In The
Supreme Court of the United States

BASS PRO OUTDOOR WORLD, L.L.C.,

Petitioner,

v.

KYLE J. KELLY,

Respondent.

On Petition For A Writ Of Certiorari To The Missouri Court Of Appeals, Eastern District

RESPONDENT'S BRIEF IN OPPOSITION

RAY A. GERRITZEN
Counsel of Record for Respondent
MICHAEL A. GERRITZEN
GERRITZEN & GERRITZEN
One US Bank Plaza, Suite 2205
505 N. 7th Street
St. Louis, Missouri 63101-1600
Telephone: (314) 231-2786
Fax: (314) 231-2587
gerritze@swbell.net

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OR CALL COLLECT (402) 342-2831

COUNTERSTATEMENT OF QUESTIONS PRESENTED

1. Whether a trial court complies with *State Farm Mutual Insurance Company v. Campbell*, 538 U.S. 408, 123 S.Ct. 1513, (2003), by reducing a jury verdict of $2.8 million to $650,000.00 in punitive damages, with $4,300.00 in actual damages, when the trial court makes findings that justify a higher ratio of punitive to actual damages, including the findings that the plaintiff was financially vulnerable and the defendant was guilty of repeated intentional malice, trickery and deceit.

2. Whether there is a constitutional conflict between the amount or ratio of punitive damages awards between Federal and State Courts, because the punitive damages in each case is based on its own unique facts.

PARTIES TO THE PROCEEDINGS

1. Bass Pro Outdoor World, L.L.C., Petitioner, was the Defendant below.

2. Kyle J. Kelly, Respondent, was the Loss Prevention Agent for Bass Pro and the Plaintiff below.

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STATEMENT OF THE CASE

I. STATEMENT OF THE FACTS

On Friday, April 11, 2003, Michael McKernon, came to work at 5:00 a.m. (Transcript ("Tr") 171-172) He worked the camera in the monitoring room from 5:00 a.m. to 9:00 a.m. (Tr 175) Ritter came into the monitor room with a kind of a smirk on his face and said to McKernon, "Do you want to see something funny, watch this, I am going to break into that car." (Tr 175) McKernon turned the video camera to observe Ritter. He observed Ritter retrieve a "slim jim" from his private vehicle to break into the Buick. (Tr 175, 180-184)

The Missouri Court of Appeals found:

> "The video tape reveals Ritter initially had difficulty gaining access to the Buick and he spent approximately five minutes angling the slim jim in the front passenger side window. Ritter also attempted to pry the same window open by wedging the slim jim in between the window and windshield. After failing to gain access through the front passenger door, Ritter used the slim jim on the rear passenger door and gained entry. Once inside, Ritter searched through the backseat, the glove compartment, sun visor, and the trunk, but removed nothing from the Buick. Ritter testified the car had power locks, which he used to lock the car when he was finished. The video tape shows Ritter kicking

> the passenger side door shut with his foot after finishing his search." (Pet.App.19)[1]

The area where the Buick was parked was owned, controlled, and maintained by Greater Missouri Builders, not Bass Pro.[2] (Ex 9, Tr 284, 286, 288, 304-305, 372, 376, 432, 441, 625, SLF 11-12)

Southerly, the Team Lead or Assistant Manager of the Loss Prevention Department, arrived at work on April 11, 2003 around 9:00 a.m. When he arrived, McKernon was viewing the tape of Ritter breaking into the Buick. (Tr 297-298) Respondent arrived around noon. McKernon and Southerly both said that you are not going to believe this, and you have got to see this. They played the videotape for Respondent. (Tr 371) After viewing the videotape, there was a discussion between the three men. (Tr 372) Respondent thought that Ritter breaking into the Buick was illegal, as you can't break into a vehicle without probable cause. (Tr 376-377) Numerous other Loss

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[1] Page 4 of Bass Pro's Petition states Ritter "closed" the door with his foot. The Court of Appeals specifically found the video tape "demonstrates Ritter damaged the Buick with his prolonged use of the slim jim and his *kicking* the door shut after it would not close when he used his hand." (Pet.App.30)

[2] Pages 4 and 6 of Bass Pro's Petition indicates Bost's car was parked "in the store's parking lot." This is incorrect as per the testimony of Kent Evans, Vice President for Greater Missouri Builders, and Lindell Reynolds, Property Manager for Greater Missouri Builders. Moreover, the Missouri Court of Appeals found, "Ritter knew the Buick was parked on private property, not owned by Bass Pro." (Pet.App.32)

Prevention Agents and Officers testified to viewing the tape. (Tr 391-392, 482-486) Respondent said everybody couldn't believe what had happened. (Tr 391) Southerly said by Sunday all the Agents and 90% of the Officers had seen it. (Tr 308)

Respondent wasn't sure if it was Friday or Saturday, but he called St. Charles Police from the monitoring room, after everyone had agreed it was a crime. He spoke to a desk sergeant. (Tr 380) He explained to him a hypothetical situation to see if it was a crime. He never used the name Ritter or Bass Pro. (Tr 380-381) McKernon heard Respondent call the St. Charles Police Department and verified that he used a fictitious situation. He didn't use names, business names, or personal names. It was strictly hypothetical. (Tr 193) Southerly also heard Respondent call the St. Charles Police, but he did not remember any of the words. (Tr 301, 320) After getting a reply from a desk sergeant, Respondent decided it absolutely had to be reported. (Tr 381-382) Southerly said after the call, the three discussed the situation further and decided to talk to somebody higher in authority at Bass Pro. (Tr 301-302) Respondent was elected to do that job. (Tr 382) Respondent was convinced, in his mind, that Ritter had done something illegal. (Tr 386-387)

On Saturday afternoon, April 12, 2003, Respondent went to Beasley, the Assistant Store Manager, because Rogers, the Store Manager, was either out of town or off that weekend. (Tr 387) Respondent reported the incident to Beasley in his office in a closed

door environment, with no one else present. (Tr 388, 576) When reporting the incident, Respondent believed he was following the Bass Pro policies, titled "Solving Your Problems." (Tr 385) Respondent told Beasley, we have a touchy situation. We have a video of Ritter breaking into an automobile, and we are concerned that it's an illegal situation. Respondent said Beasley had a "shocked look" on his face and asked when it happened. Respondent told him the day before in the morning. Beasley asked who knew about it, and Respondent told him everybody in the Loss Prevention Department knows about it. (Tr 387-388, 390) Beasley testified he told Respondent not to talk to anyone about this, except Rogers and himself. (Tr 576-577) Respondent specifically testified Beasley's testimony was false. Beasley instructed him, "make sure this doesn't leave the Loss Prevention Department." (Tr 389-390) Respondent testified this followed the Code of Conduct, as well as the practice of the Loss Prevention Department.[3] (Tr 389-390)

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[3] The Loss Prevention Code of Conduct in pertinent part provides:

> " . . . Loss Prevention Representatives at all levels are privy to confidential information. . . . It is pertinent that information of this nature be kept confidential and *within the Loss Prevention Department. Confidential information is not to be discussed with any associate outside of Loss Prevention Department* without prior approval from the Director Of Loss Prevention. . . ." (Ex 2)

Respondent worked on Sunday and Monday. The tape was still a topic of conversation and still being shown constantly in the Loss Prevention Office. (Tr 395) If an arrest had been made or somebody had stolen stuff the night before, it was the topic of conversation the next day and the tape would be constantly shown. (Tr 395-396) Since the event involved Ritter, the Manager, it was even more of a topic of conversation, because it was so controversial. (Tr 395-396)

On Sunday or Monday morning, Ritter told McKernon "whoever made that phone call to the police department, their employment with Bass Pro is going to be short." (Tr 203)

Respondent was off Tuesday and Wednesday. On Thursday April 17, 2003, about 45 minutes after he returned to work, Ritter came into the monitor room and told Respondent that Rogers wanted to speak with him. Respondent went to Rogers' office, where he met Rogers and Ron Goetz, Petitioner's Human Resources Manager. (Tr 396) Rogers asked Respondent if he knew why he was there, and Respondent said he was pretty sure. Respondent thought it was because Rogers wanted Respondent to explain the situation, like he had explained it to Beasley. Rogers asked him what happened Friday morning. Respondent explained the whole situation to Rogers. Rogers then asked Respondent if he was familiar with the Handbook and had Goetz read a rule from the Handbook. Rogers asked Respondent if he had disobeyed a direct order from a supervisor by telling somebody,

after Beasley told him not to tell anybody. Rogers never identified that person, and Petitioner never maintained that Respondent told anyone outside Loss Prevention about the Ritter incident. (Tr 729) Respondent testified that he didn't tell anyone outside of Loss Prevention. Beasley told him to keep it in Loss Prevention, which follows the code of conduct. (Tr 396-397)

Rogers asked Respondent if he called the police. Respondent told him we wanted to present to the police a hypothetical situation, to see if they thought it was a crime. (Tr 397-398) He never used Bass Pro's or Ritter's name. (Tr 399) Rogers said what if I told Ritter to break into that car, and Respondent told him then you are as much in the wrong, as he is. (Tr 401) Rogers then said you don't work for the police. You work for Bass Pro. Respondent said he understood that, but his security license mandates that an Agent report crimes. Rogers then terminated Respondent. (Tr 400) Rogers testified he was going to fire Respondent, whether or not an actual crime had been committed by Ritter. (Tr 754)

Shortly after Respondent was fired, Rogers called a Loss Prevention meeting. (Tr 199-200) He told the Loss Prevention Department employees that he had given permission to Ritter to break into the Buick (Tr 200-201, 239-240, 258), but in his deposition, he testified he was unaware that the Buick was even there. (Tr 745, 747) Rogers also told the Loss Prevention employees that he fired Respondent because he went out of the chain of command to call the police.

(Tr 200) Rogers testified he was unaware of Respondent asking about a hypothetical situation with the St. Charles Police. (Tr 750-752) Rogers also advised all the Loss Prevention agents and officers present at the meeting that if you ever talk about this case at any time in the future, you too will be fired. (Pet.App.25, 29)

Respondent was terminated by Bass Pro on April 17, 2003 and found a new job in July 2003. (Tr 396-402) He lost wages of $4,300.00 and his Security Officer's License, causing him to seek a new profession. (Tr 402-404, 424) (Pet.App.8) Respondent received no compensation for his lost security license and having to seek a new profession. Respondent had attended Missouri Law Enforcement Training Academy in 1997 and 1998 to obtain his License, graduating May 2, 1998 with 840 hours. This qualified him as a Class A Certified Police Officer. (Tr 360-361, Ex 4) Bass Pro's records also show that he was insubordinate by disobeying a direct order of a supervisor. (Tr 759)

II. PROCEDURAL HISTORY

On June 12, 2003, Respondent filed suit against Petitioner, seeking actual and punitive damages for his wrongful termination. On May 4, 2006, the jury returned a unanimous verdict for $4,300.00 in actual damages and that Defendant was liable for punitive damages. After a bifurcated hearing, the same jury returned a verdict for $2,800,000.00 in punitive

damages. Petitioner filed various post-trial motions, including a Motion arguing that "the punitive damages award must be reduced because it was grossly excessive in violation of due process." On July 7, 2006, the Trial Court denied all of Petitioner's post-trial motions without explanation.

Petitioner appealed to the Missouri Court of Appeals, Eastern District, raising three issues. These were: (1) that Respondent had failed to make a submissible case for punitive damages; (2) the $2,800,000.00 verdict violated due process; and (3) Respondent failed to make a submissible case for wrongful termination because Respondent did not have an objective reasonable basis for believing his supervisor committed a crime. On December 18, 2007, the Missouri Court of Appeals, Eastern District affirmed the award of actual damages and found Petitioner was liable for punitive damages. *Kelly v. Bass Pro Outdoor World, L.L.C.*, 245 S.W.3d 841 (Mo. App. E.D. 2007) (Pet.App.15-36). With greater factual detail than this Brief, the Court of Appeals set forth Petitioner's reprehensible conduct. The Court found that Respondent made a submissible case based on Respondent's reasonable belief that Ritter committed a crime by entering the Buick without the owner's consent, and he was terminated for reporting this. The Opinion details the contradictory and implausible story Petitioner presented to the jury and argued on appeal and how there was sufficient proof of malice to submit punitive damages. The Court did find that the award of punitive damages was unconstitutionally excessive. It remanded the

case to the Trial Court for reconsideration. In a footnote, the Court indicated, "Once there has been a jury finding as to the proper amount of punitive damages, the trial court can determine whether the amount of the award is in accordance with [*State Farm Mutual Auto. Ins. Co. v. Campbell*, 538 U.S. 408 (2003)], and enter Judgment accordingly." (Pet.App.35)

Petitioner and Respondent separately filed motions for the Court of Appeals to rehear the case, or in the alternative, to transfer the case to the Missouri Supreme Court. On January 30, 2008, these motions were denied. Both parties separately moved for the Missouri Supreme Court to grant transfer. Those applications were denied on March 18, 2008.

On June 10, 2008, Respondent filed a Petition for a Writ of Certiorari to the Supreme Court of the United States. The reasons for granting transfer included arguments that the Court of Appeals had misapplied *Campbell* and that guidance was needed from this Court as to what an appellate court was to do, when a punitive damages verdict was found to be unconstitutionally excessive. It was argued that by just remanding the case for a new trial on the amount of punitive damages that the parties could end up in the same predicament with repetitive jury verdicts and appeals. Petitioner filed a brief arguing that this Court should grant review. On October 6, 2008, this Court denied Certiorari. *Kelly v. Bass Pro*, 555 U.S. 824 (2008).

The case returned to the Trial Court. The parties were originally underneath the assumption that a

new trial on the amount of punitive damages was necessary, because of the footnote referenced above. After a Writ was issued by the Missouri Court of Appeals prohibiting discovery of Petitioner's net worth, the parties understood that the Trial Court was simply to perform a *Campbell* analysis and enter Judgment. The Trial Court then allowed the parties to submit Briefs, and on May 20, 2011, entered Judgment reducing the punitive damages award from $2,800,000.00 to $650,000.00. (Pet.App.12-14) The Trial Court set forth the factors to be considered by this Court in *Campbell* and referenced the detailed opinion of the Court of Appeals, setting forth the evidence. The Judgment indicated:

> "The court has undertaken the review mandated by the Appeals Court and finds per *Campbell, supra*, that the plaintiff was financially vulnerable and that the harm he suffered was the result of intentional malice, trickery and deceit, both at the time of his wrongful termination and by testimony offered by Bass Pro at trial. Despite suggestions to the contrary in Defendants' brief, Bass Pro appealed the jury's entire verdict, not just the amount of punitive damages. The court finds that limiting punitive damages to a single digit ratio when the jury has awarded a small amount of compensatory damages 'would utterly fail to serve the traditional purposes underlying an award of punitive damages, which are to punish and deter.' See *Saunders v. Branch Banking and Trust Co. of VA*, 526 F.3d 142, 152-154 (4th

> Cir. 2008). The court hopes, but is not optimistic, that this judgment will terminate the eight-year history of litigation between these parties." (Pet.App.13-14)

Petitioner appealed again to the Court of Appeals, Eastern District on two points. It alleged that the amount of damages was excessive and violative of *Campbell*. Secondly, it alleged that the Judgment failed to provide any reasons or factors considered by the Circuit Court. On March 27, 2012, the Court of Appeals issued a per curiam Order affirming the Trial Court's Judgment of $650,000.00 in punitive damages. (Pet.App.2-3) In a separate Memorandum, the Court correctly set forth the precedents of this Court. The Court held, "In short, Bass Pro's conduct was unquestionably malicious, deceitful, and recurring within the context of this case, not only internally but also before the trial court. The trial court's findings on these factors are amply supported." (Pet.App.8) It also noted:

> "Our mandate did not require the court to enumerate which particular facts it relied on. The trial court specifically adopted the facts as recited in our opinion, and it did indeed find certain particularly notable facts, namely that Kelly was financially vulnerable and that Bass Pro acted with malice and deceit not only towards Kelly but also at trial. The trial court's *Campbell* analysis sufficiently explained the basis for its judgment

> and highlighted the most relevant factors as applicable here." (Pet.App.11)

Petitioner moved for rehearing by the Court of Appeals, which was denied on May 7, 2012. Petitioner then applied for transfer to the Missouri Supreme Court. On July 3, 2012, the Missouri Supreme Court denied transfer. On October 12, 2012, Petitioner filed its Petition for a Writ of Certiorari with this Court, alleging two issues.

REASONS FOR DENYING THE PETITION

I. THE MISSOURI COURTS CORRECTLY APPLIED WELL-ESTABLISHED LEGAL PRINCIPLES TO THE FACTS OF THIS CASE

Petitioner, in its Petition for a Writ of Certiorari, attempts to re-characterize the facts in this case, to support its argument that Defendant's conduct was not reprehensible. The Trial Court and the Missouri Appellate Courts clearly found reprehensible conduct. In *Cooper Industries, Inc. v. Leatherman Tool Group, Inc.*, 532 U.S. 424, 435 (2001), this Court held that a de novo standard of review was necessary for the legal question of whether the amount of punitive damages violated due process, but it gave deference to the trial court's factual findings, unless they were clearly erroneous. A trial court's finding regarding the degree of reprehensibility is a factual finding, which is in the discretion of the trial court to weigh. *Myers v. Central Florida Investments, Inc.*, 592 F.3d 1201,

1220-1221 (11th Cir. 2010); *Haynes v. Stephenson*, 588 F.3d 1152, 1157 (8th Cir. 2009). In this case, the Trial Court's findings of fact, that Defendant's conduct was highly reprehensible and that Plaintiff was financially vulnerable, are to be accepted with the review of the issue of whether the $650,000.00 in punitive damages violate due process.

This Court has issued three guideposts for reviewing the reasonableness of a punitive damages award. They are: "(1) the degree of reprehensibility of the defendant's misconduct; (2) the disparity between the actual or potential harm suffered by plaintiff and the punitive damages award; and (3) the difference between the punitive damages award and civil penalties imposed or authorized in comparable cases." *State Farm Mut. Auto. Ins. Co. v. Campbell,* 538 U.S. 408, 418 (2003). The degree of reprehensibility is the most important guidepost. *Campbell* 538 U.S. 409; *BMW of North America, Inc. v. Gore*, 517 U.S. 559, 575-577 (1996). In determining the reprehensibility of a defendant's conduct, a court is to consider the following factors,

> "whether: the harm was physical as opposed to economic; the tortious conduct evinced an indifference to or 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 resulted from intentional malice, trickery, or deceit, or mere accident."

Campbell, supra, 538 U.S. 419.

This Court has consistently refused to adopt an arbitrary ratio for reviewing punitive damage awards, consistent with the recognition that punitive damages further a State's legitimate interests in punishing wrongful conduct and deterring its repetition. *Gore, supra*, 517 U.S. 568; *Campbell, supra*, 538 U.S. 424-425. This Court further explained in *Campbell, supra,* 538 U.S. 425:

> " . . . 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 resulted in only a small amount of economic damages. . . .'"

In this case, the Trial Court specifically found that Respondent was financially vulnerable; there were repeated actions involved; and the harm was the result of intentional malice, trickery and deceit. Under *Cooper Industries, Inc.*, 532 U.S. 424, 435, 121 S.Ct. 1678 (2001), these factual findings are to be accepted by this Court, unless clearly erroneous.[4]

Petitioner's actions were repeated, as Rogers specifically stated to the other Loss Prevention employees that anyone else, who talked about the Ritter incident, would also lose their jobs. (Pet.App.25, 29) Also, Petitioner not only wrongfully terminated

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[4] Petitioner did not raise any issue in the second appeal that the Trial Court's findings were erroneous. Instead, it claimed the Trial Court failed to make findings.

Respondent for reporting the criminal acts of Ritter, but Petitioner concocted a scheme to cover up the real reason it terminated Respondent. Petitioner claimed Respondent was insubordinate by talking about Ritter's incident after meeting with Beasley. In fact, Respondent was not insubordinate. Beasley testified that he instructed Respondent to not talk about the Ritter incident with anyone other than Rogers and himself. (Tr 186, 199, 262, 303, 307) Respondent testified that he was told to not let it leave Loss Prevention. (Tr 365) The jury found Respondent's testimony was truthful. There was no evidence that Respondent ever talked about the Ritter incident with anyone outside of Loss Prevention. Therefore, there was no evidence that Respondent was insubordinate, and Beasley's testimony has to be viewed as mendacious. In addition to having Beasley lie to cover up the real reason Respondent was fired, Petitioner also had Rogers lie by testifying he authorized Ritter to break into the car, when Rogers did not even know about the car, until after Ritter broke into it. (Pet.App.29) There was ample evidence of repeated malice and deceit, which the Trial Court described as "both at the time of his wrongful termination and by testimony offered by Bass Pro at trial." (Pet.App.13-14) Since these factual findings are accepted unless clearly erroneous, *Cooper Industries, Inc., supra*, at 435, the *Campbell* de novo analysis starts with the realization that this case involves a high degree of reprehensibility.

In *Gore*, this Court found a ratio of 500 to 1, with $4,000.00 in actual damages and $2,000,000.00 in

punitive damages, violated due process, but it was primarily based on the absence of the reprehensibility guidepost. In *Gore, supra*, 517 U.S. 579, this Court held, "Finally, there is no evidence that BMW engaged in deliberate false statements, acts of affirmative misconduct or concealment of evidence of improper motive, such as were present in *Haslip* and *TXO*." In *TXO Prod. Corp. v. Alliance Resources Corp.*, 509 U.S. 443 (1993), this Court approved a ratio of 526 to 1, with $19,000.00 in actual damages and $10,000,000.00 in punitive damages. Defendant's intentional malice was the reason. As Justice Kennedy indicated in the Concurring Opinion in *TXO, supra*, 509 U.S. 468-469:

> " . . . There is, however, another explanation for the jury verdict, one supported by the record and relied upon by the state courts, that persuades me that I cannot say with sufficient confidence that the award was unjustified or improper on this record: TXO acted with malice. This was not a case of negligence, strict liability, or *respondeat superior*. TXO was found to have committed, through its senior officers, the intentional tort of slander of title. The evidence at trial demonstrated that it acted, in the West Virginia Supreme Court's words, through a 'pattern and practice of fraud, trickery and deceit' and employed 'unsavory and malicious practices' in the course of its business dealings with respondent. . . . 'The record shows that this was not an isolated incident on TXO's part – a mere excess of zeal by

> poorly supervised, low level employees – but rather part of a pattern and practice of TXO to defraud and coerce those in positions of unequal bargaining power.'"

Similar factual findings were made by the Trial Court in this case. As noted in the first appellate opinion (Pet.App.15-36), which the Trial Court acknowledged in its Judgment (Pet.App.12-14), Petitioner's management committed a crime that was reported by Respondent; Respondent was terminated because he reported this criminal activity; Petitioner's management concocted a false reason for Respondent's termination; Petitioner had its managers commit perjury to cover up the real reason for Respondent's termination; Petitioner threatened other employees with termination, if they did not help cover up the criminal activity of management; and Petitioner repeatedly refused to correct the problem through trial. Petitioner's entire defense was a deceitful fraud. Petitioner's concocted story was an attempt to scare its employees, whose Missouri State licenses required them to report crimes, to never report crimes of management.

Petitioner could have corrected the situation by viewing the tape, talking with some of its employees, performing a cursory examination, or admitting what the tape showed, at any point up to when Respondent was terminated or at Trial. Petitioner intentionally chose to repeatedly cover up the illegal actions of its management, rather than admit the wrongdoing and correct the problem. This establishes a high degree of

reprehensibility weighing, not only in favor of a punitive damages award, but a high punitive damages award. *TXO*, *supra*. In fact, Petitioner was so bold in this case, that it threatened numerous employees in Loss Prevention with termination, if they did not conceal the crime committed by management. "Rogers threatened that anyone who continued to discuss the incident would be terminated as well." (Pet.App.29) Contrary to the Petition, the termination of Respondent was not an isolated incident,[5] but rather, part of an entire scheme to cover up the criminal activity of management, as described in the detailed Court of Appeals Opinion (Pet.App.15-36), which the Trial Court acknowledged in its Judgment. (Pet.App.13) With these factual findings, the 151 to 1 ratio of the Trial Court's Judgment was correctly affirmed in the second well reasoned Opinion of the Court of Appeals. (Pet.App.4-11)

In *Haynes v. Stephenson*, 588 F.3d 1152 (8th Cir. 2009), the court affirmed a ratio of 2500 to 1 in a 1983 action, with nominal damages of $1.00 being awarded. In affirming, the court noted in *Haynes, supra*, at 1157:

> "We agree with the district court's assessment that Stephenson's testimony that he did not swear at Haynes 'comes dangerously close to outright perjury.'"

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[5] Page 30 of Bass Pro's Petition states, " . . . There is no evidence that this was part of a scheme or plot that extended beyond a single event."

Similarly in this case, Defendant had multiple employees outright lie to cover up the true reason Plaintiff was fired, and the Trial Court's finding of a high degree of reprehensibility is not clearly erroneous. This is the type of case, which this Court said was an exception, not only in favor of punitive damages, but a large punitive damages award. *Gore, supra*, 517 U.S. 582; *Campbell, supra*, 538 U.S. 424-425. Similar to *TXO, supra*, 509 U.S. 462, this case involves a pattern of fraud, trickery, and deceit by senior employees, not low level employees. Included are: Ritter, Head of Loss Prevention; Beasley, Assistant Manager; and Rogers, Store Manager. Petitioner summarily fired Respondent without any investigation and concocted a false reason for his firing. As noted by this Court, "the flagrancy of the misconduct is thought to be the primary consideration in determining the amount of punitive damages." *Gore, supra*, 517 U.S. 576, footnote 23.

Petitioner emphasizes the second guidepost, which is the ratio or disparity between the harm or potential harm suffered by Respondent and the punitive damages awarded. Petitioner cites cases with lower ratios, based on the absence or a low degree of reprehensible conduct and larger damages. These cases are not persuasive to Petitioner's argument, as this Court has explained that reprehensibility is the most important factor. *Campbell, supra*, at 409. Also, this Court has noted the difficulty with comparing punitive damages verdicts. As held in *TXO, supra*, 509 U.S. 457, "Because no two cases are

truly identical, meaningful comparisons of such awards are difficult to make." This court declined in *TXO* to adopt a comparative approach, which was proposed, that any punitive damages amount must be comparable to a prior punitive damages award.[6]

This Court, in *TXO*, *supra*, 509 U.S. 459-460, held that actual damages can be very small, but still warrant substantial punitive damages. The actual damages in *TXO* were $19,000.00, and this Court approved punitive damages of $10,000,000.00 as being constitutionally permissible. In *Gore, supra*, 517 U.S. 582, this Court quoted *TXO*:

> "Indeed low 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. A higher ratio may also be justified in cases in which the injury is hard to detect or the monetary value of a noneconomic

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[6] *TXO*, *supra*, at 458 states:

"Thus, while we do not rule out the possibility that the fact that an award is significantly larger than those in apparently similar circumstances might, in a given case, be one of many relevant considerations, we are not prepared to enshrine petitioner's comparative approach in a 'test' for assessing the constitutionality of punitive damages awards."

> harm might have been difficult to determine."[7]

This holding was reaffirmed in *Campbell, supra*, 538 U.S. 425.

These clear holdings have been followed by the federal and state courts. In *Saunders v. Branch Banking and Trust Co. of VA*, 526 F.3d 142 (4th Cir. 2008), the Fourth Circuit affirmed a punitive damages award of $80,000.00 with compensatory damages of $1,000.00. The court explained that other federal courts were in general agreement that, in that circumstance, limiting punitive damages to a single-digit ratio "would utterly fail to serve the purposes of punitive damages." *Saunders, supra*, at 154. The Trial Court cited *Saunders* and made this factual finding in its Judgment. (Legal File 148-149):

> " . . . when a jury only awards nominal damages or a small amount of compensatory damages, a punitive damages award may exceed the normal single digit ratio because a smaller amount 'would utterly fail to serve the traditional purposes underlying an award

[7] In this case, Respondent received compensation for his lost wages of $4,300.00, but he received no damages from the loss of his security guard license, for which he took classes for a year. (Tr 360-361) As the Court of Appeals held, Respondent "lost his security license and was forced to seek employment in an unrelated field." (Pet.App.8)

> of punitive damages, which are to punish and deter.'"

See also *Abner v. Kan. City S. R.R.*, 513 F.3d 154, 165 (5th Cir. 2008) (affirming punitive damages award of $125,000.00 accompanying nominal damages of $1.00); *Lee v. Edwards*, 101 F.3d 805, 811 (2d Cir. 1996) (rejecting ratio analysis because "the compensatory award here was nominal, [so] any appreciable exemplary award would produce a ratio that would appear excessive by this measure").

The unsound nature of Petitioner's bright line ratio argument is clearly seen, if you take the facts of this case and substitute a higher paid employee being terminated. Assume Petitioner had terminated a store manager, such as Rogers, and further assume he made $300,000.00 per year with the same facts and degree of reprehensibility. Based on Appellant's bright line ratio analysis, this would mean that a punitive damages judgment of $650,000.00 would be constitutionally acceptable, as it would be below a 10 to 1 ratio.[8] This approach would conflict with the punishment and deterrence purpose of punitive damages. Whether an employer fires a store manager or a loss prevention associate, such as Respondent, the punitive damages have to be high enough to punish the employer for its conduct and to deter the

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[8] $300,000.00 per year ÷ 12 months per year = $25,000.00 per month; $25,000.00 per month x 3 months work lost = $75,000.00; $75,000.00 in actual damages x 9 (ratio factor) = $675,000.00; $675,000.00 > $650,000.00.

conduct from being repeated. The conduct is just as reprehensible, if a lower paid employee is terminated for reporting a crime by management, as is the termination of a higher paid employee. In fact, there is a strong public policy reason for awarding higher punitive damages in this case. Respondent's security guard license required him to report crimes. (Tr 400) Therefore, Petitioner's termination of Respondent for reporting criminal activity not only offends Missouri's public policy interest in protecting and encouraging whistleblowers, *Brenneke v. Department of Missouri Veterans of Foreign Wars of the United States of America*, 984 S.W.2d 134, 138-139 (Mo. App. W.D. 1998), but Missouri's public policy in protecting the requirements of its State licenses.

In *JCB, Inc. v. Union Planters Bank, NA*, 537 F.3d 862 (8th Cir. 2008), the court affirmed a jury verdict of $1,446,500.00 in compensatory damages and $1,150,000.00 in punitive damages on a conversion claim, but reduced the punitive damages awarded on a trespass claim from $1,087,500.00 to $108,750.00, with $1.00 in compensatory damages. The court held at 876-877:

> ". . . . Punitive damages may withstand constitutional scrutiny when only nominal or a small amount of compensatory damages have been assigned, even though the ratio between the two will necessarily be large. See *Saunders v. Branch Banking & Tr. Co. of VA*, 526 F.3d 142, 154 (4th Cir. 2008) (collecting cases). . . . Our court as well as Missouri

> courts have affirmed punitive damages supported by only nominal compensatory damages. See *Asa-Brandt*, 344 F.3d at 743 & 747 (affirming $1.25 million on a breach of fiduciary duty claim with nominal damages); *Labrier v. Anheuser Ford, Inc.*, 621 S.W.2d 51, 58 (Mo Banc 1981) (collecting cases)."

In affirming a ratio of over 100,000 to 1, the Eighth Circuit noted that the defendant's actions were particularly reprehensible.[9] By the Trial Court's remittitur of the punitive damages to $650,000.00, the ratio in this case is considerably less at only 151 to 1. The Trial Court reduced the original punitive damages verdict of $2,800,000.00 by over 75 percent or by $2,150,000.00.

In *Goff v. Elmo Greer & Sons Const. Co., Inc.*, 297 S.W.3d 175 (Tenn. 2009), cert. den., ___ U.S. ___, 130 S.Ct. 1910, 176 L.Ed.2d 367 (2010), the defendant, a construction company working on a highway expansion project, intentionally buried tires and other waste under several feet of compacted rock on the plaintiff's property. For that conduct, a jury awarded the plaintiff $3,305.00 in compensatory damages and $1,000,000.00 in punitive damages. On review, the Tennessee Supreme Court first determined that defendant's conduct "d[id] not constitute an environmental hazard or threaten the health or safety of any

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[9] It is interesting that the Eighth Circuit finds its decisions on higher ratios are in line with Missouri State decisions, contrary to the Petition.

individual" and that the defendant's actions did not reach the highest levels of reprehensibility; consequently, the ratio of 302:1 was excessive. *Id. at 195*. Nonetheless, the court rejected the defendant's argument that the federal constitution requires the punitive and compensatory damages ratio be in single digits, concluding that such a claim "reflects an overly restrictive view that does not comport with the Supreme Court's jurisprudence on the subject." *Id. at 194*. The court determined that a punitive damages award of $500,000.00 (a ratio of 151:1) was adequate to send a "strong message." *Id. at 196*. A similar strong message is necessary in this case. The Trial Court's Judgment in this case results in a ratio slightly over 151 to 1.

In conformity with this Court's precedents, the Missouri Supreme Court has held that the number one basis in reviewing a punitive damages awards is the reprehensibility of the Defendant's conduct. *Werremeyer v. K.C. Auto Salvage Co., Inc.*, 134 S.W.3d 633 (Mo. banc 2004). The Missouri Supreme Court held in *Scott v. Blue Springs Ford Sales, Inc.*, 176 S.W.3d 140, 144 (Mo. banc 2005):

> "Because each case must be assessed on its own facts, no court has imposed inviolable constitutional limits on the ratio between punitive and compensatory. To do so would require the courts to supplant the jury's considered decision in favor of an arbitrary limit that may have no relationship whatsoever to

> the extent and severity of the defendant's misconduct."

The Trial Court's remittitur evinces a "reasonable relationship" between actual and punitive damages given the nature of Petitioner's conduct. *Gore, supra*, 517 U.S. 580. It was properly affirmed by the Missouri Court of Appeals.

Limiting the punitive damages to a single digit ratio or $38,700.00 (nine times actual) would do nothing to punish and deter Bass Pro under the facts and circumstances of this case. Limiting punitive damages, such as this, would only encourage unscrupulous employers, such as Bass Pro, to fire whomever they wanted for reporting any corporate wrongdoing. A bright line ratio would trivialize the strong States' interests involved with this case. It would essentially grant limited immunity to companies who fire employees for reporting crimes or suspected crimes. Petitioner's argument is in direct conflict with Missouri's public policy to encourage and protect whistleblowers, *Brenneke, supra*, and this Court's acknowledgment that punitive damages are to punish and deter. *Campbell, supra*, at 415. It would also reverse established precedent that there is no bright line and each case must be reviewed independently. *Campbell, supra*; *TXO, supra*.

The real punitive damages issue here is what amount of money will punish Petitioner for maliciously and vindictively firing Respondent for reporting criminal activity of management without any investigation whatsoever; deceitfully covering up the

real reason Respondent was fired; and deterring Petitioner and other corporations from treating its employees in the same fashion. *Campbell* does not confer upon appellate judges a constitutional obligation to limit punitive damages, because a certain ratio is not met, regardless of the facts.

For the third guidepost, there should be a review of the difference between the punitive damages awarded and civil or criminal penalties authorized or imposed in comparable cases. *Gore, supra*, 517 U.S. 583. A reviewing court should "accord substantial deference to legislative judgments concerning appropriate sanctions for the conduct at issue." *Gore, supra*, 517 U.S. 583. Petitioner has cited no legislative pronouncements, and Respondent is unaware of any.

II. THERE ARE NO INCONSISTENT INTERPRETATIONS, AND DIFFERENT STANDARDS DO NOT EXIST AMONG FEDERAL AND STATE COURTS

Petitioner attempts to compare punitive damages verdicts in various cases, based upon a straight ratio analysis and a few words characterization of each case. This completely disregards the directions of this Court that an independent decision has to be made based on the facts of each case, *Cooper Industries, Inc. v. Leatherman Tool Group, Inc.*, 532 U.S. 424, 431 (2001), and the Court's prior refusal to adopt a comparative analysis test advocated by Petitioner. *TXO, supra*, at 457. All employment discrimination cases do not involve the same facts and do not

warrant the same amount of punitive damages or the same ratio. Similarly, all fraudulent sale of automobile cases do not involve the same degree of reprehensibility.

The weakness of Petitioner's argument is poignantly evident in its analysis of the Missouri Supreme Court's *Overbey* decision. Petitioner suggests on pages 15 and 16 of its Petition that the fraud involved in *Estate of Overbey v. Chad Franklin National Auto Sales North, LLC*, 361 S.W.3d 364 (Mo. banc 2012), should have had the same or similar ratio of punitive damages, as was found in *Gore*. *Overbey* was a claim for fraudulent representations made in violation of the Missouri Merchandising Practices Act (MMPA), associated with the sale of a vehicle to the Overbeys. The case arises from a number of advertisements run for Payment for Life Membership Plan by an automobile dealership. Underneath the membership, you lock in your low monthly payment for the rest of your life. You buy a pre-owned vehicle, and at the end of one year, you bring it back and pick out another vehicle. You continue to drive a different vehicle every year, but your monthly payment will never change and you can cancel the membership whenever you want. The Overbeys purchased an SUV for $37,191.28 over seventy-one months. By joining the Payment for Life Membership Plan, they were told that for $500.00, the monthly payment would only be $49.00. Once the Overbeys signed the contract, National paid them $3,253.00 to cover their difference between $49.00 per month, and a monthly payment of $719.52, for a period of six months. After six months, the

Overbeys were informed that they bought the vehicle for $37,191.28, and their monthly payment for the remaining sixty-five months of the loan would be $719.52 per month. There was evidence that four other persons had been similarly misled, and thirty-five complaints had been filed with the Attorney General's Office, causing them to seek an injunction against the defendant. The jury found that both the dealership and the owner of the dealership, Mr. Franklin, violated the MMPA. The Overbeys were awarded $76,000.00 in actual damages, and $250,000.00 in punitive damages against the dealership. The jury also awarded $4,500.00 in actual damages, and $1,000,000.00 in punitive damages against the dealership owner, Mr. Franklin. The trial court overruled the JNOV filed by the individual defendant, including an allegation that the punitive damages were excessive. The trial court did grant Mr. Franklin's Motion to Reduce the Punitive Damages Award pursuant to the damages cap contained in §510.265 RSMo to $500,000.00. These facts are clearly distinguishable from those present in *Gore*, where this Court specifically found there was no evidence that BMW "engaged in deliberate false statements, acts of affirmative misconduct or concealment of improper motive." *Gore, supra*, at 517 U.S. 579.[10] This is the exact problem that arises when you attempt to compare all types of cases in one

[10] Respondent submits Petitioner's attack on the Missouri Supreme Court and the decision in *Overbey* is disingenuous. Due to space limitations, Respondent does not have the capacity to demonstrate the inaccuracy of all the cases cited by Petitioner, but this is a good example.

lump category without looking at the facts. All automobile fraud cases are not the same, just as all employment cases are not the same. It is a strong reason supporting this Court's rejection of a comparative analysis test in *TXO*.

It is also important to note how the Petitioner completely misinterprets and/or misstates the holdings of various courts. Page 11 of the Petition indicates various States, including Missouri, "view any relatively small compensatory award as authorization for a punitive damages award exceeding single digits." It cites, in support of this, the *Overbey* case. In contrast, the Missouri Supreme Court in *Overbey*, correctly cited the instructions of this Court from *Campbell* and *Gore*. It specifically held in *Overbey, supra*, at 373:

> "While this statutory framework of course cannot permit a punitive damage award larger than due process will allow, it is an additional indication that, in the case of small awards, due process does not prevent larger ratios if necessary, *given particular facts*, to impose punishment and deter future misconduct." (Emphasis ours)

The Missouri Supreme Court clearly did not indicate small actual damages, alone, authorized higher ratios of punitive damages, as claimed by Petitioner.

In the following cases, Appellate Courts similarly have approved punitive damages in amounts and in ratios greater than or similar to those present in this case. *Rodriguez-Torres v. Caribbean Forms*

Manufacturer, 399 F.3d 52, 56 (1st Cir. 2005) (punitive damages award of $199,999.00, compensatory damages of $1.00, for 199,999:1 ratio, in Title VII discrimination claim); *Romanski v. Detroit Entertainment, LLC*, 428 F.3d 629, 649 (6th Cir. 2005), cert. den., 549 U.S. 946, 127 S.Ct. 209 (2006) (punitive damages of $600,000.00, economic damages of $279.05, for 2,150:1 ratio, for false arrest and confiscation of lunch voucher by casino security officer); *Kemp v. American Tel. & Tel. Co.*, 393 F.3d 1354, 1365 (11th Cir. 2004) (punitive damages of $250,000.00, compensatory damages of $115.05, for 2,173:1 ratio, for defrauding customers); *Mathias v. Accor Economy Lodging, Inc.*, 347 F.3d 672, 674 (7th Cir. 2003) (punitive damages of $186,000.00, compensatory damages of $5,000.00, 37:1 ratio, for bedbug-infested hotel room); *Goff v. Elmo Greer & Sons Const. Co., Inc.*, 297 S.W.3d 175, 196 (Tenn. 2009), cert. den., ___ U.S. ___, 130 S.Ct. 1910, 176 L.Ed.2d 367 (2010) (punitive damages of $500,000.00, compensatory damages of $3,305.00, for 151:1 ratio, in common-law nuisance action); *Myers v. Workmen's Auto Ins. Co.*, 140 Idaho 495, 95 P.3d 977, 982-83 (2004) (punitive damages of $300,000.00, compensatory damages of $735.00, for 408:1 ratio, in breach of contract case).[11]

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[11] Petitioner seeks to exclude comparison of all cases with $1.00 in damages based on the claim that Respondent was fully compensated for his actual damages. This is not true. He was not compensated for his lost security guard license. He attended school for a year to obtain that license. The Court of Appeals specifically found he had to seek a new profession from losing this license. (Pet.App.8)

Petitioner claims in the nine years since *Campbell*, decisions of State Courts and Federal Courts, interpreting and applying the small damages exception, have been increasingly inconsistent and contradictory. In every one of the cases referred to by Petitioner in its Petition, the reviewing court has quoted and relied on the principles articulated in *Campbell, supra*, and *Gore, supra*. The difference is the facts of each case, which cannot be summarized adequately in one sentence. Respondent submits that no real conflict exists. Any differences arise because each case depends on its own facts and circumstances. The Federal and State Courts throughout the United States have adopted this Court's precedents that when actual damages are very large, punitive damage may be equal to or slightly less than the actual damages, depending on the unique facts in each case. Conversely, when actual damages are extremely small, as in the case at bar, the punitive damages ratio may be higher, depending on the facts. This is because actual and punitive damages serve two different purposes. Actual damages serve to compensate the plaintiff for his or her actual loss, whereas punitive damages serve to punish and deter. *Gore, supra*, 517 U.S. 568. Applying that very principle in the case at bar, the Trial Court found:

> "that limiting punitive damages to a single digit ratio when the jury has awarded a small amount of compensatory damages 'would utterly fail to serve the traditional purposes underlying an award of punitive damages, which are to punish and deter.'

Saunders v. Branch Banking & Trust Co. of VA, 526 F.3d 142, 152-154 (4th Cir. 2008)." (Pet.App.14)

The Missouri Court of Appeals agreed and held that "Bass Pro's maximum suggested award of $38,700.00, or nine times the compensatory damages award, would have no punitive or deterrent impact." (Pet.App.10)

On page 9 of the Petition, Petitioner makes an argument based on its self-created category that actual damages of $500.00 to $100,000.00 are small damages and actual damages less than $500.00 are nominal damages. This is clearly biased and arbitrary. Petitioner's characterization of nominal damages being damages up to $500.00 is juxtaposed to the definition of nominal damages.[12] If the actual damages are $499.99, and that is the amount of actual damages that a plaintiff suffered, then the damages are not nominal, as they are an attempt at measured compensation. No precedent is cited for Petitioner's categories of damages. The Oregon Supreme Court noted in *Hamlin v. Hampton Lumber Mills,*

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[12] Black's Law Dictionary, 7th Edition (1999) defines Nominal Damages as "A trifling sum awarded when a legal injury is suffered but when there is no substantial loss or injury to be compensated. Cf. *substantial damages*. Substantial damages is defined as, "A considerable sum awarded to compensate for a significant loss or injury. Cf. *nominal damages*. 'Substantial damages . . . are the result of an effort at measured compensation, and are to be contrasted with nominal damages which are in no sense compensatory, but merely symbolic.' Charles T. McCormick, *Handbook on the Law of Damages* §20, at 85 (1935).

Inc., 246 P.2d 1121, 1128 (Oregon 2011), that courts have characterized awards less than $12,000.00 as small and awards less than $25,000.00 as relatively small.[13] Respondent maintains that Petitioner created this arbitrary category of small damages cases of $500.00 to $100,000.00 to avoid ratios, which are in line with the decision of the Trial Court in this case. The cases, cited in this Brief, show different courts have approved ratios greater than the 151:1. This Court denied certiorari of the *Goff* case, which involved a ratio of 151:1. This Court should similarly deny certiorari in this case. This Court approved a ratio of 526 to 1 in *TXO*, with $19,000.00 in actual damages and $10,000,000.00 in punitive damages.

Petitioner also argues that little judicial guidance exists on what constitutes "particularly egregious." Respondent submits that to attempt to further define "particularly egregious," this Honorable Court would have to capture virtually every instance in which

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[13] The court specifically noted in *Hamlin, supra*, at 1128:

" . . . a compendium of cases from other jurisdictions demonstrates that courts generally hold that, in instances in which compensatory awards are $12,000 or less, awards in excess of single-digit ratios are not 'grossly excessive.' See Lauren R. Goldman and Nicholai G. Levin, "State Farm at Three: Lower Courts' Application of the Ratio Guidepost", 2 NYU J L & Bus 509, 514-15 (2005-06) (of 40 decisions in which the compensatory damages award was $25,000 or less, 24 upheld punitive damages awards with a double-digit or higher ratio, and 23 of those 24 involved compensatory damages awards of $12,000 or less)."

punitive damages were applicable and enumerate a guidepost for appellate courts to follow in each instance. This is unrealistic, and the precedents of this Court adequately guide the lower courts on this issue. Petitioner's actions in this case were "particularly egregious," as described in this Brief. This was not only found by the Court of Appeals in its first opinion, but the Trial Court on remand and the Court of Appeals in its second Opinion. To the undersigned's knowledge, no court has found that damaging a financially vulnerable person with repeated incidents of intentional malice, trickery, and deceit was not particularly egregious. (Pet.App.13) Those are the facts of this case, and the Petition ignores them to support its argument.

Furthermore, there is nothing in our jurisprudence that states we must be able to "predict" punitive damages or any type of damages in a given case. The amount of damages, actual or punitive, is a fact to be determined by a jury. Due process has never been interpreted to ensure that any party can predict what damages will be rendered in a case, because of a category of the case, such as employment termination, motor vehicle fraud, etc. It depends on the facts presented to the jury in each case. The comparison of *Gore* and *Overbey* is a graphic example why such an analysis would be flawed.

Petitioner goes on to suggest that one solution would be to require the courts to measure the compensatory award on a continuum ranging from nominal to substantial. How much detail would this Petitioner suggest? Does this Court really wish to undertake

distinguishing small from nominal for every different factual situation? The trial and appellate courts have done a masterful job in applying the principles set out in *Campbell, supra*, and *Gore, supra*. There is no reason to attempt to further define particularly "egregious," "small" or "nominal," or any other *Campbell* term. In the end, Petitioner's continuum proposition would cause courts to endure a needless exercise. Since this Court has clearly explained that the facts of the case might justify higher ratios, *TXO, supra*, 505 U.S. 459-460; *Gore, supra*, 517 U.S. 582; and *Campbell, supra*, 538 U.S. 425, any continuum would have to have exceptions for the facts of the case. If the facts control, there is no need for Petitioner's additional continuum test.

On page 31, Petitioner claims this Court should clarify that once a reviewing court determines comparative reprehensibility, there would be a presumption with small damages cases that the ratio of compensatory to punitive damages would be in single digits. That would utterly destroy the purpose of punitive damages. It would reverse the precedent of this Court acknowledging the purpose of punitive damages. *Gore, supra*, 517 U.S. 568. In fact, Respondent maintains that if this Court were to adopt Petitioner's position, it would encourage the specific conduct that punitive damages are meant to discourage. As an example, assume an employer is contemplating firing a well trained and qualified employee, capable of getting another job within a reasonable period of time. Further assume that the employer is contemplating firing that employee for a reprehensible reason and it is prepared to have senior management

lie to conceal the real reason for termination. If Petitioner's position was adopted that employer might be encouraged to fire the employee, as it knows that even if a judgment is entered against it for actual and punitive damages, that it will be significantly reduced purely on a ratio analysis, without regards to the facts. That would only encourage the very behavior that punitive damages are intended to deter. Firing an employee, whose Missouri state license requires him to report crimes, for reporting criminal acts of management is clearly reprehensible. That reprehensibility is magnified when numerous members of management commit perjury to cover up the reason that employee was terminated.

CONCLUSION

Petitioner's Petition for Writ of Certiorari should be denied, and the 9 year history of this litigation can come to an end.

Respectfully submitted,

RAY A. GERRITZEN
Counsel of Record for Respondent
MICHAEL A. GERRITZEN
GERRITZEN & GERRITZEN
One US Bank Plaza, Suite 2205
505 N. 7th Street
St. Louis, Missouri 63101-1600
Telephone: (314) 231-2786
Fax: (314) 231-2587
gerritze@swbell.net