

## **Damages Issues in Aviation and Catastrophic Accident Cases**

**By Stephen A. Wood**

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### **TIP**

Damages are usually significant in catastrophic accident cases, and may present unique or unusual issues or disputes not arising in other tort cases. Insurers and practitioners should be prepared to address these damages issues early in litigation.

Litigation arising out of aviation and similar catastrophic accidents can present rather unique facts and legal issues that do not arise often in other types of litigation because of the horrific circumstances as well as the laws that have been adopted by countries to address liability and damages issues. The circumstances prevailing in the minutes or seconds before and after the accident typically garner great attention in discovery and at trial, not only because they can reveal much about the cause of a particular accident, but also because they inform the issue of damages. Recovery will be determined to a large extent not only by these circumstances, but by the law applied to the case. In the aviation context, for domestic flights, state law controls damages issues, and there can be significant variability from state to state. Choice of law in these instances can be outcome determinative. For international flights, the Montreal and Warsaw Conventions control. This article takes a brief look at recent decisions highlighting some of the more significant and contentious damages issues in air crash and similar catastrophic accident litigation.

### **Choice of Law Issues on Damages**

As noted, choice of law in any aviation case can be outcome determinative. Consequently, disputes over the governing law can be some of the most contentious for the parties and complex for the courts to resolve. In a typical case involving an aircraft accident, the analysis is potentially impacted by the law of several different jurisdictions: where the court sits, the place of the accident, the domicile of the plaintiffs, the domicile of the defendants, the location where the alleged wrongful act occurred, etc. Generally, the court will commence the analysis by applying the choice of law rules of the jurisdiction where the action was brought.<sup>1</sup>

In *In re Air Crash Near Clarence Center, New York, on February 12, 2009*, choice of law issues arose more than once. For example, the defendant airline moved for dismissal of the action brought by the deceased flight attendant's administrator on the ground that the action was barred by workers' compensation laws. This argument led to a choice of law analysis insofar as the decedent was a resident of New Jersey, the accident occurred in New York, and the action was originally filed in New York. Moreover, there was a conflict between New York and New Jersey law regarding the scope of the exception for intentional wrongdoing. The district court applied New York's "interest analysis," which compares the purposes of the laws that are in conflict and examines which state has the greater interest in giving effect to the purpose of the law under the facts presented. In a dispute over the application of workers' compensation laws, New York generally applies the law of the state where workers' compensation benefits are paid. That meant application of New Jersey law. The court denied the airline's motion to dismiss on the ground that New Jersey's exception to the exclusive remedy provisions of its workers' compensation law for wrongs intentionally caused was broader than New York's. Thus, that issue could not be resolved without discovery.

Matters of compensatory damages are frequently governed by the law of the state where the injured or deceased person is domiciled. During the discovery phase of *Air Crash Near Clarence Center, New York*, the defendants brought a motion to compel discovery of one of the decedent's electronic communications. The decedent was a citizen of China living and working in New Jersey at the time of the accident. In ordering production, the district court noted that the documents sought were relevant to the decedent's domicile at the time of the crash, which could have a significant bearing on the choice of law to govern the plaintiff's claims:

In this Court's view, there can be little debate that the information Defendants seek from [the decedent] and the claimants is relevant to [the decedent's] domicile at the time of the air-crash, which could be an important choice-of-law issue in this case. [The decedent's] and the claimants' electronic communications may contain evidence relating to [the decedent's] plans about returning to China (or not), plans for the care of her son, travel information, etc. Electronic communications may also contain information concerning [the decedent's] financial support (or not) of the claimants.<sup>2</sup>

The district court's holding illustrates the importance of a decedent's or injured plaintiff's domicile in the choice of law analysis.

The *Air Crash Near Clarence Center, New York*, litigation also spawned a dispute and subsequent in-depth analysis of choice of law principles to determine which state's law applied to the issue of punitive damages. The defendants argued for the application of Virginia law, which capped punitive damages at \$350,000. The plaintiff argued for the application of New York law, which has no cap.<sup>3</sup> The transferee multidistrict litigation (MDL) court set about applying the conflicts rules of the various states where the lawsuits were filed, beginning with New York. The court discussed the traditional *lex loci delicti* doctrine, whereby the law of the place of the wrong applied. It noted that New York's analysis had shifted away from this somewhat rigid, mechanical rule to the more flexible "interest analysis" discussed above. "In deciding which state has the prevailing interest, we look only to those facts or contacts that relate to the purpose of the particular laws in conflict. Punitive damages are aimed at deterrence and retribution. They may properly be awarded to further a State's legitimate interests in

punishing unlawful conduct and deterring its repetition.”<sup>4</sup> After a detailed review of the defendants’ various contacts with Virginia and New York, the district court found that New York’s interests were greater.

The district court also recognized that one state’s laws could govern compensatory damages while another state’s law governed punitive damages, based on the doctrine of *depeçage*, which “recognizes that in a single action different states may have different degrees of interest with respect to different operative facts and elements of a claim or defense.”<sup>5</sup> Thus, it was appropriate to bifurcate the choice of law analysis between compensatory and punitive damages.<sup>6</sup>

### **Damages for Pre-Impact Fear**

This category of damages is intended to compensate plaintiffs for emotional distress experienced by persons involved in catastrophic accidents prior to the moment of impact. Most states award damages for pre-impact fear, also known as pre-impact terror or pre-impact pain and suffering, in air crash litigation and other types of catastrophic accident cases. Typically, there must be some proof that there was pre-impact terror—that the passengers on a plane were aware of an impending crash for some period of time, however brief, prior to the impact. The basis for these damages can be either statutory or grounded in a state’s common law.

*Delacroix v. Doncasters, Inc.*, involved the crash of a Twin Otter that was being used to carry passengers on skydiving expeditions.<sup>7</sup> On July 29, 2006, the plane experienced a right engine failure and crashed. All on board, except one person, perished on impact. The plaintiffs alleged that replacement engine blades manufactured by the defendant caused the crash. At trial, the jury awarded the plaintiffs compensatory damages of \$20 million.<sup>8</sup> On appeal, among other sources of error, the defendant challenged a jury instruction that permitted the jury to award pre-impact damages, claiming that Missouri law permitted wrongful death damages suffered only between the time of injury and the time of death. Thus, the award of pre-impact damages was improper.

The Missouri Court of Appeals, sitting en banc, disagreed, holding that the language of the state’s wrongful death act permitted an award of damages covering “any pain, suffering and other compensatory damages the deceased may have experienced *prior to death*”:

Here, substantial evidence was introduced to show that Decedents suffered from pre-impact terror prior to the crash of the Twin Otter. Dr. Carlos Diaz testified for Plaintiffs and described pre-impact terror as a set of sensations, feelings, and emotions a person experiences when that person feels that death is imminent. Dr. Diaz opined that Decedents experienced “horrific” pre-impact terror for fifty-two seconds prior to the crash. Doncasters contends that it was erroneous to allow the jury to consider these pre-impact damages because any pre-impact terror was sustained by Decedents prior to their injuries, which Doncasters contends occurred at the impact of the crash.<sup>9</sup>

In essence, the court found that this expert evidence established “injury” that occurred prior to the moment of impact.<sup>10</sup> The court also stated that the wrongful death act “is a remedial statute that must be applied to promote the object of the legislative enactment. Remedial statutes are construed broadly and liberally to effect the statute’s plain purpose. Ensuring that tortfeasors pay for the consequences of their actions has been identified as one purpose of a wrongful death action.”<sup>11</sup>

In *In re Air Crash Near Clarence Center, New York, on February 12, 2009*, pre-impact terror was part of the justification for a joint motion to compel production of the cockpit voice recorder.<sup>12</sup> The plaintiffs and the aircraft manufacturer defendants jointly sought production of the recording, which was opposed by two of the three airline defendants.<sup>13</sup> The movants argued that the written transcript—prepared by a National Transportation Safety Board selected committee—was neither complete nor accurate, that it contained gaps and notations (e.g., “expletive”) in place of the actual words used. They also argued that the recording was relevant to pre-impact terror, conscious pain and suffering, the atmosphere in the cockpit, and the cockpit crew’s situational awareness. The opponents of the motion contended that the transcript was sufficient, cockpit evidence was not relevant to pre-impact terror of the cabin occupants, and public policy (privacy interests of the cockpit crew and their families as well as publicly sensationalizing the claims of pilot error) warranted denial of the motion.

The court agreed that the written transcript was incomplete and inaccurate. The plaintiffs were entitled to examine the transcript and evaluate it with their experts in light of the actual recording (the court noted that its own comparison of the recording with the transcript revealed several minor transcript errors). Also, the transcript did not reflect tone, volume, inflection, etc. The court accordingly ordered the production of the recording subject to a protective order protecting the privacy interests of the cockpit crew and their families. In its ruling, the court did not specifically address the argument that the recording was relevant to pre-impact terror.

*In re Air Crash at Lexington, Kentucky, August 27, 2006*, involved controlling law that precluded damages for pre-impact fear.<sup>14</sup> The claims in this case arose out of the crash of Comair Flight 5191, which occurred on takeoff approximately 1,000 feet from the departure end of the runway, killing all 47 passengers and two of the three crewmembers.<sup>15</sup> During pretrial proceedings, the defendants filed motions to dismiss a number of the plaintiffs’ damages claims, including claims for pre-impact fear. The district court relied on a recent ruling by the Kentucky Supreme Court in *Steel Technologies, Inc. v. Congleton*,<sup>16</sup> in which the decedent’s truck was crushed by a 37,000-pound steel coil dislodged from a flatbed truck in the direct path of the decedent’s truck. Reversing the jury’s award of pre-impact damages, the Kentucky Supreme Court stated: “It is not enough that emotional distress be accompanied by contact—it must be *caused* by the contact. This also means that any contact must precede the emotional distress before recovery is permissible under a negligence theory.”<sup>17</sup> Based on *Congleton*, the district court dismissed claims for damages based on fear that preceded any impact. In the Comair crash, however, the plaintiffs noted that there was evidence of multiple impacts (the plane hit an earthen berm, a fence, and trees). The court agreed that to the extent there was evidence of emotional distress arising after an impact, that would not be precluded by *Congleton*.<sup>18</sup>

If *Air Crash at Lexington, Kentucky*, had been decided just four years later, the result would have been quite different. In *Osborne v. Keeney*,<sup>19</sup> the Supreme Court of Kentucky, only five years after deciding *Congleton*, abrogated the rule requiring impact as a condition precedent to the award of damages for

fear, terror, or mental suffering. For a case involving claims of pre-impact fear, *Osborne* is unusual in that it involved a suit by the plaintiff against her attorney for legal malpractice. The plaintiff claimed that her lawyer failed to timely bring suit against the pilot of an aircraft that crashed into the plaintiff's house. The claims were tried to a jury and a verdict returned for the plaintiff in the amount of \$5 million.

On appeal, among other issues, the Supreme Court took up the impact rule. The analysis opens with the following statement: "Nearly since its inception into American law in the late 19th century, a large body of scholarly work has disparaged the impact rule. The criticism has not come from scholars alone. Our sister jurisdictions have retreated from the impact rule in droves, leaving Kentucky in a very small minority."<sup>20</sup> After reciting the policy justifications for and against the rule, and surveying the law in other jurisdictions, the Kentucky Supreme Court announced a more modern approach:

[W]e agree with our sister jurisdiction, Tennessee, that recovery should be provided only for "severe" or "serious" emotional injury. A "serious" or "severe" emotional injury occurs where a reasonable person, normally constituted, would not be expected to endure the mental stress engendered by the circumstances of the case. Distress that does not significantly affect the plaintiff[']s everyday life or require significant treatment will not suffice. And a plaintiff claiming emotional distress damages must present expert medical or scientific proof to support the claimed injury or impairment. This rule accords with the concerns we expressed in *Cogleton* and the majority of jurisdictions in the United States. Moreover, this rule continues to address and support the concerns that prompted the adoption of the impact rule in the first place. But now the rule is updated in light of societal advancements in mental health treatment and education, in a manner that assures individuals suffering from legitimate emotional injuries will be able to seek recovery.<sup>21</sup>

*Osborne* thus brings Kentucky into line with the majority of states that permit recovery for mental distress in the absence of a physical impact.

### **Damages for Post-Impact Pain and Suffering**

Nearly every jurisdiction permits recovery for post-impact pain and suffering when the evidence supports it, even in wrongful death cases. In aviation accident cases involving death, however, the issue is typically reduced to consideration of whether the decedent survived and was conscious enough for a period of time after the accident to experience post-impact pain and suffering. The evidence on this issue will typically come from either eyewitnesses who testify that there was movement or sound emanating from the decedent prior to death, or expert medical witnesses relying on toxicology testing, or other evidence regarding the crash.

*In re Jacoby Airplane Crash Litigation* is illustrative.<sup>22</sup> *Jacoby* involved the crash of a single-engine propeller aircraft in Newark, New Jersey, resulting in the death of the three passengers on the plane and one person on the ground, in addition to property damage to multiple buildings. The defendants moved to exclude any evidence or argument as to whether the passengers experienced post-impact conscious pain and suffering. The defendants argued that the only reasonable conclusion from available evidence was that the decedents died on impact (air traffic control data showed 10,000 fpm rate of descent prior to impact).

The district court disagreed, however, relying on some of the evidence discounted by the defendants, as well as a presumption. The court noted that the plane clipped a chimney on a building approximately eight blocks short of the final crash site. This could be considered an impact that was survived by the deceased passengers seconds prior to their impact with the ground. Also, in other cases, the New Jersey courts permitted post-impact damages where the time of survival was exceedingly short:

[T]he New Jersey courts' decision to adopt a "split-second" definition of what constitutes a non-instantaneous death, along with the presumption of continuing life, leaves this Court no alternative but to allow Plaintiffs to submit such evidence to the trier of fact for a factual determination as to how much those seconds, or tenths of a second, are worth.<sup>23</sup>

As a result, the court denied the defendants' motion for judgment as a matter of law as to all post-impact injuries and motion in limine to exclude any statements that the decedents survived impact.

### **Punitive Damages**

Plaintiffs in aviation disaster cases will usually plead punitive damages when there is a possibility that the applicable law will permit punitives. Most states permit punitive damages for egregious conduct that causes harm, the standard usually being one of willful, intentional, reckless, or grossly negligent conduct. Several states, however, preclude punitive damages in wrongful death cases.<sup>24</sup> Many states that allow punitive damages, in personal injury or wrongful death cases, impose limits such as caps or specific multiples of compensatory damages.<sup>25</sup> Punitive damages are also not available in actions involving international air travel, which are governed by the Montreal and Warsaw Conventions.<sup>26</sup> Furthermore, punitive damages are not available in aviation cases occurring on the high seas, insofar as they are precluded by the Death on the High Seas Act (DOHSA).<sup>27</sup>

Since the Supreme Court's landmark rulings in *BMW of North America, Inc. v. Gore*,<sup>28</sup> and *State Farm Mutual Automobile Insurance Co. v. Campbell*,<sup>29</sup> any award of punitive damages is subject to significant limitations. In *Gore*, the Supreme Court considered a trial court's award of compensatory damages to the plaintiff of \$4,000 for BMW's concealing damage to his car that occurred during shipping. BMW admitted that it did not notify customers or dealers if the cost of repairing predelivery damage was less than 3 percent of the estimated value of the car. The jury also awarded \$4 million in punitive damages (later reduced to \$2 million by the Alabama Supreme Court).

The Supreme Court noted that an award 500 times compensatory damages was grossly excessive and violated the due process clause of the Fourteenth Amendment. The Court set forth the following three guideposts for determining whether a punitive damages award is grossly excessive: (1) the degree of reprehensibility of the defendant's misconduct; (2) the disparity between the plaintiff's harm and the punitive damages award; and (3) the difference between the punitive damages remedy and civil penalties imposed in comparable cases (Alabama imposed a maximum \$2,000 fine for comparable conduct).<sup>30</sup>

In the *Campbell* case, the plaintiff insured brought suit against the defendant insurer for bad faith, among other things, based on the defendant's refusal to settle a claim against the insured by paying the policy limits, thus forcing the case against the insured to go to trial. When the judgment against the insured exceeded his \$50,000 policy limits by \$136,000, the insurer refused to pay the difference.

Although the insurer ultimately changed its mind, the insured sued anyway. At trial on the bad faith claim, the jury awarded the plaintiff \$2.6 million in compensatory damages and \$145 million in punitive damages. The trial judge reduced this award to \$1 million in compensatory and \$25 million in punitive damages, but the Utah Supreme Court reinstated the punitive award, in part based on the defendant's "massive wealth."

The U.S. Supreme Court vacated this award and remanded the case. On the issue of reprehensibility, the first *Gore* guidepost, the Court set forth the following criteria: whether the harm caused was physical as opposed to economic, whether the wrongful behavior reflected an indifference to or a reckless disregard of the health or safety of others, whether the plaintiff was financially vulnerable, whether the conduct was recurring or an isolated incident, and whether the injury arose from intentional malice or mere accident.

The Court stated that as a general rule a state does not have a legitimate interest in punishing a defendant for conduct that occurred outside the jurisdiction, which was not to say that it could not be considered:

[O]ut-of-state conduct may be probative when it demonstrates the deliberateness and culpability of the defendant's action in the State where it is tortious, but that conduct must have a nexus to the specific harm suffered by the plaintiff. More fundamentally, in relying on such evidence, the Utah courts awarded punitive damages to punish and deter conduct that bore no relation to the [plaintiffs'] harm. Due process does not permit courts to adjudicate the merits of other parties' hypothetical claims under the guise of the reprehensibility analysis.<sup>31</sup>

Regarding the ratio of compensatory to punitive damages, the Court declined to impose a bright-line rule, but indicated that "in practice, few awards exceeding a single-digit ratio between punitive and compensatory damages . . . will satisfy due process."<sup>32</sup> Furthermore, where particularly egregious conduct was involved, a greater punitive award might be justified, and when compensatory damages are substantial, a lesser ratio, such as one-to-one, might reach the limit of due process.<sup>33</sup>

These principles are well illustrated in a nonaviation case, *Conboy v. Wynn Las Vegas, LLC*, an action brought against the defendant hotel for negligence arising out of its treatment of the plaintiff guest (which resulted in the guest being arrested).<sup>34</sup> Several arguments relating to evidence and punitive damages arose in the context of motions in limine filed by the parties. First, the defendant moved to exclude any evidence of conduct toward others who were not parties to the case. This argument was based on *Philip Morris USA v. Williams*, wherein the Supreme Court held that due process did not permit a jury to base an award "in part upon its desire to *punish* the defendant for harming persons who are not before the court (e.g., victims whom the parties do not represent)."<sup>35</sup> The Court made clear that "a jury may not . . . use a punitive damages verdict to punish a defendant directly on account of harms it is alleged to have visited on nonparties."<sup>36</sup> While this evidence could be considered on the issue of reprehensibility, nevertheless, a court must impose safeguards to ensure that the evidence is not being used improperly by the jury. Because such evidence can be considered for a limited purpose—to show reprehensibility—the *Conboy* court denied the defendant's motion.<sup>37</sup>

The defendant also moved to exclude any evidence of its allegedly wrongful conduct occurring outside the state of Nevada. Although the plaintiff stated that she did not intend to offer such evidence, the trial court still denied the motion, noting that such evidence could be used to demonstrate reprehensibility, even if such evidence could not be used to support directly an award of punitive damages. Finally, the defendant moved to exclude any evidence relating to its non-Nevada finances, arguing that, based on *Campbell*, only its Nevada business activities could be considered in the punitive damages analysis. The *Conboy* court rejected this argument, finding that the defendant was reading *Campbell*'s restriction on evidence of wealth too broadly:

When it comes to not basing punitive damages on a company's overall wealth, *Campbell* is not silent, but its main takeaway merely reiterates a point from *Gore* that, "the wealth of a defendant cannot justify an otherwise unconstitutional punitive damages award." Moreover, *Campbell* quotes Justice Breyer's concurrence in *Gore* which says "[Wealth] provides an open-ended basis for inflating awards when the defendant is wealthy . . . . That does not make its use unlawful or inappropriate; it simply means that this factor cannot make up for the failure of other factors."<sup>38</sup>

The court gave no indication of the manner in which it would ensure that evidence of wealth—in state or out—would not be used improperly by the jury.

### Conclusion

In catastrophic accident cases, the issue of liability often captures the main focus of the parties. The foregoing discussion shows, however, that the issue of damages usually is not a mere afterthought, reduced to basic elements such as lost income, society, or medical expenses. Indeed, in some cases, the damages issues can be more nuanced and more contested than the liability issues. As demonstrated by recent decisions on both compensatory and punitive damages, the law is evolving. The diligent and careful practitioner must, therefore, stay abreast of the changes in controlling law and analyze the variety of damages issues at the earliest stages of litigation.

### Notes

1. See *In re Air Crash Near Clarence Ctr.*, N.Y., on Feb. 12, 2009, 882 F. Supp. 2d 405, 409 (W.D.N.Y. 2012).
2. *In re Air Crash Near Clarence Ctr.*, N.Y., on Feb. 12, 2009, No. 09-CV-9618, 2011 WL 6370189, at \*5 (W.D.N.Y. Dec. 20, 2011).
3. *In re Air Crash Near Clarence Ctr.*, N.Y., on Feb. 12, 2009, 798 F. Supp. 2d 481, 486 (W.D.N.Y. 2011).
4. *Id.* at 488–89 (citations omitted) (internal quotation marks omitted).
5. *Id.* at 488 n.6.
6. See also *In re Air Crash at Belle Harbor*, N.Y., on Nov. 12, 2001, No. MDL 1448(RWS), 2006 WL 1288298, at \*23 (S.D.N.Y. May 9, 2006) ("Since punitive damages serve a completely different purpose than compensatory damages, it is only logical that courts have determined that the issue of punitive damages is distinct from the issue of compensatory damages and, therefore, the application of different laws to these different issues may be appropriate.").
7. 407 S.W.3d 13 (Mo. Ct. App. 2013) (en banc).

8. At trial, the jury also awarded the plaintiffs \$28 million in punitive damages, but the trial court granted the defendant judgment notwithstanding the verdict (JNOV) on that award. The court of appeals reversed this ruling and ordered the punitive damages award reinstated by the trial court. *Id.* at 22, 43.

9. *Id.* at 23–24.

10. *See id.* at 24 (finding that while the statute at issue limited recovery of damages “to that occurring between the time of injury and the time of death, in this case, there was substantial evidence that Decedents’ injuries occurred prior to the impact of the crash”).

11. *Id.* (citations omitted).

12. No. 09-md-2085, 2010 WL 4116790 (W.D.N.Y. Oct. 19, 2010).

13. The remaining airline defendant took no position in the motion.

14. 556 F. Supp. 2d 665 (E.D. Ky. 2008).

15. The first officer, who was flying the plane at the time, was the only survivor.

16. 234 S.W.3d 920 (Ky. 2007).

17. *Id.* at 929.

18. Liability arising out of international air transportation is governed by the Warsaw and Montreal Conventions. *See* *El Al Israel Airlines, Ltd. v. Tseng*, 525 U.S. 155, 169 (1999). Under those treaties, damages for purely emotional or mental harm are precluded. *Id.* at 162 (citing *E. Airlines, Inc. v. Floyd*, 499 U.S. 530 (1991)); *see also* *Dogbe v. Delta Air Lines, Inc.*, 969 F. Supp. 2d 261, 275 (E.D.N.Y. 2013) (recognizing that the Conventions permit recovery for mental injury only to the extent it was caused by physical injury).

19. 399 S.W.3d 1 (Ky. 2012).

20. *Id.* at 14 (footnotes omitted).

21. *Id.* at 17–18 (footnotes omitted).

22. No. 99-6073 (HAA), 2006 WL 3511162 (D.N.J. Dec. 5, 2006). *Jacoby* also involved questions of damages for pre-impact fear. Resolving an issue of first impression in New Jersey at the time, the court concluded that the New Jersey Supreme Court would, if given the opportunity, allow for the recovery of pre-impact fear. *Id.* at \*5.

23. *Id.* at \*9.

24. *See, e.g.*, *Bethel v. Janis*, 597 F. Supp. 56, 59 (D.S.D. 1984); *Vincent v. Alden-Park Strathmoor, Inc.*, 948 N.E.2d 610, 615–16 (Ill. 2011); *Smith v. Printup*, 866 P.2d 985, 999 (Kan. 1993); *Simeone v. Charron*, 762 A.2d 442, 443 (R.I. 2000).

25. *See, e.g.*, VA. CODE ANN. § 8.01-38.1 (2006) (capping punitives at \$350,000).

26. *Ginsberg v. Am. Airlines*, No. 09 Civ. 3226(LTS)(KNF), 2010 WL 3958843, at \*3 (S.D.N.Y. Sept. 27, 2010).

27. *See* *Dooley v. Korean Air Lines Co.*, 524 U.S. 116, 118 (1998).

28. 517 U.S. 559 (1996).

29. 538 U.S. 408 (2003).

30. *Gore*, 517 U.S. at 574–75.

31. *Campbell*, 538 U.S. at 409–10.

32. *Id.* at 425.

33. *Id.* The Court also significantly limited the relevance of a defendant's net worth in the punitive damages calculus: "[T]he presentation of evidence of a defendant's net worth creates the potential that juries will use their verdicts to express biases against big business, particularly those without strong local presences." *Id.* at 417. "The wealth of a defendant cannot justify an otherwise unconstitutional punitive damages award." *Id.* at 427.

34. No. 2:11-CV-1649 JCM (CWH), 2013 WL 1701073 (D. Nev. Apr. 18, 2013).

35. 549 U.S. 346, 349 (2007).

36. *Id.* at 355.

37. *Conboy*, 2013 WL 1701073, at \*12.

38. *Id.* at \*13 (citations omitted).