on interstate commerce. *Gore*, 517 U.S. at 583-85, 116 S.Ct. 1589.

Justice Breyer, along with two of the other justices who joined the majority opinion in *Gore*, concurred. He emphasized the need for proper standards for reviewing an award of punitive damages and concluded that the standards that the Alabama court had applied were so vague and open ended as to risk arbitrary results. In his view, those standards provided no basis for distinguishing between conduct that warrants a small award and conduct that would justify a very large award, and he thought that the Alabama courts had applied them in ways that did not in fact limit the amounts awarded. *Gore*, 517 U.S. at 586-89, 116 S.Ct. 1589 (Breyer, J., concurring). He also believed that BMW's financial status was offered into evidence simply to provide an open-ended basis for inflating an award against a wealthy defendant. Although the use of that factor was not unlawful or inappropriate *per se*, he said that it could not make up for the failure of other factors, such as reprehensibility, to constrain an award. *Id*. at 591, 116 S.Ct. 1589 (Breyer, J., concurring). He faulted the Alabama courts for not applying any economic theory in evaluating the award and explained that the award, in his view, did not exemplify any community understanding or historic practice. *Id*. at 592-94, 116 S.Ct. 1589 (Breyer, J., concurring). Because Alabama's legal standards offered vir-

tually no constraint on jury awards, and because of the severe disproportion between the award and legitimate objectives for punitive damages, Justice Breyer agreed both with the Court's decision to scrutinize the award and with its conclusion that the award was grossly excessive and therefore unconstitutional. *Id*. at 596-97, 116 S.Ct. 1589 (Breyer, J., concurring).

Gore provided the framework for our initial opinion in this case. Our opinion followed the Oregon Supreme Court's holding in *Parrott*. In that case, the court applied the above-mentioned cases to a claim made under the Unlawful Trade Practices Act (UTPA), which expressly authorizes punitive damages for a violation of the statute. ORS 646.608(1)(e), (g), (t); ORS 646.638(1). The defendant, Carr Chevrolet, had been found to have knowingly misrepresented the status of the title and a number of other aspects of a vehicle that it had sold to the plaintiff. According to the evidence, those actions were part of Carr's normal business practices. The jury awarded the plaintiff compensatory damages of $11,496 and punitive damages of $1 million. The trial court reduced the punitive damages award to $50,000; on appeal, this court partially restored the award to $300,000. *Parrott v. Carr Chevrolet, Inc.*, 156 Or.App. 257, 965 P.2d 440 (1998). The Oregon Supreme Court, after evaluating the Gore guideposts together with the "rational juror" criteria that the court had previously identified in *Oberg v. Honda Motor Co.*, 320 Or. 544, 888 P.2d 8 (1995), *cert. den.*, 517 U.S. 1219, 116 S.Ct. 1847, 134 L.Ed.2d 948 (1996), reinstated the jury's verdict in its entirety. It emphasized that, at least for the purposes of *Parrott*, both the *Gore* criteria and the rational juror standard were based entirely on federal law; at least before the adoption in 1995 of *former* ORS 18.537(2) (1995), *renumbered as*

ORS 31.730(2)(2003),[13] there was no basis in Oregon law for challenging an award of punitive damages if there was any evidence to support an award. *See Parrott*, 331 Or. at 551-65, 17 P.3d 473.

Applying its understanding of *Gore*, the Oregon Supreme Court identified in *Parrott* five criteria for determining the range of punitive damages that a rational juror would be entitled to award: (1) the statutory and common-law facts that allow an award for the claim at issue; (2) the state interests that the award would serve; (3) the degree of reprehensibility of the defendant's conduct; (4) the disparity between the award and the actual or potential harm inflicted; and (5) the civil and criminal sanctions provided for similar misconduct. The latter three criteria are the *Gore* guideposts. The second criterion also came from *Gore*, while the first criterion came from the court's previous discussion in *Oberg*. *Parrott*, 331 Or. at 555, 17 P.3d 473. After examining the facts in *Parrott*, the court stated that the case presented an extremely egregious violation of the UTPA. It held that punishing the defendant for misconduct in Oregon and deterring it from additional such conduct furthered a significant state interest. In its view, the defendant's misconduct was far more serious than that of the defendant in *Gore*, in part because it involved intentional affirmative misrepresentations of material facts and, in part, because the defendant's conduct was part of its ordinary business practices. *Id*. at 560-62, 116 S.Ct. 1589.

The *Parrott* court then turned to the relationship between the actual or potential harm and the punitive damages award. It noted that analyzing that relationship required a consideration of the harm that was likely to result, as well as the harm that actually resulted. Because the defendant's conduct was a

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[13] *Former* ORS 18.537 codified the "rational juror" standard that the Oregon court described in *Oberg*, making it part of state law. It became effective after the events at issue in *Parrott*.

routine part of its business practices, the court considered the potential injury that those practices caused to past, present, and future customers. In that light, the 87-to-1 ratio between the punitive and compensatory damages did not raise any constitutional concerns. *Parrott*, 331 Or. at 562-63, 17 P.3d 473. Finally, the court noted that the civil penalties for Carr's conduct could include injunctive relief and the loss of its business license. Those penalties could have potentially serious economic consequences for Carr. *Id*. at 563-64, 17 P.3d 473. For all of those reasons, the court reinstated the full amount of the punitive damages award. In turn, in light of *Parrott*, we reinstated the jury's award of punitive damages in this case. *Williams*, 182 Or.App. at 70-74, 48 P.3d 824. With that background, we turn to the Court's decision in *State Farm*, which was decided after the Oregon Supreme Court ruled in *Parrott* and which has prompted the remand of this case to us.

Curtis Campbell, one of the plaintiffs in *State Farm*, negligently caused an automobile accident that resulted in the death of another driver and the permanent disability of a third driver. The injured driver and the deceased driver's estate sued Campbell. State Farm Mutual Insurance Company (State Farm) was Campbell's liability insurer; its policy limits were $25,000 per claimant, for a total of $50,000. Although investigators and witnesses reached a consensus that Campbell's negligence was the cause of the accident, State Farm decided to contest liability and refused offers from the injured parties to settle for the policy limits. Before trial, it assured Campbell and his wife that they had no reason to be concerned and that it would represent their interests. After the jury returned a verdict for $185,849, State Farm told them to put "for sale" signs on their house and refused to post a supersedeas bond in order for Campbell to appeal the judgment. Campbell managed to appeal on his own, and State Farm paid the judgment after the appellate court affirmed it. During the course of the appeal, Campbell and his wife

reached an agreement with the injured parties under which the injured parties agreed not to seek satisfaction of their claims from the Campbells personally and under which the Campbells agreed to pursue a bad faith action against State Farm. *State Farm*, 538 U.S. at 412-14, 123 S.Ct. 1513.

The Campbells filed an action against State Farm. The trial court held a bifurcated trial. At the end of the first portion of the trial, the jury found that State Farm's decision not to settle was unreasonable because there was a substantial likelihood of an excess verdict. During the second part of the trial, the Campbells introduced evidence that State Farm's response to the claims against them was the result of a national program ("Performance, Planning and Review," or "PP & R") designed to cap payments on claims throughout the company. The evidence offered related to State Farm's business practices over a 20 year period in numerous states; most of it had no relationship to third-party insurance claims. State Farm countered with evidence that its decision to take the case to trial was simply an honest mistake. However, the jury awarded compensatory damages of $2.6 million and punitive damages of $145 million to the Campbells. The trial court reduced the awards to $1 million in compensatory damages and $25 million in punitive damages. On appeal, the Utah Supreme Court, applying the *Gore* guideposts, reinstated the original punitive damages award. In evaluating the reprehensibility of State Farm's conduct, it emphasized the evidence concerning the PP & R policy. The court also relied on State Farm's massive wealth and reasoned that, because of the clandestine nature of State Farm's conduct, the chance of punishment in any specific case was extremely small. *State Farm*, 538 U.S. at 414-16, 123 S.Ct. 1513.

In reviewing the Utah court's decision, the United States Supreme Court first restated its concerns about excessive punitive damages. It observed that the primary danger in such awards is their potential to deprive a person of property arbitrarily without fair notice and without furthering any legiti-

mate purpose of punishment or deterrence. It stated that an award that is grossly excessive furthers no legitimate purpose and constitutes an arbitrary deprivation of property. The Court said that defendants subject to civil punitive damages do not have the same protections as defendants in a criminal case; among other things, jury instructions typically are vague and leave juries with broad discretion in choosing the amount to award, and evidence of a defendant's net worth creates the potential for bias against large businesses. Such concerns, according to the Court, increase when the decision-maker is presented with evidence that has little bearing on the amount that it should award. Based on those concerns, the Court proceeded to apply *Gore* guideposts to the case before it. *State Farm*, 538 U.S. at 416-18, 123 S.Ct. 1513.

With regard to the reprehensibility of State Farm's conduct, the Court summarized the factors that it had previously identified in *Gore* as whether

> "the harm caused was physical as opposed to economic; the tortious conduct evinced an indifference to or a reckless disregard of the health or safety of others; the target of the conduct had financial vulnerability; the conduct involved repeated actions or was an isolated incident; and the harm was the result of intentional malice, trickery, or deceit, or mere accident."

State Farm, 538 U.S. at 419, 123 S.Ct. 1513 (citation omitted). The Court agreed that State Farm's conduct toward the Campbells did not merit any praise. In fact, State Farm employees had altered the company's records to make Campbell appear less culpable in the underlying accident, the company had disregarded the overwhelming likelihood both of liability and of a verdict in excess of the policy limits, and, although it had first assured the Campbells that their assets would be safe, after the verdict it had told them to sell their house. Thus, State Farm's conduct was reprehensible enough to

support an award of punitive damages in some amount. *Id*. at 419-20, 123 S.Ct. 1513.

The problem, however, in the case, according to the Court, was that the Campbells and the Utah courts had used State Farm's conduct in that case as a platform to expose and punish perceived deficiencies in State Farm's operations throughout the country concerning matters that had no relationship to its conduct in regard to the Campbells. In reinstating the jury's award, the Utah Supreme Court had emphasized evidence that the way that State Farm had treated the Campbells was simply one application of its nationwide PP & R policy. In doing so, according to the Court, the Utah court had improperly relied on evidence of dissimilar acts and of acts that were lawful in the states in which they occurred. The Court said that a state generally does not have a legitimate interest in punishing even unlawful acts committed outside of the state's jurisdiction. *State Farm*, 538 U.S. at 420-22, 123 S.Ct. 1513. It explained:

> "A basic principle of federalism is that each State may make its own reasoned judgment about what conduct is permitted or proscribed within its borders, and each State alone can determine what measure of punishment, if any, to impose on a defendant who acts within its jurisdiction."

Id. at 422, 123 S.Ct. 1513 (citation omitted). That does not mean, the Court continued, that lawful out-of-state conduct is always irrelevant. Indeed, such "conduct may be probative when it demonstrates the deliberateness and culpability of the defendant's action in the State where it is tortious, but that conduct must have a nexus to the specific harm suffered by the plaintiff." *Id*.

In the Court's view, the Campbells demonstrated little evidence of repeated misconduct by State Farm of the kind that injured them. *State Farm*, 538 U.S. at 423, 123 S.Ct. 1513. The Court concluded that, "because the Campbells

have shown no conduct by State Farm similar to that which harmed them," the only relevant conduct was State Farm's treatment of the Campbells themselves. *Id*. at 424, 123 S.Ct. 1513. The limited evidence of State Farm's conduct that the jury could properly consider made that conduct far less reprehensible than the Utah court had believed it to be.

The Court turned next to the second *Gore* guidepost, the relationship between State Farm's conduct and the size of the award. It observed that the "precise award in any case, of course, must be based upon the facts and circumstances of the defendant's conduct and the harm to the plaintiff." *Id*. at 425, 123 S.Ct. 1513. The Court did not reject the 145-to-1 ratio between the Campbells's compensatory damages and the award of punitive damages out of hand. Rather, it stated that the ratio gave rise to a presumption of constitutional invalidity and that the other considerations that it had identified did not overcome that presumption. It considered the fact that the Campbells had received $1 million as full compensation for a year and a half of emotional distress. Also, because State Farm paid the excess verdict before the Campbells filed their bad faith action, they had suffered only minor economic injuries. Their emotional harm thus arose from an economic transaction, not from a physical assault or trauma, and they had suffered no physical injuries. Moreover, in the Court's view, the compensatory and punitive damages partially overlapped because the compensatory damages included compensation for the emotional distress that State Farm had caused, a factor that the Court believed was also a basis for the punitive damage award. Although the Utah court had stated that State Farm's policies had affected many other Utah consumers, the Campbells were unable to point to evidence in the record demonstrating harm to anyone other than those involved in the case. Finally, the Court observed that State Farm's great wealth did not support an otherwise unconstitutional award, in part because the purpose of much of that wealth was to enable State Farm to pay the claims of its poli-

cyholders and in part because wealth by itself cannot make up for the failure to satisfy other guideposts, such as reprehensibility, to justify an award. *Id*. at 426-28, 123 S.Ct. 1513.

With regard to the third *Gore* guidepost, the disparity between the punitive damages award and potentially applicable civil penalties, the Court modified its previous reliance on criminal penalties, suggesting that, although the existence of a criminal penalty bears on the seriousness with which the state views wrongful conduct, it is less useful in evaluating the amount of a punitive damages award. A state can impose criminal penalties only after providing the protections that the criminal process entails; the remote possibility of a criminal sanction does not automatically sustain a punitive damages award. In any event, the only relevant Utah statutory penalty appeared to be a $10,000 fine for an act of fraud, an amount dwarfed by the punitive award of $145 million. The Court concluded that the evidence would sustain a punitive award only at or near the amount of compensatory damages, but it left the precise amount for the Utah courts to resolve in the first instance. *State Farm*, 538 U.S. at 428-29, 123 S.Ct. 1513.

We have previously applied *State Farm* to two cases involving punitive damages, each on remand from the United States Supreme Court. *Bocci v. Key Pharmaceuticals, Inc.*, 189 Or.App. 349, 76 P.3d 669, *modified on recons*., 190 Or.App. 407, 79 P.3d 908 (2003); *Waddill v. Anchor Hocking, Inc.*, 190 Or.App. 172, 78 P.3d 570 (2003). In *Bocci*, the plaintiff Bocci took a prescription drug for asthma that the defendant Key Pharmaceuticals (Key) promoted as a safe product. He then took an antibiotic for a skin rash without telling the prescribing physician about his consumption of the asthma drug. When he began experiencing what proved to be toxicity from the asthma drug, he saw Edwards, a physician, for diagnosis and treatment. Because Key had promoted the asthma drug as safe, Edwards did not recognize

Bocci's symptoms as toxicity to that drug. As a result, Edwards simply sent Bocci home; soon afterwards Bocci began experiencing seizures and ultimately suffered serious permanent injuries. He sued both Key and Edwards, and Edwards filed a cross-claim against Key. The jury awarded Bocci significant compensatory and punitive damages and awarded Edwards compensatory damages of $500,000 and punitive damages of $22.5 million. The jury expressly found that Key was negligent with respect to Edwards, that it had made fraudulent misrepresentations to him, that it had knowingly withheld or misrepresented information concerning the drug's toxicity to the Food and Drug Administration or prescribing physicians, and that it had acted with wanton disregard for the safety of others. 189 Or.App. at 352-53, 76 P.3d 669.

When we first considered the award of punitive damages in *Bocci*, before the decision in *State Farm*, we applied *Parrott* and affirmed the award. *Bocci v. Key Pharmaceuticals, Inc.*, 178 Or.App. 42, 35 P.3d 1106 (2001). On remand from the Court after its decision in *State Farm*, we reevaluated the jury's award in light of the *Gore* guideposts as the Court had refined them in that case. We began with the first guidepost, the reprehensibility of Key's conduct, and considered the various factors that the Court had identified in *State Farm*. We rejected Key's argument that we should ignore evidence that did not directly relate to Edwards's claim. Unlike in *State Farm*, where the evidence of other harm involved dissimilar acts that bore no relation to the harm that the Campbells suffered, Key's actions toward Bocci were the same acts that caused harm to Edwards. In addition, we rejected Key's argument that we should ignore the evidence of its out-of-state promotional activities. Although the Court in *State Farm* had rejected the Campbells' evidence of State Farm's unrelated misconduct, it also had recognized the relevance of repeated out-of-state misconduct of the same sort that injured the plaintiff. We concluded that it was appropri-

ate for the jury to consider evidence that Key had engaged in a nationwide dissemination of false and misleading information and that that conduct had led to Bocci's and Edwards's damages. *Bocci*, 189 Or.App. at 356-58, 76 P.3d 669.

The harm that resulted from Key's conduct was physical and economic harm to Bocci as well, and Key's actions demonstrated an indifference to or reckless disregard of the health and safety of others. Neither party addressed the factor of the victim's financial vulnerability, but it was clear that Key's actions were repeated as opposed to isolated incidents of misconduct. In addition, Key knowingly withheld or misrepresented information concerning the toxicity and safety of the drug. Thus, there was evidence of four of the five factors for determining reprehensibility that the Court had applied in *State Farm*. *Bocci*, 189 Or.App. at 358-59, 76 P.3d 669.

We next discussed the relationship between the harm or potential harm to the plaintiff and the punitive damages award. We recognized that the Court had suggested that the ratio between compensatory and punitive damages should ordinarily be in single digits and that a ratio greater than 4 to 1 might be questionable. The ratio of the punitive damage award to the award of compensatory damages in *Bocci* exceeded single digits, which raised questions about the award. Although we held that Key's conduct did not rise to the level of " 'particularly egregious,' intentionally malicious acts that would justify a ratio in excess of single digits," it was sufficiently malicious that it justified a ratio greater than 4 to 1. *Bocci*, 189 Or.App. at 359-61, 76 P.3d 669. We ultimately concluded that a ratio of 7 to 1, or an award of $3.5 million, was constitutionally permissible.[14]

[14] There was no relevant evidence on the third guidepost, the relationship between the award and any civil penalties authorized in similar cases. *Bocci*, 189 Or.App. at 361, 76 P.3d 669.

Waddill was a personal injury case in which the plaintiff was severely injured when a glass fishbowl shattered while she was carrying it filled with water. Although Anchor Hocking, the defendant manufacturer, had learned of similar incidents, it had not retained records of them and had failed to use those incidents to improve the safety of its product. It had not even added a simple warning of the dangers of carrying a fish bowl with water in it. The jury awarded Waddill compensatory damages of $132,472 (which the court reduced to $100,854 to reflect the jury's finding that the plaintiff was 25 percent at fault) and punitive damages of $1 million. *Waddill*, 190 Or.App. at 178-79, 78 P.3d 570. We originally affirmed, *Waddill v. Anchor Hocking, Inc.*, 175 Or.App. 294, 27 P.3d 1092 (2001), *rev. den.*, 334 Or. 260, 47 P.3d 486 (2002), but the Court vacated our decision and remanded for reconsideration in light of *State Farm*.

On remand, we concluded that Anchor Hocking was indifferent to or recklessly disregarded the health and safety of its customers. However, the evidence of repeated conduct was weak, and there was no evidence that Anchor Hocking had acted with intentional malice or had engaged in fraudulent conduct or deceit. We concluded that Anchor Hocking's actions were sufficiently egregious to justify an award of punitive damages, but they were not as egregious as those of the defendant in *Bocci*. Because the Court indicated in *State Farm* that a ratio of 4 to 1 was close to the constitutional ceiling, and because there was nothing unusual about the facts of *Waddill*, we concluded that the maximum permissible award in *Waddill* was four times the harm that Anchor Hocking caused and reduced the punitive damages award accordingly. *Waddill*, 190 Or.App. at 182-83, 78 P.3d 570.

We turn now to the parties' argument in this case after remand by the Court. Defendant first argues that it is now clear, as a result of the Court's discussion in *State Farm*, that we erred in our previous decision when we rejected its as-

signment of error concerning the trial court's failure to instruct the jury that, among other things,

> "[t]he size of any punishment should bear a reasonable relationship to the harm caused to Jesse Williams by the defendant's punishable misconduct. Although you may consider the extent of harm suffered by others in determining what that reasonable relationship is, you are not to punish the defendant for the impact of its alleged misconduct on other persons, who may bring lawsuits of their own in which other juries can resolve their claims and award punitive damages for those harms, as such other juries see fit."

(Internal quotations omitted.) Defendant states that the instruction "perfectly predicted the Supreme Court's holdings in *State Farm*." In support of its argument, it quotes the Court's statements that

> "[d]ue process does not permit courts, in the calculation of punitive damages, to adjudicate the merits of other parties' hypothetical claims against a defendant under the guise of the reprehensibility analysis"

and that punishment on the basis of harm to nonparties

> "creates the possibility of multiple punitive damages awards for the same conduct; for in the usual case nonparties are not bound by the judgment some other plaintiff obtains."

538 U.S. at 423, 123 S.Ct. 1513.

We briefly considered this aspect of *State Farm* in *Bocci*, in which Key argued, based on the first statement that defendant quotes, that we should not consider the harm to Bocci in evaluating the punitive damages awarded to Edwards. In response, we noted that the Court had made that statement in the context of discussing the Utah Supreme Court's reliance on what the Court described as State Farm's dissimilar acts,

which, according to the Court, bore no relationship to the harm that the Campbells suffered. In *Bocci*, in contrast, there was nothing hypothetical about Bocci's claim or about the harm that Key caused him; the harm to Edwards was the result of the same acts that had caused harm to *Bocci*. We therefore rejected that argument in that case. *Bocci*, 189 Or.App. at 357-58, 76 P.3d 669.

In this case, there is evidence concerning other Oregon victims of defendant's decades-long fraudulent scheme. The tobacco industry and defendant directed the same conduct toward thousands of smokers in Oregon. They all received the same representations, from the same entities, and through the same media, and the industry intended to induce Oregon smokers to act on those representations in the same way. That conduct was a fundamental part of defendant's business strategy; Williams was simply one of its many Oregon victims. In that sense, this case is more like *Gore* than like *State Farm*. In *Gore*, there was evidence of BMW's identical misconduct toward 13 other people in Alabama that the Court considered relevant. Under the facts of this case, the evidence of injury to others is not an attempt to blacken defendant's reputation in general, but, rather, it describes the consequences to other Oregonians resulting from the very actions that harmed plaintiff. Thus, we are not persuaded by defendant's argument that we erred in our previous decision when we rejected its argument that the trial court erred by failing to instruct the jury that it could not punish defendant for the impact of its misconduct on others.

In addition, as we noted in our original opinion, ORS 30.925(2)(g) requires a jury to consider evidence of punishments already imposed on the defendant when it considers the amount of an award of punitive damages. As a result, the Court's concern in *State Farm* about multiple punitive damages awards that would be excessive in total is ameliorated by Oregon law. By introducing evidence of this award in future cases, defendant can ensure that both juries and courts

will adjust any future award to account for this one. Contrary to the usual situations on which the Court based its statement, the judgment in this case will protect defendant from an excessive judgment in a future case, even if it may not be legally binding on future parties. For both of those reasons, we believe that the holding in *State Farm* does not affect our previous conclusion that "the potential injury to past, present, and future consumers as the result of a routine business practice is an appropriate consideration in determining the amount of punitive damages." *Williams*, 182 Or.App. at 64, 48 P.3d 824.[15]

We now turn to the primary issue before us, whether the jury's award is consistent with the *Gore* guideposts as the Court refined them in *State Farm*. As an initial matter, in general, the State of Oregon has a legitimate interest in punishing defendant and deterring it from further misconduct. *See Gore*, 517 U.S. at 568-69, 116 S.Ct. 1589 (discussing the state's interest regarding punitive damage awards).[16] In *Gore*, those interests were limited by, among other things, the nature of the harm (economic) and the diversity of state approaches to dealing with deceptive trade practices. In this case, the state's interests are at their maximum; they involve the protection of the health and lives of its citizens. *See Williams*, 182 Or.App. at 68-69, 48 P.3d 824. Defendant does not suggest that there is any diversity among states concerning the importance of that kind of interest.

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[15] As plaintiff points out, defendant's proposed instruction is also confusing, and the trial court could properly have refused to give it for that reason. The instruction would have informed the jury both that it *may* consider the harm to others in determining the reasonable relationship of its award to the harm caused to Williams and that it *may not* punish defendant for the impact of its misconduct on others.

[16] *See also* ORS 31.735 (providing for the distribution of punitive damages between prevailing parties and the State of Oregon).

The first *Gore* guidepost concerns the reprehensibility of defendant's conduct. In our view, this case involves conduct that is more reprehensible than that in any of the cases that we have discussed. As we have said, the jury could have found the following facts from the evidence before it. Defendant sold a product that it knew would cause death or serious injury to its customers when they used it as defendant intended them to use it. Despite that knowledge, defendant, together with the rest of the tobacco industry, engaged in an extensive campaign to convince smokers that the issue of cigarette safety was unresolved. It insisted that more research was necessary at the very time that it was carefully avoiding doing the very research for which it called, although it had an extensive program of research into other issues. Rather, it used its research to determine the optimum dose of nicotine in each cigarette, knowing of, but publicly denying, nicotine's highly addictive properties. Defendant also knew that, because of those addictive properties, it would be difficult for smokers to quit smoking, and it relied on its fraudulent message to discourage them from doing so. The result, as defendant hoped, was that addicted smokers remained addicted and purchased more of its product. In short, defendant used fraudulent means to continue a highly profitable business knowing that, as a result, it would cause death and injury to large numbers of Oregonians.

We held in *Bocci* that Key's conduct of disseminating false and misleading information about its drug throughout the nation was especially reprehensible and justified a greater award. Key's drug was, however, potentially useful in the treatment of a serious disease, and there was no evidence that Key routinely engaged in that misconduct with regard to its products. In comparison, defendant's actions in this case are far more egregious than Key's actions in *Bocci*, considering the length of time over which the conduct occurred, the number of business entities involved, the express intention to mislead consumers, the number of people harmed, and in al-

most every other aspect of what defendant did. That difference in magnitude of harm places this case in a different class from the cases that we have described. Here, the harm caused was physical rather than economic and, for Williams, the most serious physical harm possible, his death. Defendant's conduct not only shows a reckless disregard of the safety of others but conduct with knowledge that others would be harmed by its actions. Moreover, defendant's fraud was motivated by economic considerations. In other words, the jury could have found that defendant misrepresented the safety of its product for its own pecuniary gain, gain that it would not otherwise have achieved but for the misrepresentation. There is no evidence concerning the third factor, whether Williams was financially vulnerable. The fourth factor is whether the conduct involved repeated actions or was simply an isolated incident. Not only did defendant's conduct involve repeated actions, those actions were directed at Oregon citizens over a period of 40 years. The fifth factor is whether the harm was the result of intentional malice, trickery, or deceit or simply an accident. Here, defendant intentionally misled the Oregon public regarding the results of its research and increased the nicotine in its products to make them more addictive and more dangerous. Thus, in our view, four of the five *Gore* factors exist in this case.[17]

The second *Gore* guidepost is "the disparity between the actual or potential harm suffered by the plaintiff and the punitive damages award [.]" *State Farm*, 538 U.S. at 418, 123

[17] Defendant argues that Oregon cannot punish it for conduct that was lawful where it occurred or for selling a lawful product. First, all of the out-of-state conduct that we discuss led to actions within Oregon or that were directed to Oregonians; Oregon has the authority to punish defendant for such conduct. Second, the punitive damages award was based not simply on defendant's selling cigarettes but on its using fraudulent and deceptive means in order to do so.

S.Ct. 1513. For purposes of guidance, we quote extensively from the Court's opinion in *State Farm*:

> "Turning to the second *Gore* guidepost, we have been reluctant to identify concrete constitutional limits on the ratio between harm, or potential harm, to the plaintiff and the punitive damages award. 517 U.S. at 582, 116 S.Ct. 1589 ('[W]e have consistently rejected the notion that the constitutional line is marked by a simple mathematical formula, even one that compares actual *and potential* damages to the punitive award'); *TXO*, *supra*, at 458, 113 S.Ct. 2711. We decline again to impose a bright-line ratio which a punitive damages award cannot exceed. Our jurisprudence and the principles it has now established demonstrate, however, that, in practice, few awards exceeding a single-digit ratio between punitive and compensatory damages, to a significant degree, will satisfy due process. In *Haslip*, in upholding a punitive damages award, we concluded that an award of more than four times the amount of compensatory damages might be close to the line of constitutional impropriety. 499 U.S. at 23-24, 111 S.Ct. 1032. We cited that 4-to-1 ratio again in *Gore*, 517 U.S. at 581, 116 S.Ct. 1589. The Court further referenced 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. *Id*. at 581, and n. 33, 116 S.Ct. 1589. 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 ratios in range of 500 to 1, *id*., at 582, 116 S.Ct. 1589 or, in this case, of 145 to 1.
>
> "Nonetheless, because there are no rigid benchmarks that a punitive damages award may not surpass, ratios greater than those we have previously upheld may comport with due process where 'a particularly egregious act has re-

> sulted in only a small amount of economic damages.' *Ibid*.; see also *ibid*. (positing that a higher ratio *might* be necessary where 'the injury is hard to detect or the monetary value of noneconomic harm might have been difficult to determine'). The converse is also true, however. When compensatory damages are substantial, then a lesser ratio, perhaps only equal to compensatory damages, can reach the outermost limit of the due process guarantee. The precise award in any case, of course, must be based upon the facts and circumstances of the defendant's conduct and the harm to the plaintiff.
>
> "In sum, courts must ensure that the measure of punishment is both reasonable and proportionate to the amount of harm to the plaintiff and to the general damages recovered."

Id. at 424-26, 123 S.Ct. 1513 (emphasis and brackets in original).

There is no doubt that, under the holding in *State Farm*, there is a presumption of constitutional invalidity arising from the jury's award of punitive damages in this case, if there is, in fact, a 96-to-1 ratio between the compensatory and punitive damages awarded to plaintiff. We are mindful that the Court said in *State Farm* that "few awards exceeding a single-digit ratio * * * will satisfy due process" and that "an award of more than four times the amount of compensatory damages might be close to the line of constitutional impropriety." *State Farm*, 538 U.S. at 425, 123 S.Ct. 1513 (citation omitted). We first inquire therefore as to what is the correct amount of compensatory damages to consider for purposes of computing the ratio under the second guidepost in *Gore*. In answering that question, we are guided by the Court's decisions in *TXO* and *Gore*.

In *TXO*, the plurality writing for the Court took into consideration the respondents' actual damages and the potential

damage that could have been caused by its conduct, had TXO's fraudulent scheme succeeded:

> "It is appropriate to consider the magnitude of the *potential harm* that the defendant's conduct would have caused to its intended victim if the wrongful plan had succeeded, as well as the possible harm to other victims that might have resulted if similar future behavior were not deterred."

509 U.S. at 460, 113 S.Ct. 2711 (emphasis in original). The Court calculated the potential harm of TXO's conduct to be more than 50 times the $19,000 in actual damages that the respondents suffered. *Id*. at 459-62, 113 S.Ct. 2711 (plurality opinion). In *Gore*, the plaintiff introduced evidence that BMW had sold 14 cars in the State of Alabama without disclosing that the cars had been repainted. The Court recognized that "[p]unitive damages may properly be imposed to further a State's legitimate interests in punishing unlawful conduct and deterring its repetition." *Gore*, 517 U.S. at 568, 116 S.Ct. 1589. Court explained that, to avoid encroachment on policy choices of other states, the economic penalties that a state inflicts must be supported by the state's interest in protecting its own consumers. Thus, the Court analyzed the reasonableness of the award of punitive damages in *Gore* based on the interests of Alabama consumers rather than those of the entire nation. *Id*. at 572-73, 116 S.Ct. 1589.

We apply those principles to the facts in this case. First, there is the harm to Williams found by the jury to amount to $21,485 in economic damages and $800,000 in noneconomic damages. Second, defendant inflicted potential harm on the members of the public in Oregon through its fraudulent promotional scheme. As we said in our previous opinion,

> "The jury could find on this record that defendant's public relations campaign had precisely the effect that defendant intended it to have and that it affected large numbers of tobacco consumers in Oregon other than Williams. It

> is also reasonably inferable from the evidence that defendant's products, used as defendant intended them to be used, caused a significant number of deaths each year in Oregon during the pertinent time period, together with other serious but nonfatal health problems with their attendant economic consequences."

Williams, 182 Or.App. at 67, 48 P.3d 824. As the Court did in *TXO*, the jury in assessing the amount of punitive damages was entitled to draw reasonable inferences as to the number of smokers in Oregon who had been defrauded during the past decades and would be affected in the future by defendant's conduct, if that conduct were not deterred. Based on the evidence before it, and, particularly, the pervasiveness of defendant's advertising scheme in Oregon, it would have been reasonable for the jury to infer that at least 100 members of the Oregon public had been misled by defendant's advertising scheme over a 40-year period in the same way that Williams had been misled. Such a conservative calculation of compensatory damages based on William's actual damages and the potential magnitude of damage to the public thus would cause the ratio between compensatory and punitive damages, whatever it is, to fall within *State Farm's* 4-to-1 boundary.

But even if the $79 million award is deemed to exceed a single-digit ratio, it is difficult to conceive of more reprehensible misconduct for a longer duration of time on the part of a supplier of consumer products to the Oregon public than what occurred in this case. We think that the reprehensibility of defendant's conduct far exceeds that of *TXO* where the Court upheld a 10-to-1 ratio, or in *Bocci*, where we upheld a 7-to-1 ratio. Here, in contrast to those cases, the number of potentially defrauded and injured victims is much greater. As the *State Farm* Court stated in the above-quoted language, there are no bright-line ratios or rigid benchmarks that a punitive damage award cannot exceed. We think the unique facts in this case, when compared to the circumstances con-

sidered by the Supreme Court and this court in other cases, would justify more than a single-digit award under the Due Process Clause.

The final *Gore* guidepost examines any disparity between the punitive damages award and other penalties that the state provides for the same conduct. In our previous opinion, we noted that Oregon does not provide civil sanctions for defendant's conduct and that the criminal statutes that plaintiff mentioned were not truly comparable. *Williams*, 182 Or.App. at 72, 48 P.3d 824. Thus, this guidepost does not play a significant role in our analysis, and to the extent that the purpose of the guidepost is to give defendants notice that they may be held liable for punitive damages, ORS 30.925(2) fulfills that function.

Finally, we consider the subject of defendant's wealth and the profitability of its conduct. Although the Court in *State Farm* was concerned that the use of the factor of a defendant's wealth could lead a jury to act to redistribute wealth from a wealthy corporation to an impoverished plaintiff, the wealth of a defendant continues to be an appropriate consideration. *State Farm*, 538 U.S. at 427-28, 123 S.Ct. 1513. In this case, the evidence was that, at the time of trial, defendant's net worth was over $17 billion and defendant's profit for the most recent year for which figures were available was $1.6 billion. *Williams*, 182 Or.App. at 67, 48 P.3d 824. That evidence could be properly considered by the jury in two ways. First, the jury could have found that a large award was necessary in order to punish defendant adequately because it would treat a small award as no more than an insignificant nuisance and part of the cost of doing business. Second, the jury could have found on the evidence before it that a large award would require defendant to disgorge some of the profit that it gained over a number of decades by its misconduct directed at decedent and other Oregonians. In that light, the evidence of defendant's wealth and profits both

supports the award of punitive damages and provides a proper basis for consideration by the jury.

Based on the above analysis, we conclude that an award of punitive damages in the amount of $79.5 million does not violate the Due Process Clause under the guidelines provided by *State Farm* because the amount of the award is reasonable and proportionate to the wrong inflicted on decedent and the public of this state. It follows, that, after reconsidering our previous opinion in light of *State Farm*, we believe that our original decision was correct. We therefore again reinstate the award of punitive damages as originally found by the jury.

On appeal, reversed and remanded with instructions to enter judgment on jury verdict; affirmed on cross-appeal.