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THE IMPACT OF RECENT U.S. SUPREME COURT PUNITIVE DAMAGES JURISPRUDENCE ON OKLAHOMA'S PUNITIVE DAMAGES STATUTE AND JURY INSTRUCTIONS

ANDREW C. JAYNE*

I. Introduction

In *State Farm Mutual Automobile Insurance Co. v. Campbell*, the U.S. Supreme Court overturned a punitive damages award as "grossly excessive" in violation of the Due Process Clause of the Fourteenth Amendment for only the second time in the Court's history. Since the Court's decision in *Campbell*, legal commentators have disagreed about the significance of the opinion, and lower courts have struggled to apply *Campbell* in postverdict reviews of punitive damages awards. An even more puzzling question left open after *Campbell* concerns the degree of guidance a jury must be given before it assesses punitive damages. This question of procedural due process

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3. Compare Mark Bonino, *The U.S. Supreme Court and Punitve Damages: On the Road to Reform: After Years of Developing Its Jurisprudence, the Supreme Court in State Farm Signals that the Days of Runaway, Irrational Punitve Damages May Be Ending*, 70 Def. Couns. J. 432, 432 (2003) (stating that, in *Campbell*, the U.S. Supreme Court has signaled that it intends to limit, if not eliminate, punitive damages), and Michael J. Brady, *A New Predictability in Punitve Damages?*, FOR THE DEF., June 2003, at 10 (calling *Campbell* a "momentous decision and victory for insurers, corporations, and wealthy individuals throughout the land who face exposure to punitive damages"), with Larry Stewart, *Constitutional Requirements for Punitve Damages: Reality, Not Hyperbole — The Real Import of State Farm v. Campbell*, 78 FlA. B.J. 34, 34 (2004) ("*Campbell* is not a watershed decision but rather a fact-bound application of existing precedent that did not fundamentally change the standards the Supreme Court had established seven years earlier in [Gore].").
has been largely neglected by the Supreme Court since its 1991 opinion in *Pacific Mutual Life Insurance Co. v. Haslip.*

The Supreme Court’s renewed interest in procedural due process and jury instructions for punitive damages raises questions concerning the constitutional sufficiency of Oklahoma’s punitive damages statute and jury instructions. Oklahoma’s punitive damages statute provides the framework for the Oklahoma Uniform Civil Jury Instructions dealing with punitive damages. This framework defines the type of conduct that may justify an award of punitive damages, and incorporates escalating caps on the amount of such damages, based on a list of factors a jury may consider in determining the award. The framework differs significantly from both the punitive damages statutes at issue in *Campbell* and *Haslip* and from the punitive damages statutes currently in place in most states.

This Article argues that Oklahoma’s punitive damages statute and uniform civil jury instructions relating to punitive damages provide more than sufficient guidance to a jury presented with the option of imposing punitive damages. Oklahoma’s punitive damages framework adequately protects against the concerns underlying the Supreme Court’s punitive damages jurisprudence. Although some additional safeguards may still be necessary, in the vast majority of cases, Oklahoma’s system for imposing punitive damages will prevent a punitive damages award that could be rendered invalid on postverdict review as grossly excessive in light of the substantive due process limits discussed in *Campbell.*

Part II of this Article traces the line of U.S. Supreme Court cases leading up to *Campbell* and analyzes the *Campbell* decision itself. This part focuses on the Supreme Court’s approval of very minimal jury instructions in *Haslip* and the Court’s return to procedural due process in *Campbell.* Part III explains how Oklahoma’s punitive damages statute and punitive damages jury instructions work together in civil cases. Next, Part IV analyzes the constitutionality of Oklahoma’s punitive damages statute and jury instructions in light of *Campbell* and its predecessor cases. This part argues that

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7. Oklahoma Uniform Civil Jury Instructions, nos. 5.6, 5.7 (2d ed. 2002) [hereinafter OUJI-CIV].
Oklahoma’s current punitive damages jury instructions provide constitutionally sufficient guidance to a jury assessing whether to impose punitive damages. Finally, Part IV discusses the changes that will have to be made to Oklahoma’s punitive damages procedure in light of Campbell’s discussion on the use of evidence of out-of-state conduct by the defendant in other cases.

II. The Evolution of the Supreme Court’s Punitive Damages Jurisprudence

The U.S. Supreme Court’s jurisprudence involving substantive Fourteenth Amendment due process limitations on punitive damages awards can be traced back to the early twentieth century. These early cases, however, involved civil statutory penalties rather than punitive damages awards assessed by a jury. Supreme Court jurisprudence specifically relating to due process limits on punitive damages awards can only be traced back to the Court’s 1989 decision in "Browning-Ferris Industries of Vermont, Inc. v. Kelco Disposal, Inc." In "Browning-Ferris", a corporation challenged a $6 million punitive damages award in an antitrust case under the Eighth Amendment’s Excessive Fines Clause and the Due Process Clause of the Fourteenth Amendment. The Court held that the Excessive Fines Clause of the Eighth Amendment does not apply to punitive damages awards in civil cases between private parties. The Court also held that the petitioner failed to properly preserve the due process issue for appeal by failing to raise the issue before the district court or the court of appeals and by failing to address the argument in its petition of certiorari.

While the "Browning-Ferris" Court found that the petitioner failed to preserve its due process argument, the Court left open the possibility of a due process challenge to a punitive damages award. The majority noted:

The parties agree that due process imposes some limits on jury awards of punitive damages, and it is not disputed that a jury award

9. See TXO Prod. Corp. v. Alliance Res. Corp., 509 U.S. 443, 453-54 (1993) (citing a number of cases from the early twentieth century where the U.S. Supreme Court acknowledged that the Due Process Clause of the Fourteenth Amendment places substantive limits on the amount of monetary penalties a state may impose).
10. See id.
11. 492 U.S. 257 (1989). The "Browning-Ferris" Court considered as a matter of first impression “whether due process acts as a check on undue jury discretion to award punitive damages in the absence of any express statutory limit.” Id. at 276-77.
12. Id. at 259-60.
13. Id. at 262-76.
14. Id. at 276-77.
may not be upheld if it was the product of bias or passion, or if it was reached in proceedings lacking the basic elements of fundamental fairness.\textsuperscript{15}

Thus, \textit{Browning-Ferris} opened the door for the Court's first substantive review of a punitive damage award under the Due Process Clause of the Fourteenth Amendment less than two years later.

\textbf{A. Pacific Mutual Life Insurance Co. v. Haslip}

In \textit{Pacific Mutual Life Insurance Co. v. Haslip}, the Court addressed a properly presented challenge to a punitive damages award under the Due Process Clause of the Fourteenth Amendment. In \textit{Haslip}, the plaintiffs brought a fraud claim against their insurer, Pacific Mutual Life Insurance Company, after their insurer's agent misappropriated insurance premiums and then concealed the fact that the plaintiffs had lost their coverage.\textsuperscript{16} The Alabama jury awarded a lead plaintiff $200,000 in compensatory damages and $840,000 in punitive damages.\textsuperscript{17} After the Alabama Supreme Court upheld the punitive damages award,\textsuperscript{18} Pacific Mutual appealed to the U.S. Supreme Court, and the Court granted certiorari.\textsuperscript{19}

\textit{1. The Majority Opinion}

The majority in \textit{Haslip} began its review by noting that Alabama followed the common law method for assessing punitive damages, in which "the amount of the punitive award is initially determined by a jury instructed to consider the gravity of the wrong and the need to deter similar wrongful conduct."\textsuperscript{20} The \textit{Haslip} Court then pointed out that the "Court more than once has approved the common law method for assessing punitive awards."\textsuperscript{21} Given the long history of the Court's acceptance of the common law method for assessing punitive damages, the \textit{Haslip} Court was unable to find "that the

\textsuperscript{15} \textit{Id.} at 276. Justice Brennan's concurrence, which Justice Marshall joined, went a step further. Justice Brennan wrote, "I join the Court's opinion on the understanding that it leaves the door open for a holding that the Due Process Clause constrains the imposition of punitive damages in civil cases brought by private parties." \textit{Id.} at 280 (Brennan, J., concurring).
\textsuperscript{17} \textit{Id.} at 7 n.2.
\textsuperscript{20} \textit{Haslip}, 499 U.S. at 15.
\textsuperscript{21} \textit{Id.}
common law method for assessing punitive damages is so inherently unfair as to deny due process and be per se unconstitutional." 22

After approving the common law method for assessing punitive damages, the Haslip Court continued its analysis of the procedures used at the Alabama trial court level. The Court initially voiced its continued concerns "about punitive damages that 'run wild.'" 23 The Court refused, however, to apply a "bright-line" test for determining whether a particular punitive damages award was unconstitutionally excessive. 24 Instead, the Court preferred a general reasonableness assessment. 25 With these principles in mind, the Haslip Court found that the jury instructions used in that case provided constitutionally adequate guidance to the jury. 26

Finally, the Haslip Court reviewed Alabama's postverdict procedure for evaluating a punitive damages award. The Court found Alabama's procedure sufficient to determine whether a particular award is greater than reasonably

22. Id. at 17.
23. Id. at 18.
24. See id.
25. Id. at 19-20.
26. The entirety of the instructions on punitive damages presented to the jury in Haslip read as follows:

      Now, if you find that fraud was perpetrated then in addition to compensatory damages you may in your discretion, when I use the word discretion, I say you don't have to even find fraud, you wouldn't have to, but you may, the law says you may award an amount of money known as punitive damages.

      This amount of money is awarded to the plaintiff but it is not to compensate the plaintiff for any injury. It is to punish the defendant. Punitive means to punish or it is also called exemplary damages, which means to make an example. So, if you feel or not feel, but if you are reasonably satisfied from the evidence that the plaintiff, whatever plaintiff you are talking about, has had a fraud perpetrated upon them and as a direct result they were injured and in addition to compensatory damages you may in your discretion award punitive damages.

      Now, the purpose of awarding punitive or exemplary damages is to allow money recovery to the plaintiffs, it does to the plaintiff, by way of punishment to the defendant and for the added purpose of protecting the public by [deterring] the defendant and others from doing such wrong in the future. Imposition of punitive damages is entirely discretionarly with the jury, that means you don't have to award it unless this jury feels that you should do so.

      Should you award punitive damages, in fixing the amount, you must take into consideration the character and the degree of the wrong as shown by the evidence and necessity of preventing similar wrong.

       Id. at 6 n.1. The Supreme Court found that these instructions "enlightened the jury as to the punitive damages' nature and purpose, identified the damages as punishment for civil wrongdoing of the kind involved, and explained that their imposition was not compulsory." Id. at 19.
necessary to punish the defendant and deter similar conduct.\textsuperscript{27} The majority ultimately found that the jury instructions, along with the postverdict review by the trial court and the Alabama Supreme Court, provided the defendant with constitutionally sufficient due process.\textsuperscript{28}

2. Justice O’Connor’s Dissent

Justice O’Connor was the lone dissenting Justice in \textit{Haslip}, arguing that the common law procedures for awarding punitive damages used in Alabama violated the procedural arm of the Due Process Clause of the Fourteenth Amendment.\textsuperscript{29} Specifically, Justice O’Connor found that the jury instructions used in \textit{Haslip} were constitutionally flawed and Alabama’s postverdict review could not cure the standardless discretion inherent in its punitive damages jury instructions.\textsuperscript{30}

First, Justice O’Connor took issue with an instruction characterizing the award of punitive damages as “\textit{entirely discretionary} with the jury,” not to be made “\textit{unless this jury feels} that you should do so.”\textsuperscript{31} Justice O’Connor found that “[i]nstead of reminding the jury that its decision must rest on a factual or legal predicate, the instruction suggests that the jury may do whatever it ‘feels’ like.”\textsuperscript{32} Thus, for Justice O’Connor, Alabama’s common law punitive damages scheme would fail under a vagueness analysis.\textsuperscript{33}

Justice O’Connor was equally critical of an instruction dealing with the amount of punitive damages to assess, which stated, “Should you award punitive damages, in fixing the amount, you must take into consideration the character and the degree of the wrong as shown by the evidence and [the] necessity of preventing similar wrong.”\textsuperscript{34} Justice O’Connor disagreed with the majority’s position that this statement sufficiently limited the jury’s discretion in fixing an amount of punitive damages.\textsuperscript{35}

Justice O’Connor further indicated that postverdict review, no matter how thorough, cannot cure a jury verdict tainted by passion or prejudice stemming from a lack of guidance.\textsuperscript{36} While Justice O’Connor had no problem with the
factors Alabama appellate courts examine when reviewing a punitive damages award.\textsuperscript{37} she objected that the factors "play a role only after the jury rendered its verdict" and thus, the factors could not "cure the vagueness of the jury instructions."\textsuperscript{38}

Second, Justice O'Connor explained that even if Alabama's common law punitive damages scheme was not void for vagueness, the scheme still failed the Supreme Court's balancing test for procedural due process.\textsuperscript{39} In \textit{Mathews v. Eldridge},\textsuperscript{40} the Court set forth a "sliding-scale test for determining whether a particular set of procedures was constitutionally adequate."\textsuperscript{41} Under this test, the Court looks at "(1) the private interest at stake; (2) the risk that existing procedures will wrongly impair this private interest, and the likelihood that additional procedural safeguards can effect a cure; and (3) the governmental interest in avoiding these additional procedures."\textsuperscript{42} Justice O'Connor found that Alabama's procedures clearly deprived the defendants of property without due process of law under the \textit{Mathews} balancing test.\textsuperscript{43}

Of particular importance is Justice O'Connor's analysis of the second prong of the \textit{Mathews} balancing test, in which she focused heavily on the fact that Alabama could easily remedy the procedural deficiencies in its common law punitive damages scheme.\textsuperscript{44} For example, the state could (1) provide the jury with some or all of the factors the appellate courts considered when reviewing a punitive damages award in the form of jury instructions; (2) legislate fixed monetary limits for awards of punitive damages for particular types of conduct; or (3) bifurcate trials into liability and punitive damages phases and require clear and convincing evidence that the defendant acted with the requisite culpability at the punitive damages stage.\textsuperscript{45} Justice O'Connor

\textsuperscript{37} See \textit{id.} at 51-52 (O'Connor, J., dissenting) (citing Green Oil Co. v. Hornsby, 539 So. 2d 218, 223-24 (Ala. 1989) (setting forth factors for review)).
\textsuperscript{38} \textit{id.} at 52 (O'Connor, J., dissenting).
\textsuperscript{39} \textit{id.} at 53-60 (O'Connor, J., dissenting).
\textsuperscript{40} 424 U.S. 319 (1976).
\textsuperscript{41} \textit{Haslip}, 499 U.S. at 53 (O'Connor, J., dissenting) (citing \textit{Mathews}, 424 U.S. at 335).
\textsuperscript{42} \textit{id.}
\textsuperscript{43} \textit{id.} at 54 (O'Connor, J., dissenting). In analyzing the first prong of the \textit{Mathews} balancing test, Justice O'Connor found the private interest at stake to be substantial because "a jury would not exceed its discretion under state law by imposing an award of punitive damages that was deliberately calculated to bankrupt the defendant." \textit{id.}
\textsuperscript{44} \textit{id.} at 57 (O'Connor, J., dissenting).
\textsuperscript{45} \textit{id.} at 57-58 (O'Connor, J., dissenting). Justice O'Connor explained that bifurcating punitive damages and liability stages and requiring "clear and convincing evidence that the defendant acted with the requisite culpability" in the punitive damages stage would serve two goals. \textit{id.} at 58 (O'Connor, J., dissenting). First, the clear and convincing standard would constrain the jury's discretion and limit punitive damages to egregious cases only. \textit{id.} (citing
explained that any of these procedures would provide more "meaningful
guidance to juries, thereby lessening the chance of arbitrary and
discriminatory awards, without impairing the State's legitimate interest in
punishment and deterrence." Out of concerns for "federalism" and "judicial
restraint," however, Justice O'Connor refrained from designating a particular
method that states must adopt.

B. Post-Haslip and the Supreme Court's Focus on Substantive Due Process

After Haslip but before Campbell, the Court heard four additional
challenges to punitive damages awards under the Due Process Clause of the
Fourteenth Amendment. In these cases, however, the Court shifted its focus
from procedural to substantive due process.

In TXO Production Corp. v. Alliance Resources Corp. the Court made
explicit what it had hinted at two years earlier in Haslip — that the Due
Process Clause of the Fourteenth Amendment places "substantive limits" on
the amount of punitive damages a jury may award. From this point forward,
the Court's jurisprudence in this area focused almost exclusively on
addressing substantive concerns and articulating a workable test for
postverdict review of a punitive damages award. In turn, Haslip's
acceptance of minimal common law jury instructions became the benchmark
by which to judge jury instructions.

Dorsey D. Ellis, Jr., Punitive Damages, Due Process, and the Jury, 40 ALA. L. REV. 975, 995-96 (1989)). It would also "permit closer scrutiny of the evidence by trial judges and reviewing
courts." Id. Second, "the higher evidentiary standard would signal to the jury that it should
have a high level of confidence in its factual findings before imposing punitive damages." Id.

46. Id.
47. Id.
48. See Cooper Indus., Inc. v. Leatherman Tool Group, 532 U.S. 424 (2001); BMW of N.
50. See Franze & Scheuerman, supra note 8, at 440.
51. TXO, 509 U.S. at 453-55.
52. In Honda Motor Co. v. Oberg, 512 U.S. 415 (1994), the Court shifted its focus back
to procedural due process. However, the issue before the Court was whether Oregon's
prohibition against postverdict review of the amount of a punitive damages award violated
procedural due process. Id. at 418. The U.S. Supreme Court concluded that Oregon's
prohibition against postverdict review of the amount of punitive damages awards violated the
Fourteenth Amendment and remanded the case to the Oregon Supreme Court for further
proceedings. Id. at 435.
53. See Franze & Scheuerman, supra note 8, at 488-89.
The Court further refined its substantive due process analysis of punitive damages awards in *BMW of North America, Inc. v. Gore*.\(^54\) *Gore* articulated three "guideposts" for lower courts to use in postverdict reviews, and struck down a punitive damages award as unconstitutionally excessive for the first time in the Court’s history.\(^55\)

The *Gore* Court also found that the jury’s consideration of certain out-of-state conduct by the defendant — which was not shown to be illegal in the state in which it occurred and did not cause the injury at issue — was constitutionally improper.\(^56\) *Gore* acknowledged that the amount of the award is not the only basis for finding a punitive damages award offensive to the Due Process Clause of the Fourteenth Amendment, but that punitive damages awards based on improper considerations by the jury may also violate substantive due process.\(^57\)

Although the *Gore* Court did not approve of a jury’s use of out-of-state conduct by a defendant as a "multiplier in computing the amount of its punitive sanction" — which had actually occurred with the jury in *Gore*\(^58\) — the Court made it clear that out-of-state evidence may be used to assess the need for punitive damages.\(^59\) Specifically, the Court found that out-of-state conduct may be relevant to the "degree of reprehensibility of the defendant’s conduct."\(^60\) Evidence that a defendant engaged in a pattern or practice of conduct "while knowing or suspecting that it was unlawful would provide relevant support for an argument that strong medicine is required to cure the defendant’s disrespect for the law."\(^61\)

In *Gore*, the Court also articulated three guideposts courts should use during postverdict review of a punitive damages award: (1) the degree of reprehensibility of the defendant’s conduct; (2) the disparity between the

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\(^54\) 517 U.S. 559 (1996).
\(^55\) See id. at 574-86.
\(^56\) Id. at 568-74.
\(^57\) Id.; see also Franze & Scheuerman, supra note 8, at 468 ("Apart from the guideposts, most courts ignored BMW’s holding that a punitive award may violate due process not only if its size is grossly excessive, but also if the award is based on improper considerations.").
\(^58\) The plaintiff had argued that a $4 million punitive damages verdict was reasonable in light of the fact that BMW had sold nearly one thousand cars under the same circumstances in other states, and the jury apparently accepted the plaintiff’s punitive damages formula. *Gore*, 517 U.S. at 564. The Alabama Supreme Court, however, found the jury’s approach flawed, holding instead that a $2 million punitive damages award was appropriate and ordered a remittitur in that amount. Id. at 567.
\(^59\) Id. at 574 n.21.
\(^60\) Id.
\(^61\) Id. at 576-77.
actual or potential harm to the plaintiff and the punitive damages award; and (3) the disparity between the punitive damages award and civil or criminal penalties imposed in comparable cases. Though the Court still refused to "draw a bright line marking the limits of a constitutionally acceptable punitive damages award," after applying the three guideposts, the Court found that the $2 million punitive damages award, as limited by the Alabama Supreme Court, was "grossly excessive" in violation of the Due Process Clause of the Fourteenth Amendment.

C. State Farm Mutual Automobile Insurance Co. v. Campbell

Seven years later, in State Farm Mutual Automobile Insurance Co. v. Campbell, the U.S. Supreme Court attempted to clarify questions raised by lower courts in applying the Gore guideposts and address how lower courts should treat evidence of a defendant's out-of-state conduct in punitive damages situations. Within the Campbell Court's analysis of the jury's use of out-of-state conduct, the Court also mandated that courts give particular punitive damages jury instructions in certain circumstances. The Court's mandate that particular jury instructions be given in certain cases is significant in determining what instructions Oklahoma courts are required to give to juries assessing punitive damages. It may also signal that the Court is going to require more than the Haslip common law instructions in order to comply with procedural due process.

1. The Facts and Procedural History of Campbell

The Campbell dispute arose out of a 1981 three-car wreck that occurred when Mr. Campbell, who was accompanied by his wife in the passenger seat, attempted to pass six vans traveling ahead of him on a two-way highway. Todd Ospital, who was driving in the opposite direction, swerved onto the
shoulder to avoid a head-on collision with Campbell, and in the process collided with a vehicle driven by Robert Slusher.\textsuperscript{69} Ospital died in the crash, and Slusher suffered serious and permanent injuries.\textsuperscript{70}

Slusher brought a tort claim against the Campbells, who were insured by State Farm, and against Ospital's estate.\textsuperscript{71} Ospital's estate cross-claimed against Campbell for wrongful death, and Campbell cross-claimed against Ospital's estate for contribution.\textsuperscript{72}

Despite evidence indicating that Campbell was at fault, State Farm refused to settle the case and rejected several offers from Slusher and Ospital's estate to settle for the policy limits.\textsuperscript{73} Ultimately, the wrongful death and tort action proceeded to trial, and the jury found Campbell entirely at fault, awarding Slusher $135,000 and Ospital $50,849.\textsuperscript{74}

In 1989, the Utah Supreme Court denied State Farm's appeal in the wrongful death and tort action, and State Farm finally paid the entire judgment, including the excess above Campbell's policy limits.\textsuperscript{75} Subsequently, Campbell filed suit against State Farm alleging insurance bad faith, fraud, and intentional infliction of emotional distress.\textsuperscript{76}

Campbell premised his bad faith claim on State Farm's failure to inform him early on in the wrongful death and tort action that the evidence indicated that he was at fault.\textsuperscript{77} While Campbell had consistently maintained that he was not at fault during the wrongful death and tort action, he explained during the bad faith lawsuit that he would have agreed to settle the wrongful death and tort action if State Farm had informed him of the overwhelming evidence indicating his fault.\textsuperscript{78}

The trial court initially granted summary judgment in favor of State Farm because the insurer had ultimately paid the excess judgment.\textsuperscript{79} The Utah Court of Appeals reversed, finding that the bad faith and intentional infliction
of emotional distress claims could be premised on State Farm’s unreasonable delay in paying the excess judgment regardless of whether the judgment was ultimately satisfied.\textsuperscript{80}

The trial court then bifurcated the proceedings into liability and damages phases.\textsuperscript{81} In the first phase, the jury found State Farm liable based on its unreasonable refusal to settle when there was such a high likelihood of an excess verdict.\textsuperscript{82} Before the damages phase, however, State Farm renewed its prior motions in limine to exclude all evidence of its out-of-state conduct in unrelated cases.\textsuperscript{83} The trial court denied these motions, and Campbell’s attorneys were allowed to present substantial evidence concerning State Farm’s “Performance, Planning and Review” or “PP&R” policy.\textsuperscript{84} Campbell’s counsel used this evidence to show a nationwide scheme by State Farm to cut the costs of claims at the expense of its insureds.\textsuperscript{85} At least some of this evidence included State Farm’s handling of first-party claims that “bore no relation to third-party automobile insurance claims, the type of claim underlying the Campbells’ complaint against the company.”\textsuperscript{86}

At the conclusion of the damages phase, the jury awarded the Campbells $2.6 million in compensatory damages and $145 million in punitive damages.\textsuperscript{87} The trial court then remitted the jury awards to $1 million in compensatory damages and $25 million in punitive damages.\textsuperscript{88} Attempting to apply \textit{Gore}'s three guideposts on appeal, and relying on the “extensive evidence concerning the PP&R policy” and testimony concerning State Farm’s “massive wealth,” the Utah Supreme Court reinstated the $145 million punitive damages award.\textsuperscript{89}

\textbf{2. The Supreme Court’s Concerns About Procedural Due Process}

The U.S. Supreme Court began its analysis of the award in \textit{Campbell} by once again expressing concern over the lack of guidance given to juries presented with the opportunity to impose punitive damages. The Court noted that punitive damages serve the same purposes as criminal penalties, except

\textsuperscript{82} \textit{Campbell}, 65 P.3d at 1142-43.
\textsuperscript{83} \textit{Campbell}, 538 U.S. at 414.
\textsuperscript{84} \textit{Id.} at 414-15.
\textsuperscript{85} \textit{Id.}
\textsuperscript{86} \textit{Id.}
\textsuperscript{87} \textit{Id.}
\textsuperscript{88} \textit{Id.}
\textsuperscript{89} \textit{Id.}
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"defendants subjected to punitive damages in civil cases have not been accorded the protections applicable in a criminal proceeding."\(^{90}\) This lack of procedural guidance, the Court reasoned, "pose[s] an acute danger of arbitrary deprivation of property."\(^{91}\)

The Campbell Court indicated that its procedural due process concerns were heightened because the jury was presented with "evidence that [had] little bearing as to the amount of punitive damages that should be awarded," and "vague instructions, . . . [which did] little to aid the decisionmaker in its task of assigning appropriate weight to evidence . . . ."\(^{92}\) After Campbell, the type of evidence presented to the jury will be central to the Court's review of procedural and substantive due process protections in any punitive damages award.

3. Campbell's "Reprehensibility" Analysis

After expressing its general concerns about the lack of guidance the jury received when assessing punitive damages, the Court moved on to its substantive due process analysis employing the three guideposts articulated in Gore.\(^{93}\) The Court began its analysis under the first guidepost — the degree of reprehensibility of the defendant's misconduct. Under this guidepost, courts should consider whether: (1) the harm caused was physical as opposed to economic; (2) the tortious conduct evinced an indifference to or a reckless disregard for the health or safety of others; (3) the target of the conduct was financially vulnerable; (4) the conduct involved repeated actions or was an isolated incident; and (5) the harm was the result of intentional malice, trickery, deceit, or mere accident.\(^{94}\) The Court explained that the "existence of any one of these factors weighing in favor of a plaintiff may not be sufficient to sustain a punitive damages award; and the absence of all of them renders any award suspect."\(^{95}\)

The Campbell Court then focused its analysis on the jury's reliance on State Farm's out-of-state conduct and the Utah Supreme Court's reliance on this same out-of-state conduct as the basis for approving the punitive damages award, which had been reduced to $25 million.\(^{96}\) The Court pointed out that a substantial portion of the evidence presented to the jury during the punitive

\(^{90}\) Id. at 417.

\(^{91}\) Id.

\(^{92}\) Id. at 418.

\(^{93}\) Id. at 418-29.

\(^{94}\) Id. at 418 (citing BMW of N. Am., Inc. v. Gore, 517 U.S. 559, 576-77 (1996)).

\(^{95}\) Id. at 419.

\(^{96}\) Id. at 420.
damages phase of the trial involved conduct by State Farm in other out-of-state cases that had no similarity to the facts of the Campbell’s claim.97 Specifically, the Court noted that many of these instances involved first-party claims that had no similarity to the third-party claim at issue in Campbell.98

As the Gore Court previously indicated, a state lacks a legitimate interest in punishing lawful conduct committed in another state.99 Likewise, the Campbell Court found that, in general, a state does not have a legitimate interest in imposing punitive damages to punish a defendant for unlawful acts committed outside of the state.100 The Campbell Court ultimately concluded that the Utah Supreme Court’s consideration of State Farm’s out-of-state conduct as part of the reprehensibility analysis was improper.101

The Court was careful not to foreclose the use of out-of-state conduct to support a punitive damages claim in all circumstances.102 Out-of-state conduct may be used to show the “deliberateness or culpability” of a defendant’s action, or a pattern or practice of certain conduct.103 This conduct must, however, be similar to the conduct at issue in the lawsuit. Moreover, there must be a nexus between the specific harm suffered by the plaintiff and the out-of-state conduct that the plaintiff seeks to admit as evidence of the defendant’s culpability.104 Further, if a plaintiff can establish the requisite nexus between the particular facts of the case and the out-of-state conduct, the jury “must be instructed . . . that it may not use evidence of out-of-state conduct to punish a defendant for action that was lawful in the jurisdiction where it occurred.”105

The Court’s command that a jury be provided a particular instruction significantly departs from the Court’s prior punitive damages jurisprudence. Campbell is the first case in which the U.S. Supreme Court required that states provide a specific punitive damages jury instruction, other than the minimal common law instructions that merely informed the jury of the nature and

97. Id. at 423-24.
98. Id.
100. Campbell, 538 U.S. at 421. The Due Process Clause, according to the Court, “does not permit courts, in the calculation of punitive damages, to adjudicate the merits of [third] parties’ hypothetical claims against a defendant under the guise of the reprehensibility analysis . . . .” Id. at 423.
101. Id. at 424.
102. Id. at 422-24.
103. Id. at 422; see also Gore, 517 U.S. at 574 n.21.
104. Campbell, 538 U.S. at 422-23.
105. Id. at 422 (citing Gore, 517 U.S. at 572-73).

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purpose for punitive damages.106 While the Court previously noted its concern with vague jury instructions, until Campbell, it had consistently maintained that it would not require states to provide a particular jury instruction.107 The Campbell Court's departure from this philosophy signals that the Court might be willing to reexamine its prior restraint and require states to provide particular punitive damages jury instructions.108

4. The Second Guidepost

The Court moved on to analyze the ratio between the harm or potential harm to the plaintiff and the amount of the punitive damages award. The Court renewed its previous refusal to "impose a bright-line ratio which a punitive damages award cannot exceed." In dicta, however, the Court referenced a constitutional limitation on the ratio between actual and punitive damages, stating that, "[the Court's] jurisprudence and the principles it . . . established demonstrate . . . , that, in practice, few awards exceeding a single-digit ratio between punitive and compensatory damages . . . will satisfy due process." The Court explained that ratios "greater than those [it had] previously upheld may comport with due process where 'a particularly egregious act has resulted in only a small amount of economic damages.'" Subsequently, the Court found the punitive damages award in Campbell unreasonable and disproportionate to the economic harm suffered by the plaintiff.112

5. The Third Guidepost

The Court did not expend much effort analyzing the punitive damages award under the third Gore guidepost, which tests the disparity between the punitive damages award and civil or criminal penalties imposed in comparable cases. The Court recognized that in the past it had looked at criminal penalties as well as civil penalties in comparable cases. In Campbell, however, the

106. See Franze & Scheuerman, supra note 8, at 507-08.
108. See Franze & Scheuerman, supra note 8, at 511-24.
109. Id. at 425.
110. Id.
111. Id. (quoting Gore, 517 U.S. at 582). "A higher ratio may also be justified in cases in which the injury is hard to detect or the monetary value of noneconomic harm might have been difficult to determine." Gore, 517 U.S. at 582.
113. Id. at 428.
Court noted that there was less utility in comparing civil penalties with criminal penalties because a court may only impose criminal penalties after the "heightened protections of a criminal trial have been observed." In terms of civil penalties, the Court held that a $10,000 penalty for fraud was the only comparable civil penalty. Ultimately, the Court found that such a penalty could not justify a $145 million punitive damages award. The Court concluded that the punitive damages verdict failed all three of the *Gore* guideposts and remanded the case.

Before *Campbell*, the Court focused its attempts to limit excessive punitive damages awards on the postverdict review of such awards under the substantive due process rubric. However, *Campbell*’s pronouncement that a court must give a jury a particular instruction regarding the use of out-of-state conduct in other cases signals a synthesis of the Court’s substantive and procedural due process jurisprudence. At a minimum, *Campbell* indicates that the Court may further deviate from its historical hesitancy to impose procedural due process requirements on the states with respect to punitive damages. In light of this development, Oklahoma must reevaluate its procedures for imposing punitive damages in civil cases.

### III. Oklahoma’s Punitive Damages Procedure

#### A. Oklahoma’s Punitive Damages Statute

Oklahoma’s punitive damages statute is found at title 23, section 9.1 of the Oklahoma Statutes. Section 9.1 governs when a court may award punitive damages and sets limits on the amount of punitive damages a plaintiff can recover by creating three separate categories of punitive damages caps. These categories are based on the reprehensibility of the defendant’s conduct. Thus, before the jury can decide whether to award punitive damages, it must first make a finding as to the level of reprehensibility of the defendant’s

114. *Id.*
115. *Id.*
116. *Id.*
117. *Id.*
119. See *Franze & Scheuerman, supra* note 8, at 511-12.
121. *See id.*

https://digitalcommons.law.ou.edu/olr/vol57/iss4/13
conduct. This finding controls the amount of punitive damages the jury may assess in the second stage of the proceedings. 122

For a plaintiff to recover any punitive damages under Category I, the jury must find by clear and convincing evidence that the defendant "has been guilty of reckless disregard for the rights of others" or "an insurer has recklessly disregarded its duty to deal fairly and act in good faith with its insured." 123 If the jury makes such a finding, it may then award punitive damages after an award of actual damages has been made. 124 Category I punitive damages are limited to the greater of $100,000 or the amount of actual damages. 125

For a plaintiff to recover Category II punitive damages, the jury must find by clear and convincing evidence that the defendant "acted intentionally and with malice towards others" or that an insurer "has intentionally and with malice breached its duty to deal fairly and act in good faith with its insured." 126 If the jury makes such a finding, it may then award the greater of (1) $500,000, (2) twice the amount of actual damages, or (3) "the increased financial benefit derived by the defendant or insurer as a direct result of the conduct causing the injury to the plaintiff and other persons or entities." 127

Finally, Category III allows a jury to award an unlimited amount of punitive damages in specific situations. 128 To award Category III punitive damages, however, there must be two separate findings: one by the jury and one by the trial judge. First, the jury must find that the defendant "acted intentionally and with malice towards others" or that an insurer "has intentionally and with malice breached its duty to deal fairly and act in good faith with its insured." 129 Then, in a separate proceeding outside the presence of the jury, the trial judge must make a finding on the record that "there is evidence beyond a reasonable doubt that the defendant or insurer acted intentionally and with malice and engaged in conduct life-threatening to humans . . . ." 130 Only after the jury and the trial judge make these separate findings is the jury

122. Id.
123. Id. § 9.1(B). The text of section 9.1 deals with defendants in general and insurers in particular. The language in the statute referring to the "insurer" is limited to bad faith lawsuits.
124. Id.
125. Id.
126. Id. § 9.1(C).
127. Id.
128. Id. § 9.1(D).
129. Id.
130. Id.
allowed to award punitive damages without regard to the limitations set forth under Categories I and II.\footnote{131}

In the second stage, after the jury has found that the defendant acted with the requisite conduct and intent to qualify for either Category I, II, or III punitive damages, the jury is presented with the following list of factors to consider when determining the amount of punitive damages to award:

- The seriousness of the hazard to the public arising from the defendant’s misconduct;
- The profitability of the misconduct to the defendant;
- The duration of the misconduct and any concealment of it;
- The degree of the defendant’s awareness of the hazard and of its excessiveness;
- The attitude and conduct of the defendant upon discovery of the misconduct or hazard;
- In the case of a defendant which is a corporation or other entity, the number and level of employees involved in causing or concealing the misconduct; and
- The financial condition of the defendant.\footnote{132}

Section 9.1 explicitly provides that the jury must predicate any award made under Category I, II, or III on this list of factors.\footnote{133}

**B. Oklahoma’s Punitive Damages Jury Instructions — Stage One**

The Oklahoma Uniform Civil Jury Instructions on punitive damages track the procedures set forth in section 9.1.\footnote{134} The punitive damages jury instruction given to Oklahoma juries in the first stage of the trial asks the jury to make a finding regarding whether the defendant acted in reckless disregard of the rights of others\footnote{135} or acted intentionally and with malice toward others.\footnote{136} This jury instruction explicitly states that it is the plaintiff’s burden

\begin{footnotes}
\footnote{131. \textit{Id.}} \\
\footnote{132. \textit{Id.} \S 9.1(A).} \\
\footnote{133. \textit{Id.} \S 9.1(E).} \\
\footnote{134. See OUJI-CIV, supra note 7, nos. 5.5, 5.6, 5.9. This article addresses the constitutionality of section 9.1 and its corresponding jury instructions.} \\
\footnote{135. Reckless disregard for the rights of others occurs when the defendant "was either aware, or did not care, that there was a substantial and unnecessary risk that [his] conduct would cause serious injury to others." OUJI-CIV, supra note 7, no. 5.6. The defendant's conduct can only be considered in reckless disregard of another's rights if it was "unreasonable under the circumstances" and there was "a high probability that the conduct would cause serious harm to another person." \textit{Id.}} \\
\footnote{136. Malice "involves either hatred, spite, or ill-will, or else the doing of a wrongful act}
\end{footnotes}
to make one or both of these showings by clear and convincing evidence.\textsuperscript{137} Finally, the instruction informs the jury that it cannot award punitive damages without meeting this standard.\textsuperscript{138} The first-stage verdict form then allows the jury to indicate whether it finds by clear and convincing evidence that the defendant acted in reckless disregard for the rights of others or whether the defendant acted intentionally and with malice toward others.\textsuperscript{139}

C. Oklahoma’s Punitive Damages Jury Instructions — Stage Two

If the jury does not find by clear and convincing evidence that the defendant either recklessly disregarded the rights of others or acted intentionally and with malice toward others, it cannot award punitive damages and there is no second stage to the trial. If, however, the jury finds that the defendant’s conduct rose to one of these levels, the trial will proceed to the second stage. The amount of punitive damages the jury may award is limited by the jury’s findings in the first stage.\textsuperscript{140}

The second-stage, punitive damages jury instruction begins by explaining to the jury that the purpose of punitive damages is to punish the defendant and to deter the defendant and others from similar conduct.\textsuperscript{141} The instruction also makes it clear, however, that the jury is not required to assess any punitive damages, and any award of punitive damages must be based on sound reason.\textsuperscript{142} Finally, the second-stage instruction lists eight factors the jury may consider in determining the amount of punitive damages.\textsuperscript{143} The instruction permits the jury to award up to the amounts set by the caps in section 9.1.\textsuperscript{144}

\textsuperscript{137} Clear and convincing evidence means “highly probable and free from serious doubt.”\textsuperscript{138} Id.\textsuperscript{139} Id. no. 5.7.\textsuperscript{140} 23 OKLA. STAT. § 9.1 (2001). Unless the plaintiff qualifies for uncapped punitive damages under Category III, the punitive damages jury instruction given in the second stage reflects the caps in Category I or II outlined in section 9.1.\textsuperscript{141} Id.\textsuperscript{142} OUJI-CIV, supra note 7, no. 5.9.\textsuperscript{143} Id.\textsuperscript{144} The wording of these eight factors has been modified slightly from the seven factors listed in section 9.1 so that they may be more easily understood by the jury. The substance of the eight factors in this jury instruction, however, are identical to the seven factors listed in section 9.1. See id.\textsuperscript{145} Id.
IV. The Impact of State Farm Mutual Automobile Insurance Co. v. Campbell on Oklahoma's Punitive Damages Statute and Jury Instructions

Oklahoma's punitive damages procedures meet the minimum standard set forth by the U.S. Supreme Court in Haslip.145 Indeed, Oklahoma has incorporated all of the procedural safeguards suggested in Justice O'Connor's dissent into its punitive damages regime.146 However, should the Court conduct a more searching analysis of states' procedures for imposing punitive damages, whether Oklahoma's punitive damages regime provides adequate guidance to Oklahoma juries is unclear.

A. Bifurcation and a Clear and Convincing Standard of Proof

Oklahoma's framework for imposing punitive damages provides the jury with factors to consider when contemplating whether to assess punitive damages as well as several additional procedural safeguards to prevent excessive and arbitrary awards.147 Not only do these safeguards address the procedural due process concerns noted by the Supreme Court throughout its Fourteenth Amendment punitive damages jurisprudence, but they also alleviate some of the substantive due process issues that the Court has traditionally left to postverdict review.

For example, Oklahoma's punitive damages framework requires that courts bifurcate the punitive damages portion of a trial into two stages. In the first stage of a trial, the jury makes a determination on liability, actual damages, and whether the defendant's conduct was sufficiently egregious to warrant any punitive damages. The amount of punitive damages, if any, is determined in a second stage proceeding that only occurs if the jury finds in the first stage that the defendant is liable and that the defendant's conduct was sufficiently reprehensible to warrant punitive damages.148 Oklahoma also requires the plaintiff to show by clear and convincing evidence that the defendant's conduct was sufficiently reprehensible to justify punitive damages.149 According to Justice O'Connor, requiring clear and convincing evidence that

146. Justice O'Connor's proposal included (1) bifurcating trials into liability and punitive damages stages; (2) requiring clear and convincing evidence that the defendant acted with the requisite conduct to warrant punitive damages; (3) placing monetary maximums on awards of punitive damages; and (4) providing the jury with a list of factors to consider when deliberating the propriety of a punitive damages award. Id. at 57-58 (O'Connor, J., dissenting).
147. See supra Part II.
148. See supra Part III (fully discussing bifurcation).
the defendant acted with the requisite culpability not only constrains the jury’s
discretion and limits punitive damages to the more egregious cases, it also
"signal[s] to the jury that it should have a high level of confidence in its
factual findings before imposing punitive damages." 150

B. Oklahoma’s Caps on Punitive Damages Help Alleviate the Court’s
Concerns About Punitive Damages Awards that Grossly Exceed the
Amount of Compensatory Damages

Oklahoma’s caps on punitive damages are also one of the methods for
preventing excessive and arbitrary punitive damages awards suggested by
Justice O’Connor in Haslip. 151 The escalating caps under Oklahoma’s
punitive damages statute ensure that the total dollar amount of any punitive
damages award reflects the level of culpability of the defendant’s conduct as
required by the second guidepost in Gore.

Gore’s second guidepost requires courts to examine the ratio between the
harm or potential harm to the plaintiff and the punitive damages award. 152
Although the Supreme Court in Campbell refused "to impose a bright-line
ratio which a punitive damages award cannot exceed," 153 the Court did state
that "few awards exceeding a single-digit ratio between punitive and
compensatory damages, to a significant degree, will satisfy due process." 154

Under Oklahoma’s punitive damages statute, the concern over punitive
damages awards that drastically exceed the amount of actual damages is
significantly limited because of the three categories limiting the amount of
punitive damages. For example, under Category I, the jury may not award
punitive damages in excess of the greater of $100,000 or the amount of actual
damages awarded. 155 This limitation should, in most cases, prevent any
punitive damages award that is more than nine times greater than the amount
of compensatory damages awarded by the jury. The only way a Category I
award could exceed a single-digit ratio between punitive and compensatory
damages would be a situation where actual damages were $10,000 or less and
the punitive damages award was close to the $100,000 maximum permitted
under Category I. While such an award would surpass the single-digit ratio

150. Haslip, 499 U.S. at 58 (O’Connor, J., dissenting).
151. Id.
of N. Am., Inc. v. Gore, 517 U.S. 559, 582 (1996)).
(1993)).
154. Id. at 425.

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noted by the Campbell Court, there is a strong chance, given Oklahoma’s detailed punitive damages procedures, that such an award would fall into one of the exceptions to the nine-to-one ratio described by the Supreme Court.

The Court in Campbell recognized that there are cases where ratios greater than those previously upheld by the Court may comport with due process. These are generally cases where “a particularly egregious act has resulted in only a small amount of economic damages” or where “the injury is hard to detect or the monetary value of the non-economic harm might have been difficult to determine.” While a Category I punitive damages award could exceed the nine-to-one ratio and thus warrant a reversal on appeal, appellate courts should consider that Oklahoma has incorporated significant procedural safeguards to prevent arbitrary and excessive punitive damages awards, and evaluate whether the particular case is one that justifies an award of punitive damages greater than nine times the actual damages.

The analysis of Category II punitive damages is similar in most cases. Under Category II, a plaintiff may recover the greater of $500,000, twice the amount of actual damages, or the increased financial benefit derived by the defendant as a result of the conduct causing the injury to the plaintiff and other persons or entities. Unless the award is based on the increased financial benefit to the defendant, the Category I analysis applies. When dealing with Category II, the dollar limit on the amount of punitive damages that may be awarded increases, as does the level of conduct that must be proven by clear and convincing evidence. In most cases, twice the amount of actual damages or $500,000 should not offend due process because in most cases awards under this provision will not reach or exceed the nine-to-one punitive damages to actual damages ratio.

As for awards based on the defendant’s increased financial gain as a result of the conduct causing harm to the plaintiff and others, this issue is more complex. To the extent the award is based solely on the defendant’s financial gain from conduct causing harm to the plaintiff, the U.S. Supreme Court would likely find that the award does not offend due process. Such an award may be particularly appropriate in terms of realizing states’ legitimate interests in imposing punitive damages — retribution and deterrence. When a Category II punitive damages award exceeds the compensatory damages award by more than a single-digit ratio, the appellate court should consider

156. See Campbell, 538 U.S. at 424.
157. Id. (quoting Gore, 517 U.S. at 582).
159. See Campbell, 538 U.S. at 416.
whether the facts and circumstances of the case warrant the exception described in Campbell.

Additional due process concerns may be raised, however, if the cap under a Category II award is based in whole or in part on the defendant’s increased financial gain resulting from similar conduct causing harm to persons other than the plaintiff. Campbell’s extensive language denouncing the use of out-of-state conduct as a basis for a punitive damages award would prohibit relying on any such out-of-state conduct to set a cap under Category II because it would likely violate the substantive aspect of the Fourteenth Amendment Due Process Clause.

If a plaintiff could show similar conduct that took place in Oklahoma causing injury to Oklahoma residents, however, such evidence probably could be the basis for establishing a cap under Category II. Oklahoma has a legitimate state interest in punishing its own residents for conduct taking place within its borders. As long as the conduct in issue was sufficiently similar to the conduct causing harm to the plaintiff, caps based on the defendant’s financial gain from similar conduct taking place in Oklahoma and causing injury to Oklahoma residents probably could be used to establish a Category II cap.

Category III removes the cap and allows the jury to impose an unlimited award of punitive damages. Despite Oklahoma’s procedural safeguards concerning Category III, Oklahoma courts should not conclude that an award by an Oklahoma jury under Category III is completely immune from reduction given the strong language in Campbell condemning large punitive awards. However, the evidentiary findings that the jury and trial judge must make before the cap on punitive damages is lifted ensure that only the most egregious cases fall within Category III.

Category III requires factual findings by the trial judge based on the criminal system’s burden of proof — beyond a reasonable doubt — before it can lift the punitive damages caps. This additional procedural hurdle of requiring an evidentiary finding by the trial judge under the criminal burden of proof seems to negate some of Campbell’s strong skepticism of large punitive damage awards.

160. Id. at 419-24.
161. Id.
162. See id. at 422-24.
163. 23 OKLA. STAT. § 9.1(D).
164. See supra Part III.A.
165. 23 OKLA. STAT. § 9.1(D)(2).
166. Campbell, 538 U.S. at 417 (noting that punitive damages are not akin to criminal
Overall, Oklahoma’s three-category system for controlling punitive damages, along with the bifurcation of the liability and punitive damages stages and the increased burden of proof, provides Oklahoma juries with much less discretion than the Utah jury in *Campbell*. Moreover, these procedural mechanisms ensure that most punitive damages awards in Oklahoma are rationally related to the actual damages award and unlimited awards are only permitted in the most egregious cases. These procedural safeguards lend legitimacy, fairness, and due process to Oklahoma juries’ awards that were not present in *Campbell*.

C. Whether the Factors an Oklahoma Jury is Allowed to Consider When Assessing the Amount of Punitive Damages to Impose Comply with the Supreme Court’s Punitive Damages Jurisprudence

As explained previously, Oklahoma’s second-stage, punitive damages jury instruction provides a list of factors the jury may consider when determining the amount of punitive damages to impose.167 These factors all center on the reprehensibility of the defendant’s conduct.168

One factor, however, concerns the wealth of the defendant.169 The idea that a jury may only focus on the wealth of the defendant, particularly an out-of-state defendant, has troubled the U.S. Supreme Court. More than once, the Court has noted that “[t]he wealth of a defendant cannot justify an otherwise unconstitutional punitive damages award.”170 The Court has consistently acknowledged, however, that presentation of evidence of a defendant’s financial wealth is not per se unconstitutional and may serve a legitimate purpose in a jury’s determination.171

Oklahoma juries are instructed that they may not consider the financial wealth of the defendant until after the jury has already made a determination

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167. See supra note 132 and accompanying text; OUJI-CIV, supra note 7, no. 5.9.
168. See *Campbell*, 538 U.S. at 419 (listing factors such as whether (1) the harm caused was physical as opposed to economic; (2) the tortious conduct evinced an indifference to or a reckless disregard of the health or safety of others; (3) the target of the conduct was financially vulnerable; (4) the conduct involved repeated actions or was an isolated incident; and (5) the harm was the result of intentional malice, trickery, deceit, or mere accident).
170. *Campbell*, 538 U.S. at 427 (Breyer, J., concurring).
171. Id. (quoting BMW of N. Am., Inc. v. Gore, 517 U.S. 559, 591 (1996)) (“Since a fixed dollar award will punish a poor person more than a wealthy one, one can understand the relevance of this factor to the State’s interest in retribution (though not necessarily to its interest in deterrence, given the more distant relation between a defendant’s wealth and its responses to economic incentives.”).
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about the level of the defendant's conduct. Furthermore, the second-stage, punitive damages jury instruction informs the jury that "the purpose of punitive damages is to punish and not destroy a defendant." Taken together, these instructions may actually cause a jury to decrease a punitive damages award or bring an otherwise excessive award within constitutional limits.

D. The Use of Evidence of a Defendant's Out-of-State Conduct in Different Cases After Campbell

The U.S. Supreme Court first admonished the use of a defendant's out-of-state conduct in different cases to justify a punitive damages award in Gore. Campbell reaffirmed this position, noting that "[a] State cannot punish a defendant for conduct that may have been lawful where it occurred." Nevertheless, the Court did not place an absolute prohibition on the use of a defendant's out-of-state conduct in other cases during a punitive damages proceeding.

If a plaintiff wants to use evidence of a defendant's acts in other jurisdictions, however, the acts must be similar to the conduct at issue in the present lawsuit. Further, if a plaintiff admits evidence of similar out-of-state conduct to show the deliberateness and culpability of the defendant's actions, the trial court must instruct the jury that "it may not use evidence of out-of-state conduct to punish a defendant for action that was lawful in the jurisdiction where it occurred."

Several of the factors presented to Oklahoma juries when considering the amount of punitive damages could implicate out-of-state conduct. For example, the defendant's out-of-state conduct in other cases could show the defendant's awareness of its conduct, its consequences, and the hazard to the public created by such conduct. Similarly, out-of-state conduct in other cases could also show the attitude and conduct of the defendant upon finding out about its misconduct. Finally, out-of-state conduct could also indicate how long the conduct has lasted and the profitability of that misconduct.

172. See OUJI-CIV, supra note 7, no. 5.9.
173. Id.
175. Campbell, 538 U.S. at 421.
176. Id. at 423-24.
177. See id.
178. Id. at 422.
179. See id.
180. See id.
181. See id.

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V. Conclusion

The impact of State Farm Mutual Automobile Insurance Co. v. Campbell on Oklahoma’s system for imposing punitive damages should be dramatically less than in most other states because of the punitive damages procedures Oklahoma had in place before the Campbell decision. Oklahoma uses every procedure recommended by Justice O’Connor in her dissent in Haslip to ensure that Oklahoma juries do not violate the Due Process Clause of the Fourteenth Amendment when punitive damages are imposed. These procedures more than adequately protect against arbitrary and excessive punitive damages awards in Oklahoma courts.

The greater impact of the Campbell decision on Oklahoma punitive damages jurisprudence relates to the use of a defendant’s out-of-state conduct in other cases. First, the Court’s language on this topic likely prevents Oklahoma courts from using defendants’ financial gain from similar out-of-state conduct, whether lawful or unlawful, as a basis for creating a cap under Category II punitive damages. To use the defendant’s financial gain from its out-of-state conduct to create a Category II punitive damages cap would likely be considered punishing the defendant for conduct outside of the relevant jurisdiction. Second, while a defendant’s out-of-state conduct in other cases is admissible to show the deliberateness and culpability of the defendant, such evidence is only admissible if it is similar to the conduct at issue in the lawsuit. Further, if a plaintiff admits evidence of the defendant’s out-of-state conduct in other cases to establish the deliberateness or culpability of the defendant, the jury must be provided with an instruction explaining that it may not use evidence of out-of-state conduct to punish the defendant for actions that were lawful in the jurisdiction where it occurred.