South Carolina Law Review

Volume 62
Issue 4 *ANNUAL SURVEY OF SOUTH CAROLINA LAW*
Article 3

Summer 2011

Punitive Damages in South Carolina: With Clarity Comes Uncertainty

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PUNITIVE DAMAGES IN SOUTH CAROLINA: WITH CLARITY COMES UNCERTAINTY

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I. INTRODUCTION

Although the Supreme Court of South Carolina recently clarified how appellate courts should review the constitutionality of punitive damages,[1] the legislature is primed to change the law in this area with a bill that would increase the difficulty for plaintiffs to obtain punitive damages.[2] The supreme court's opinion in *Mitchell v. Fortis Insurance Co.*[3] held that the three guideposts from *BMW of North America v. Gore*[4] are the predominant test of the constitutionality of punitive damages in South Carolina[5] and that appellate courts should review punitive damages awards de novo.[6]

The importance of *Mitchell* does not rest entirely on the holdings, but also rests on the clarity the court provided. South Carolina courts have used the *Gore*

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1. *See* Mitchell v. Fortis Ins. Co., 385 S.C. 570, 587, 686 S.E.2d 176, 185 (2009).
2. *See* H.R. 3375, 119th Gen. Assemb., Reg. Sess. (S.C. 2011); S. 22, 119th Gen. Assemb., Reg. Sess. (S.C. 2011).
3. 385 S.C. 570, 686 S.E.2d 176 (2009).
4. 517 U.S. 559 (1996).
5. *Mitchell*, 385 S.C. at 587, 686 S.E.2d at 185.
6. *Id.* at 583, 686 S.E.2d at 182.

guideposts since the late 1990s[7] and have acknowledged that federal courts review punitive damages de novo,[8] but never before had the supreme court explicitly declared what the guidelines were in South Carolina and how they should be applied.

However, with all the clarity that *Mitchell* brings, the South Carolina General Assembly may make punitive damages more difficult for plaintiffs to obtain by passing the South Carolina Fairness in Civil Justice Act of 2011.[9] The Act implements strict guidelines on pleading for punitive damages and caps punitive damages at the greater of three times the compensatory damages awarded or $350,000.[10]

Section II of this Note lays out the framework for a punitive damages review that the United States Supreme Court has developed over the last fifteen years and discusses a South Carolina Supreme Court case that, up until *Mitchell*, played a large role in South Carolina punitive damages award reviews. Section III analyzes two pre-*Mitchell* South Carolina Supreme Court punitive damages award decisions to demonstrate the tests that the court employed in punitive damages award reviews prior to *Mitchell*. Section IV analyzes the holdings and reasoning of *Mitchell*, explaining the new and more efficient punitive damages award review that *Mitchell* laid out. Section V examines the proposed South Carolina Fairness in Civil Justice Act of 2011, and Section VI briefly analyzes the effect it may have on future punitive damages awards if passed. Finally, Section VII concludes.

II. *GAMBLE*, *GORE*, AND *CAMPBELL*: THE FRAMEWORK OF PUNITIVE DAMAGES LAW

Gamble v. Stevenson,[11] a 1991 South Carolina Supreme Court case, was a landmark opinion for punitive damages in this state. In *Gamble*, the court set out eight considerations for a trial court to follow in determining whether a punitive damages award violates the Due Process Clause:

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7. *See* Collins Entm't Corp. v. Coats & Coats Rental Amusement, 355 S.C. 125, 140, 584 S.E.2d 120, 128 (Ct. App. 2003) (citing *Gore*, 517 U.S. at 575); Welch v. Epstein, 342 S.C. 279, 307, 536 S.E.2d 408, 422–23 (Ct. App. 2000) (citing *Gore*, 517 U.S. at 575); Lister v. NationsBank of Del., N.A., 329 S.C. 133, 151, 494 S.E.2d 449, 459 (Ct. App. 1997) (citing *Gore*, 517 U.S. at 575).

8. James v. Horace Mann Ins. Co., 371 S.C. 187, 195, 638 S.E.2d 667, 671 (2006) (citing State Farm Mut. Auto. Ins. Co. v. Campbell, 538 U.S. 408, 418 (2003)); Atkinson v. Orkin Exterminating Co., 361 S.C. 156, 166, 604 S.E.2d 385, 390 (2004) (citing *Campbell*, 538 U.S. at 418).

9. *See* H.R. 3375, 119th Gen. Assemb., Reg. Sess. (S.C. 2011); S. 22, 119th Gen. Assemb., reg. Sess. (S.C. 2011).

10. *Id.*

11. 305 S.C. 104, 406 S.E.2d 350 (1991).

> (1) defendant's degree of culpability; (2) duration of the conduct; (3) defendant's awareness or concealment; (4) the existence of similar past conduct; (5) likelihood the award will deter the defendant or others from like conduct; (6) whether the award is reasonably related to the harm likely to result from such conduct; (7) defendant's ability to pay; and finally, (8) . . . "other factors" deemed appropriate.[12]

From 1991 to 1996, these eight considerations formed the basis for South Carolina courts' review of punitive damages awards.[13]

In 1996, in *BMW of North America v. Gore*,[14] the United States Supreme Court used three "guideposts" to determine the constitutionality of punitive damages: "the degree of reprehensibility of the [defendant's conduct]; the disparity between the harm or potential harm suffered by [the plaintiff] and [the] punitive damages award; and the difference between [the punitive damages awarded] and the [punitive awards] authorized or imposed in comparable cases."[15] The South Carolina Supreme Court responded to *Gore* by instituting an approach that used both the eight *Gamble* considerations and the three *Gore* guideposts.[16] There were difficulties with this approach, however, because practitioners were unsure which test would receive more weight.[17]

In 2003, in *State Farm Mutual Automobile Insurance Co. v. Campbell*,[18] the United States Supreme Court provided guidance regarding the determination of reprehensible conduct and insight into what qualified as an acceptable punitive damages ratio.[19] The Court specified five factors relevant to determining if a defendant's conduct is reprehensible:

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12. *Id.* at 111–12, 406 S.E.2d at 354.

13. *See, e.g.*, Defender Indus., Inc. v. Northwestern Mut. Life Ins. Co., 809 F. Supp. 400, 403 (D.S.C. 1992) (using *Gamble's* eight considerations in determining the constitutionality of a punitive damages award); S.C. Farm Bureau Mut. Ins. Co. v. Love Chevrolet, Inc., 324 S.C. 149, 154, 478 S.E.2d 57, 59 (1996) ("In light of *Gamble,* there are now three stages in this state to a trial court's review of punitive damages. First, the court must determine whether the defendant's conduct rises to the level of culpability warranting a punitive damage award. . . . Second, the trial judge must conduct a post-trial *Gamble* review to ensure that the award does not deprive the defendant of due process. If the award is determined to violate the defendant's due process rights, then the trial court must either grant a new trial absolute, or a new trial *nisi* remittitur. If the award is determined not to violate the defendant's due process rights, then the trial court reaches the third inquiry, to wit, whether, in the exercise of its discretion, it finds the award excessive or inadequate.").

14. 517 U.S. 559 (1996).

15. *Id.* at 574–75.

16. *See, e.g.*, James v. Horace Mann Ins. Co., 371 S.C. 187, 195, 638 S.E.2d 667, 671 (2006) ("Although we find the punitive damages award was reasonable under the *Gamble* factors, we must also review the trial court's ruling on punitive damages under *Gore*.").

17. *See* William J. Watkins Jr., *Don't Gamble on Due Process Review of Punitive Damages*, S.C. LAW., Jan. 2007, at 37, 41 ("A definitive word is needed from the state Supreme Court to guide the trial bench and bar on due process review of punitive damages.").

18. 538 U.S. 408 (2003).

19. *Id.* at 419, 425.

> [W]hether . . . 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.[20]

The court also established that "few awards exceeding a single-digit ratio between punitive and compensatory damages . . . [would] satisfy due process."[21]

III. SOUTH CAROLINA'S APPROACH TO PUNITIVE DAMAGES BEFORE *MITCHELL*

Prior to *Mitchell*, the South Carolina Supreme Court had used the *Gamble* considerations, the *Gore* guideposts, and the *Campbell* factors to review punitive damages awards; thus, practitioners could not accurately predict which case would weigh most heavily in the court's analysis. For example, in *Atkinson v. Orkin Exterminating Co.*,[22] the court's analysis rested on the *Gore* guideposts and *Campbell* factors, but in *James v. Horace Mann Insurance Co.*,[23] the court used both *Gore* and *Gamble*.

A. Atkinson v. Orkin Exterminating Co.

In 2004, in *Atkinson v. Orkin Exterminating Co.*, the South Carolina Supreme Court considered whether a punitive damages award was excessive and whether it violated due process.[24] *Atkinson* involved a fraudulent breach of contract by Orkin.[25] Orkin failed to honor the provision in a termite bond that allowed the Atkinsons to have the bond transferred to them from their home's previous owners.[26] Instead, Orkin offered the Atkinsons "a new contract with less desirable terms."[27] The Atkinsons denied the offer and purchased a policy from Terminix.[28] Terminix denied the Atkinsons full coverage because of substantial termite damage to the structure of the home.[29] This came as a surprise to the Atkinsons because before they purchased the home, "Orkin conducted a routine inspection and reported that the residence was free of termites and termite damage."[30] The Atkinsons brought suit against Orkin

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20. *Id.* at 419.
21. *Id.* at 425.
22. 361 S.C. 156, 604 S.E.2d 385 (2004).
23. 371 S.C. 187, 638 S.E.2d 667 (2006).
24. *Atkinson*, 361 S.C. at 164, 604 S.E.2d at 389.
25. *Id.* at 160, 604 S.E.2d at 387.
26. *Id.* at 160–61, 604 S.E.2d at 387.
27. *Id.*
28. *Id.* at 161, 604 S.E.2d at 387–88.
29. *Id.* at 161, 604 S.E.2d at 388.
30. *Id.*

claiming breach of contract and negligence for failure to disclose the termite damage in the inspection.[31] The trial court awarded the Atkinsons $6,191 in compensatory damages and $786,500 in punitive damages, a 127-to-1 ratio.[32]

In its review of the punitive damages award, the South Carolina Supreme Court primarily looked to the three *Gore* guideposts and the ratio guideline in *Campbell*.[33] In its application of the first *Gore* guidepost—the reprehensibility of the defendant's conduct—the court acknowledged *Campbell*'s five reprehensibility factors, but did not utilize them in its analysis.[34] Instead, it focused on whether the trial court improperly used any of Orkin's past misconduct to amplify the reprehensibility of its misconduct in this case.[35]

Next, the court looked to the second guidepost—the disparity between the plaintiff's harm or potential harm and the punitive damages award—and held that a 127-to-1 ratio of compensatory to punitive damages was presumptively unconstitutional.[36] The court relied on the principle from *Campbell* that "few awards exceeding a single-digit ratio between punitive and compensatory damages . . . [would] satisfy due process."[37] The court held "that the Atkinsons have failed to rebut the presumption that the three-digit, punitive-compensatory damages ratio[] in this case is unconstitutional."[38]

For the third *Gore* guidepost—the disparity between the punitive damages awarded in the present case and the punitive damages awarded in similar cases—the court examined two previous cases involving fraudulent breach of contract and determined that the compensatory–punitive damages ratio in each of those cases was far less than in the present case.[39]

B. James v. Horace Mann Insurance Co.

In contrast to the court's approach in *Atkinson*, in *James v. Horace Mann Insurance Co.* the South Carolina Supreme Court utilized both *Gamble* and *Gore*.[40] Here, the plaintiff–homeowners' dog bit James Geiger in 2002.[41] The

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31. *Id.* at 160–161, 387–88.
32. *Id.* at 164, 604 S.E.2d at 389.
33. *Id.* at 165–71, 604 S.E.2d at 390–93.
34. *Id.* at 167–69, 604 S.E.2d at 391–92.
35. *Id.*
36. *Id.* at 170, 604 S.E.2d at 392.
37. *Id.* at 170, 604 S.E.2d at 392 (citing *Campbell*, 538 U.S. at 425).
38. *Id.* at 171, 604 S.E.2d at 393.
39. *Id.* Specifically, the court examined the compensatory–punitive damages ratio in *Cock-N-Bull Steak House, Inc. v. Generali Insurance Co.*, 321 S.C. 1, 466 S.E.2d 727 (1996), and in *Pinckney v. Orkin Exterminating Co.*, 268 S.C. 430, 234 S.E.2d 654 (1977). In *Cock-N-Bull*, the South Carolina Supreme Court upheld a compensatory damages award of $52,000 and a punitive damages award of $1,500,000. *Cock-N-Bull*, 321 S.C. at 3–4, 466 S.E.2d at 728–29. In *Pinckney*, the South Carolina Supreme Court upheld a compensatory damages award of $5,000 and a punitive damages award of $4,000. *Pinckney*, 268 S.C. at 431, 234 S.E.2d at 654.
40. James v. Horace Mann Ins. Co., 371 S.C. 187, 195, 638 S.E.2d 667, 671 (2006).
41. *Id.* at 191, 638 S.E.2d at 669.

plaintiffs submitted a claim under their homeowner's insurance policy to Horace Mann Insurance Company.[42] A Horace Mann adjuster told Geiger that the company would not pay the $25,000 in liability coverage available under the plaintiffs' policy unless Geiger could provide further proof of the plaintiffs' negligence.[43] Consequently, Geiger sued the homeowners and obtained a verdict for $50,500.[44]

Thereafter, the homeowners brought a declaratory judgment action against Horace Mann claiming that the adjuster mishandled the claim by telling Geiger that he had to show proof of negligence to receive the $25,000.[45] This information was incorrect because South Carolina law imposes strict liability on dog owners for injury arising from a dog bite.[46] Geiger testified that if he had been notified of the correct law by the adjuster he would have settled and not sued the homeowners.[47] The trial court found Horace Mann liable for bad faith and awarded the homeowners $146,600 in actual damages and $1,000,000 in punitive damages, a 6.82-to-1 ratio.[48]

The court began its analysis with the eight *Gamble* considerations.[49] It noted that upholding a punitive damages award does not require a finding of fact for each *Gamble* consideration[50] and that the amount of damages still "remains largely within the discretion of the jury. . . ."[51] The court held that the punitive damages award did not violate due process under *Gamble* because Horace Mann continuously misrepresented the law to Geiger and denied him payment based on the misrepresentation.[52] This misrepresentation constituted "extremely culpable" behavior.[53]

In language critical to the confusion that *Mitchell* would later clarify, the court next stated, "[A]lthough we find the punitive damages award was reasonable under the *Gamble* factors, we must also review the trial court's ruling on punitive damages under *Gore*."[54] The court then conducted a brief analysis of the three *Gore* guideposts. For the first guidepost, it found Horace Mann's conduct reprehensible and determined that the punitive damages award did not violate due process under *Gore*[55] because the adjuster "repeatedly falsely

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42. *Id.*
43. *Id.* at 191–92, 638 S.E.2d at 669.
44. *Id.* at 192, 638 S.E.2d at 669.
45. *Id.* at 192–93, 638 S.E.2d at 669–70.
46. *Id.* at 192, 638 S.E.2d at 669 (citing S.C. CODE ANN. § 47-3-110 (1987)).
47. *Id.*
48. *Id.* at 193–94, 638 S.E.2d at 670.
49. *Id.* at 194–95, 638 S.E.2d at 671.
50. *Id.* at 195, 638 S.E.2d at 671 (citing McGee v. Bruce Hosp. Sys., 321 S.C. 340, 346, 468 S.E.2d 633, 637 (1996)).
51. *Id.* (citing Gamble v. Stevenson, 305 S.C. 104, 112, 406 S.E.2d 350, 355 (1991)).
52. *Id.*
53. *Id.*
54. *Id.*
55. *Id.* at 195–97, 638 S.E.2d at 671–72.

represented the applicable law from the time he was assigned the claim"[56] and because Horace Mann based its denial on the adjuster's misrepresentation.[57] Furthermore, Geiger would not have sued the homeowners absent the misrepresentation.[58] The court did not mention the five *Campbell* reprehensibility factors.[59]

For the second guidepost, the court relied heavily on the single-digit principle provided in *Campbell* and determined that the 6.82-to-1 ratio was "reasonably related to the actual harm suffered."[60]

For the third guidepost, the court looked to section 38-2-10 of the South Carolina Code, which imposes on insurers a penalty of $15,000 for non-willful conduct that violates the insurance laws and $30,000 for willful conduct.[61] The court determined that these "statutory penalties [were] set at 'such a low level, there [was] little basis for comparing [them] with any meaningful punitive damage award.'"[62] Notably, the court did not compare the punitive damages award at issue with awards in comparable cases.

IV. *MITCHELL V. FORTIS INSURANCE CO.*

In *Mitchell v. Fortis Insurance Co.*, the South Carolina Supreme Court answered the question of whether *Gore* or *Gamble* carries more weight in a review of punitive damages awards.[63] In adopting *Gore* as the predominant test, the court laid out a clear and formulaic approach to reviewing awards.[64]

A. Facts

Jerome Mitchell, Jr., a seventeen-year-old incoming college freshman, applied for a health insurance policy from Fortis Insurance Company on May 15, 2001.[65] The application included the following question: "'Been diagnosed as having or been treated for any immune deficiency disorder by a member of the medical profession?" Mitchell answered "no."[66] Fortis accepted Mitchell's application and provided him with a health insurance policy.[67]

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56. *Id.* at 196, 638 S.E.2d at 671.
57. *Id.*
58. *Id.*
59. *See id.*
60. *Id.* at 196, 638 S.E.2d at 671–72.
61. *Id.* at 197, 638 S.E.2d at 672 (discussing S.C. CODE ANN. § 38-2-10 (2002)).
62. *Id.* (quoting Collins Entm't Corp. v. Coats & Coats Rental Amusement, 355 S.C. 125, 142, 584 S.E.2d 120, 129 (Ct. App. 2003)).
63. *See* Mitchell v. Fortis Ins. Co., 385 S.C. 570, 587, 686 S.E.2d 176, 185 (2009).
64. *See id.* ("We now hold that *Gamble* remains relevant to the post-judgment due process analysis, but only insofar as it adds substance to the *Gore* guideposts.").
65. *Id.* at 577, 686 S.E.2d at 180.
66. *Id.*
67. *Id.*

On May 13, 2002, after attempting to donate blood to the Red Cross, Mitchell learned that his blood screened positive for HIV.[68] Mitchell immediately contacted a physician, and on May 14, the physician's tests confirmed that Mitchell was HIV positive.[69] During this visit, however, one of the physician's assistants erroneously dated Mitchell's chart May 14, 2001, rather than May 14, 2002.[70] On May 23, 2002, an infectious disease specialist confirmed Mitchell's diagnosis and entered another file detailing the diagnosis.[71]

Fortis began to receive the claims for Mitchell's HIV treatment.[72] Pursuant to company policy, Fortis investigated whether Mitchell failed to disclose the illness on his application as a preexisting condition.[73] In June 2002, a Fortis investigator obtained Mitchell's medical records and discovered the erroneously dated chart marked May 14, 2001, one day before the date of Mitchell's application.[74] The information was sent to a Fortis senior underwriter, who recommended to Fortis's rescission committee that Fortis rescind Mitchell's policy for his failure to disclose his disease.[75] The underwriter based her recommendation solely on the erroneously dated chart.[76] At trial, Mitchell's insurance expert testified that once an investigator found a single piece of evidence supporting rescission, the investigator concluded the investigation.[77]

On September 4, 2002, the rescission committee held a two-hour meeting in which it considered Mitchell's case along with forty-five other cases.[78] The committee approved rescission of Mitchell's policy.[79] Based on the fact that the committee decided forty-five cases in the two-hour meeting, Mitchell argued at trial that the insurer could not have spent more than three minutes on his case.[80]

Upon receiving notice of the rescission, Mitchell attempted to inform Fortis that he did not misrepresent his disease status, but Fortis offered him no assistance.[81] Mitchell then turned to Hope Health, a free medical clinic, for assistance.[82] The manager of the clinic called Fortis to inform it that there were several records proving that Mitchell was diagnosed with HIV after Mitchell filed his application; the manager even offered to send them to Fortis.[83] Fortis

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68. *Id.*
69. *Id.* at 577–78, 686 S.E.2d at 180.
70. *Id.* at 578, 686 S.E.2d at 180.
71. *Id.*
72. *Id.*
73. *Id.*
74. *Id.*
75. *Id.*
76. *Id.*
77. *Id.* at 580, 686 S.E.2d at 181.
78. *Id.* at 579, 686 S.E.2d at 180–81.
79. *Id.* at 579, 686 S.E.2d at 181.
80. *Id.* at 581, 686 S.E.2d at 182.
81. *Id.* at 579, 686 S.E.2d at 181.
82. *Id.*
83. *Id.*

"spurned" this offer, however, and supplied no information about Mitchell's right to appeal.[84]

In June 2003, a letter from Mitchell's attorney to Fortis finally motivated Fortis to review Mitchell's case.[85] The review resulted in Fortis affirming the rescission of Mitchell's policy.[86] Consequently, Mitchell filed suit the following month, alleging breach of contract and bad faith rescission of his policy.[87]

B. Analysis

The court began its analysis by adopting the de novo standard of review as the standard for assessing the constitutionality of a trial court's award of punitive damages.[88] Quoting from the United States Supreme Court's opinion in *Cooper Industries, Inc. v. Leatherman Tool Group, Inc.*,[89] the South Carolina Supreme Court held that a de novo review was the correct standard because (1) concepts in a punitive damages analysis are "fluid concepts that take their substantive content from the particular contexts in which the standards are being assessed"; (2) "independent review is . . . necessary if appellate courts are to maintain control of, and to clarify, the legal principles"; and (3) a "de novo review tends to unify precedent and stabilize the law."[90] Accordingly, the court abrogated use of the abuse of discretion standard[91] that it had embraced in *Gamble v. Stevenson*.[92] Next, the court announced that the *Gore* guideposts would provide the predominant framework for review of punitive damages awards, and that the *Gamble* considerations would remain relevant only in cases where they added substance to the guideposts.[93] The court also indicated that the five reprehensibility factors and ratio principles from *Campbell* would remain integral to the review of awards.[94] Ultimately, the court reasoned that "considerations of judicial economy weighed in favor of a less burdensome and duplicative analysis."

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84. *Id.* at 579–80, 686 S.E.2d at 181.
85. *Id.* at 580, 686 S.E.2d at 181.
86. *Id.*
87. *Id.*
88. *Id.* at 583, 686 S.E.2d at 182.
89. *Id.* (citing Cooper Indus., Inc. v. Leatherman Tool Grp., Inc., 532 U.S. 424, 431 (2001)).
90. *Id.* at 583, 686 S.E.2d at 183 (emphasis omitted) (quoting *Cooper*, 532 U.S. at 436) (internal quotation marks omitted).
91. *Id.* at 582–83, 686 S.E.2d at 182.
92. 305 S.C. 104, 112, 406 S.E.2d 350, 355 (1991) ("[O]nly when the trial court's discretion is abused . . . does it become the duty of this Court to set aside the award." (citing Fennell v. Littlejohn, 240 S.C. 189, 202 125 S.E.2d 408, 415 (1962))).
93. *Mitchell*, 385 S.C. at 587, 686 S.E.2d at 185.
94. *See id.*

C. Application

The court then applied the first *Gore* guidepost.[95] In so doing, it examined Fortis's conduct under each of the *Campbell* reprehensibility factors.[96] The first reprehensibility factor—whether the harm was physical as opposed to economic—seemed at first to weigh against Mitchell because his harm, the loss of health insurance, was economic.[97] However, by denying Mitchell health insurance, Fortis also "exposed him to the great risk of physical danger" because without medical treatment, his HIV could progress more quickly.[98]

The second reprehensibility factor—"whether Fortis demonstrated an indifference to Mitchell's life and a reckless disregard to his health and safety"—weighed heavily in Mitchell's favor.[99] Fortis rescinded Mitchell's policy knowing that he had HIV; thus, Fortis showed that they were not concerned with Mitchell's health, safety, and life expectancy.[100] If Mitchell had not been able to obtain medical services from Hope Health, his condition undoubtedly would have worsened during the period that Fortis withheld coverage.[101] Further, because "Fortis deliberately ignored contextual and other evidence" when it rescinded Mitchell's policy, it was indifferent to its contractual bligations.[102]

The third reprehensibility factor—whether Mitchell was financially vulnerable—was evident through his need to obtain medical services from Hope Health's free clinic.[103] The fourth reprehensibility factor—whether Fortis's conduct included repeated actions—also weighed heavily in favor of Mitchell.[104] Fortis's indifference toward Mitchell's condition took place over two years.[105] Even after Mitchell's attorney brought the erroneous date to the rescission committee's attention, the committee still rejected Mitchell's claim.[106]

The final reprehensibility factor—whether Mitchell's harm was the result of intentional malice—also favored Mitchell.[107] Fortis's investigator acknowledged in her report that whether Mitchell's HIV diagnosis predated his claim was unclear; however, the committee rescinded the policy anyway.[108] The Fortis investigator also ignored the efforts of Mitchell, his Hope Health case worker, his mother's insurance agent, and his attorney to solve the misunderstanding and

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95. *See id.* at 589, 686 S.E.2d at 186.
96. *Id.* at 589–90, 686 S.E.2d at 186.
97. *Id.* at 589, 686 S.E.2d at 186.
98. *Id.*
99. *Id.*
100. *Id.*
101. *Id.*
102. *Id.*
103. *Id.*
104. *Id.* at 589–90, 686 S.E.2d at 186.
105. *Id.* at 589, 686 S.E.2d at 186.
106. *Id.* at 589–90, 686 S.E.2d at 186.
107. *Id.* at 590, 686 S.E.2d at 186.
108. *Id.*

provide information that would show the date was a mistake.[109] Further, Fortis refused to conduct any further investigation, failed to inform Mitchell of his appeal rights, omitted Hope Health's call from the investigator's phone log, and presumably possessed medical records with the correct dates on them; these factors supplied a strong inference that Fortis engaged in intentional deceit in rescinding Mitchell's policy.[110]

Next, the court utilized the second *Gore* guidepost—"the disparity between the actual and potential harm suffered by the plaintiff and the punitive damages award"[111]—to determine the magnitude of Mitchell's potential injury and whether the ratio of potential harm to the punitive damages award was reasonable.[112] The court looked to *TXO Production Corp. v. Alliance Resources Corp.*[113] to determine whether to compare the punitive damages award to the actual harm suffered or to the potential harm suffered.[114] *TXO* held that "it is appropriate to consider the magnitude of the potential harm that the defendant's conduct would have caused to its intended victim . . . as well as the possible harm to other victims that might have resulted if similar future behavior were not deterred."[115] Therefore, the court compared the punitive damages award to Mitchell's potential harm rather than to his actual harm.[116]

Next, the court determined the dollar amount of Mitchell's potential injury.[117] The court found that Mitchell's maximum payout of $6 million under the rescinded policy was too speculative to represent Mitchell's potential economic loss.[118] Instead, it concluded that Mitchell's potential harm was the present value of the cost of treating his disease for the remainder of his life, which was estimated at trial to be $1,081,189.40.[119]

The court then determined that the compensatory–punitive "ratio of 13.9 to 1, based upon the $15 million punitive damages award and $1,081,189.40 in potential harm, [was] grossly excessive."[120] To determine the precise amount of punitive damages, the court moved on to the third and final *Gore* guidepost.[121]

The third guidepost, which directs courts to look at punitive damages awards in comparable cases,[122] led the court to reduce the punitive damages award from

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109. *Id.*
110. *Id.*
111. *Id.* at 585, 686 S.E.2d at 184 (citing BMW of N. Am. v. Gore, 517 U.S. 559, 575 (1996)).
112. *See id.* at 590–92, 686 S.E.2d at 187.
113. 509 U.S. 443 (1993).
114. *Mitchell*, 385 S.C. at 590–91, 686 S.E.2d at 187.
115. *Id.* at 591, 686 S.E.2d at 187 (emphasis omitted) (quoting *TXO*, 509 U.S. at 460) (internal quotation marks omitted).
116. *Id.*
117. *Id.*
118. *Id.*
119. *Id.*
120. *Id.*
121. *Id.*
122. *Id.*

$15 million to $10 million, or 9.2 times the compensatory damages.[123] Although no previous South Carolina case factually resembled *Mitchell*, the court did consider several cases involving fraudulent rescission of health insurance policies.[124]

In 1933, in *Jamison v. American Workmen Insurance Co.*,[125] the South Carolina Supreme Court upheld a punitive to compensatory ratio of 24 to 1.[126] In 1937, in *Riley v. Life & Casualty Insurance Co. of Tennessee*,[127] the South Carolina Supreme Court allowed a ratio of 27.8 to 1.[128] In 1954, in *Yarborough v. Bankers Life & Casualty Insurance Co.*[129] the South Carolina Supreme Court allowed a punitive to compensatory ratio of 133.3 to 1,[130] and in 1960, in *Kinard v. United Co. of America*,[131] the plaintiff's punitive–compensatory damages ratio was 6.5 to 1.[132] A more recent examination of South Carolina punitive damages case law, however, showed that punitive–compensatory damages ratios were in the low single digits.[133] Therefore, the court decreased the punitive damages award from $15 million to $10 million.[134] The court gave no specific explanation for its calculation of $10 million but did note that "[Fortis's] conduct . . . was reprehensible enough to merit an award towards the outer limits of the single-digit ratio."[135]

From one perspective, *Mitchell* changed little substantive punitive damages law in South Carolina. South Carolina courts have used the *Gore* guideposts often since their articulation by the United States Supreme Court in 1996,[136] have acknowledged the United States Supreme Court's use of the de novo standard,[137] and have cited to *Campbell*'s reprehensibility considerations[138] and

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123. *See id.* at 594, 686 S.E.2d at 188.

124. *See id.* at 592–53, 686 S.E.2d at 187–88.

125. 169 S.C. 400, 169 S.E.2d 83 (1933).

126. *Id.* 400–03, 169 S.E. at 83–84.

127. 184 S.C. 383, 192 S.E. 394 (1937).

128. *Id.* at 386–88, 192 S.E. at 395–96).

129. 225 S.C. 236, 81 S.E.2d 359 (1954).

130. *Id.* at 238–44, 81 S.E.2d at 360–63.

131. 237 S.C. 266, 116 S.E.2d 906 (1960).

132. *Id.* at 269, 116 S.E.2d at 907. In *Kinard*, the court reversed and remanded the case because of erroneous jury instructions, but it did not address—and the defendant did not appeal—the amount of the punitive damages award. *Id.* at 270–74, 116 S.E.2d at 907–09.

133. *Mitchell*, 385 S.C. at 593, 686 S.E.2d at 188.

134. *See id.* at 594, 686 S.E.2d at 188.

135. *Id.* at 593, 686 S.E.2d at 188.

136. *See* Atkinson v. Orkin Exterminating Co., 361 S.C. 156, 164–66, 604 S.E.2d 385, 389–90 (2004) (citing BMW of N. Am., Inc. v. Gore, 517 U.S. 559, 574–75 (1996)); Duncan v. Ford Motor Co., 385 S.C. 119, 142, 682 S.E.2d 877, 888–89 (Ct. App. 2009) (citing *Gore*, 517 U.S. at 575–83); Collins Entm't Corp. v. Coats & Coats Rental Amusement, 355 S.C. 125, 140, 584 S.E.2d 120, 128 (Ct. App. 2003) (citing *Gore*, 517 U.S. at 575–76); Lister v. NationsBank of Del., N.A., 329 S.C. 133, 151, 494 S.E.2d 449, 459 (Ct. App. 1997) (citing *Gore*, 517 U.S. at 575).

137. *See* James v. Horace Mann Ins. Co., 371 S.C. 187, 195, 638 S.E.2d 667, 671 (2006) (citing *Campbell*, 538 U.S. at 418); *Atkinson*, 361 S.C. at 166, 604 S.E.2d at 390 (citing *Campbell*, 538 U.S. at 418).

single-digit ratio recommendations.[139] However, the court also has used *Gamble* regularly, leaving practitioners unsure which test carried greater weight.[140] Therefore, *Mitchell* can be considered a beacon in South Carolina punitive damages law because of its clarity and guidance to practitioners.

As evidence of the confusion among practitioners by the pre-*Mitchell* test for punitive damages, South Carolina attorney William J. Watkins Jr. wrote, in 2007, that:

> *Atkinson* . . . failed to provide guidance on the status of the *Gamble* factors. Today, trial judges and litigants conduct a *Gamble* review at their peril. History and more recent U.S. Supreme Court case law suggest that *Gamble* is an outmoded method of due process review and should be discarded. A definitive word is needed from the [South Carolina] Supreme Court to guide the trial bench and bar on due process review of punitive damages.[141]

In a recent interview discussing the effects of *Mitchell*, Mr. Watkins noted that it was a welcome change for practitioners to no longer have the eight broad *Gamble* considerations—of which lawyers did not know how many needed to be proved—and instead have the three specific, concentrated *Gore* guideposts.[142] Mr. Watkins opined that on the whole, the system with *Gore* as the predominant test will be more streamlined and should serve the interests of justice more effectively and efficiently for the parties, practitioners, and society.[143]

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138. *See Atkinson*, 361 S.C. at 166–67, 604 S.E.2d at 390–91 (quoting *Campbell*, 538 U.S. at 419); *Duncan*, 385 S.C. at 145, 682 S.E.2d at 890 (quoting *Campbell*, 538 U.S. at 419).

139. *See James*, 371 S.C. at 196, 638 S.E.2d at 671 (quoting *Campbell*, 538 U.S. at 424–25); *Atkinson*, 361 S.C. at 170, 604 S.E.2d at 392 (quoting *Campbell*, 538 U.S. at 424); *Duncan*, 385 S.C. at 145, 682 S.E.2d at 890 (quoting *Campbell*, 538 U.S. at 425); Austin v. Specialty Transp. Servs., Inc., 358 S.C. 298, 318, 594 S.E.2d 867, 877 (Ct. App. 2004) (quoting *Campbell*, 538 U.S. at 425).

140. *See James*, 371 S.C. 194–95, 638 S.E.2d 671 (citing Gamble v. Stevenson, 305 S.C. 104, 111–12, 406 S.E.2d 350, 354 (1991)); Frazier v. Badger, 361 S.C. 94, 106, 603 S.E.2d 587, 593 (2004) (quoting *Gamble*, 305 S.C. at 111, 406 S.E.2d at 354) (citing *Gamble*, 305 S.C. at 111, 406 S.E.2d at 354); Welch v. Epstein, 342 S.C. 279, 306, 536 S.E.2d 408, 422 (Ct. App. 2000) (quoting *Gamble*, 305 S.C. at 111–12, 406 S.E.2d at 354). As one South Carolina practitioner said prior to the *Mitchell* decision,

> [s]o the question remains: do the Gamble factors form the appropriate framework for evaluating the constitutionality of punitive damages awards in South Carolina? South Carolina case law is unclear on this point. Atkinson appears to have adopted the Gore guideposts, but our trial and appellate courts seem unsure about dispensing with Gamble factors.

Watkins, *supra* note 17, at 41.

141. Watkins, *supra* note 17, at 41.

142. Telephone Interview with William J. Watkins, Jr., Assistant U.S. Attorney, Dist. of S.C. (Nov. 5, 2010).

143. *Id.*

V. THE FAIRNESS IN CIVIL JUSTICE ACT OF 2011

The trend in South Carolina and many nearby states has been to construct procedural roadblocks, through tort reform bills, in a plaintiff's trek to obtain punitive damages.[144] One of these roadblocks, enacted in 1988, is the clear and convincing standard of proof required for obtaining punitive damages.[145] Over the years this has proven to be a tough but fair hurdle for plaintiffs.[146]

The Fairness in Civil Justice Act of 2009 was introduced in the house at the beginning of the 118th session as another tort reform bill.[147] The bill passed the house in March 2010 by a vote of 89–10,[148] but it died in the senate when the 118th session ended.[149] The house reintroduced the bill in January 2011, and in February 2011, it passed by a vote of 100–11.[150] The bill is currently under consideration by the senate.[151]

A critical purpose of tort reform bills is to promote and attract businesses to the state by limiting potential punitive damages awards and reducing the frequency of frivolous lawsuits.[152] The Fairness in Civil Justice Act attempts to achieve these goals by capping the amount of punitive damages at the greater of three times the compensatory damages or $350,000.[153] Additionally, the Act provides that the cap is not applicable if the

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144. *See Punitive Damages*, TORT REFORM REC. (Am. Tort Reform Ass'n, Washington, D.C.), July 1, 2010, at 19–31; Andrea Moore Hawkins, Note, *Balancing Act: Public Policy and Punitive Damages Caps*, 49 S.C. L. REV. 293, 303 (1998) (citing *Summary*, TORT REFORM REC. (Am. Tort Reform Ass'n, Washington, D.C.), June 30, 1997, at 2).

145. S.C. CODE ANN. § 15-33-135 (2005).

146. *See* Taylor v. Medenica, 324 S.C. 200, 221, 479 S.E.2d 35, 46 (1996); Mishoe v. QHG of Lake City, Inc., 366 S.C. 195, 200–02, 621 S.E.2d 363, 365–66 (Ct. App. 2005).

147. *See* H.R. 3489, 118th Gen. Assemb., Reg. Sess. (S.C. 2009), *available at* http://www.scstatehouse.gov/sess118_2009-2010/hj09/972.htm.

148. H.R. 3489, 118th Gen. Assemb., Reg. Sess. (S.C. 2010), *available at* http://www.scstatehouse.gov/sess118_2009-2010/hj10/20100309.docx.

149. The last record of the bill in the senate journal is on June 2, 2010, when the senate read the bill for a second time. *See* H.R. 3489, Gen Assemb., Reg. Sess. (S.C. 2010), *available at* http://www.scstatehouse.gov/sess118_2009-2010/sj10/20100602.htm.

150. H.R. 3375, S.C. LEGISLATURE ONLINE, http://www.scstatehouse.gov/php/web_bh10.php?bill1=3375&session=119&summary=B.

151. *See* H.R. 3375, S.C. LEGISLATURE ONLINE, http://www.scstatehouse.gov/php/web_bh10.php?bill1=3375&session=119&summary=B.

152. *See* Donald R. Songer, *Tort Reform in South Carolina: The Effect of Empirical Research on Elite Perceptions Concerning Jury Verdicts*, 39 S.C. L. REV. 585, 585 (1988) (citing *Coalition of Business Requests Civil Law Reform*, SPARTANBURG HERALD-J. (Spartanburg, S.C.), Nov. 3, 1986, at B8) ("These changes are necessary, it is claimed, because there is a crisis in the tort system. It is argued that dramatic increases in both the number of liability lawsuits and the dollar amount of judgments in these suits have brought about sharp increases in liability insurance rates for many businesses and professionals.").

153. H.R. 3375, 119th Gen. Assemb., Reg. Sess. (S.C. 2011), *available at* http://www.scstatehouse.gov/sess119_2011-2012/bills/3375.htm.

(1) trial court determines that the plaintiff's injury was proximately caused by the defendant's conscious pursuit of a course of conduct that the defendant knew would likely cause injury or damage or was motivated by the pursuit of unreasonable financial gain;
(2) defendant pleads guilty to or is convicted of a felony arising out of the same act or course of conduct complained of by the plaintiff, and that act or course of conduct is a proximate cause of the plaintiff's damages; or
(3) trial court determines that at the time of the plaintiff's injury the defendant acted or failed to act while under the influence of alcohol, drugs, other than lawfully prescribed drugs administered in accordance with a prescription, or any intentionally consumed glue, aerosol, or other toxic vapor to the degree that defendant's judgment is substantially impaired.

Supporters of the bill argue that because North Carolina,[154] Georgia,[155] and Florida[156] all have caps on their punitive damages awards, businesses are more reluctant to locate in South Carolina than in its neighboring states for fear that they will be hit with a large award.[157] Logically, new businesses in the state would demand employees. Thus, legislators may be backing the bill because they want to demonstrate to their constituents that they are taking steps to foster job creation.

Opponents of the bill argue that the cap would do little more than prejudice hard-working individuals by limiting their potential awards if they bring suit against businesses for reprehensible conduct.[158] Furthermore, from 2007 to 2008, only seven of the 136 personal injury verdicts in Greenville, Charleston, and Richland counties included a punitive damages award.[159] Notably, five of those seven awards were less than $7,000 apiece.[160] Opponents, therefore, argue that the bill is unnecessary.[161] Some also argue that companies rarely look at state punitive damages law when deciding where to locate.[162]

154. N.C. GEN. STAT. § 1D-25 (2009).
155. GA. CODE ANN. § 51-12-5.1 (2000).
156. FLA. STAT. § 768.73 (2005).
157. Gina Smith, *House May Cap Damage Awards*, THE STATE, Mar. 3, 2010, at A1.
158. *See* Gina Smith & Leroy Chapman, Jr., Punitive Damages Limit Wins, THE STATE, Mar. 4, 2010, at B1.
159. Smith, *supra* note 157, at A5.
160. *Id.*
161. *Id.*
162. *Id.*

VI. WHAT THE FAIRNESS IN CIVIL JUSTICE ACT COULD DO TO PUNITIVE DAMAGES AWARDS

If passed, the Fairness in Civil Justice Act of 2011 will most affect *Campbell*'s single-digit ratio guideline. The single-digit guideline gives deference to punitive damages that are less than ten times the amount of compensatory damages awarded. The proposed legislation will reduce the punitive–compensatory damages ratio to a maximum of 3 to 1, unless the resulting dollar amount is less than $350,000. Aside from a relatively low compensatory damages amount, the ratio could only approach 10 to 1 if the defendant's conduct precluded application of the cap.

One may wonder if the legislature is overstepping its bounds by directing the judiciary's approach to punitive damages review. However, some states, including North Carolina and Alaska, have held that statutory punitive damages caps do not violate separation of powers principles.[163] In addition, Maryland's federal district court held that "[t]he power of the legislature to abolish the common law necessarily includes the power to set reasonable limits on recoverable damages in causes of action the legislature chooses to recognize."[164] A separation of powers argument against the Fairness in Civil Justice Act thus appears unlikely to succeed.

VII. CONCLUSION

Undoubtedly, a critical consideration regarding the Fairness in Civil Justice Act of 2011 involves determining the appropriate balance between assisting plaintiffs who may exaggerate their physical or economic injuries to obtain punitive damages and companies who may use the predictability of a punitive damages cap to determine what level of consumer injury is financially acceptable.

Supporters of the punitive damages cap logically argue that it will bring more enterprise and jobs to South Carolina. Nevertheless, legislators should remember that the prospect of punitive damages did not deter BMW or Boeing from entering South Carolina. Furthermore, they should be careful not to cater to the needs of businesses such that they ultimately deny plaintiffs the ability to recover damages for egregious acts.

Regardless of the final vote on the Act, *Mitchell v. Fortis Insurance Co.* has done much to clarify punitive damages law in South Carolina and to increase the efficiency of the state's judicial system.

Kyle A. Brannon

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163. *See* Evans *ex. rel.* Kutch v. State, 56 P.3d 1046, 1055–56 (Alaska 2002) (citing Franklin v. Mazda Motor Corp., 704 F. Supp. 1325, 1336 (D. Md. 1989)); Rhyne v. K-Mart Corp., 594 S.E.2d 1, 9 (N.C. 2004).

164. *Franklin*, 704 F. Supp. at 1336.