

2003

# The Expansion of Punitive Damages in Minnesota: Environmental Litigation After Jensen v. Walsh

Alexandra B. Klass

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## Recommended Citation

Klass, Alexandra B. (2003) "The Expansion of Punitive Damages in Minnesota: Environmental Litigation After Jensen v. Walsh," *William Mitchell Law Review*: Vol. 30: Iss. 1, Article 12.

Available at: <http://open.mitchellhamline.edu/wmlr/vol30/iss1/12>

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**THE EXPANSION OF PUNITIVE DAMAGES IN  
MINNESOTA: ENVIRONMENTAL LITIGATION AFTER  
*JENSEN v. WALSH***

Alexandra B. Klass<sup>†</sup>

I. INTRODUCTION .....178

II. DEVELOPMENT OF PUNITIVE DAMAGES LAW IN  
MINNESOTA.....180

A. *Standard for Adding and Recovering Punitive Damages  
Claims in Minnesota* .....181

B. *Conduct Required for Punitive Damages—“Clear and  
Convincing Evidence of Deliberate Disregard”*.....183

C. *Statutory Factors Guiding the Award of Punitive Damages*.185

III. SUBSTANTIVE REVIEW OF PUNITIVE DAMAGES:  
CONSTITUTIONAL CONCERNS AND THE “THREE  
GUIDEPOSTS” .....186

A. *The Degree of Reprehensibility of the Defendant’s Conduct*..188

1. *TXO Production Corp. v. Alliance Resources Corp.* .....188

2. *BMW of North America v. Gore*.....190

3. *State Farm Mutual Automobile Insurance Co.  
v. Campbell* .....191

B. *Ratio of the Punitive Damages Award to the Actual Harm  
Inflicted on the Plaintiff*.....192

C. *Comparison of the Punitive Damages Award and the Civil  
or Criminal Penalties that Could Be Imposed for  
Comparable Misconduct* .....196

IV. FROM *GRYC* TO *JENSEN*: THE PERSONAL INJURY  
REQUIREMENT .....197

A. *The Expansion and Contraction of Punitive Damages:  
From Gryn to Eisert and Keene*.....198

B. *Confusion in the Courts: Phelps and Molenaar*.....200

C. *A New Direction: Jensen v. Walsh*.....201

V. THE IMPACT OF *JENSEN* IN ENVIRONMENTAL CASES:  
*KENNEDY BUILDING ASSOCIATES V. VIACOM, INC.*.....203

178	WILLIAM MITCHELL LAW REVIEW	[Vol. 30:1
	A. <i>Westinghouse's Use of PCBs at the Site and Deliberate Disregard of Risks</i> .....	205
	B. <i>The Discovery and Investigation of Contamination at the Site</i> .....	207
	C. <i>Current Contamination at the Site</i> .....	208
	D. <i>Procedural History and Addition of Punitive Damages</i> .....	208
	E. <i>Trial, Verdict, and Judgment</i> .....	210
	F. <i>Lessons Learned</i> .....	211
VI.	PUNITIVE DAMAGES IN MINNESOTA: A LOOK AT THE FUTURE .....	211

### I. INTRODUCTION

In 2001, the law of punitive damages in Minnesota changed dramatically. For nearly twenty years prior to that time, there had been a significant limitation on the ability of a plaintiff to recover punitive damages under Minnesota law: personal injury was always required. This meant that even if a plaintiff could establish that the defendant acted maliciously, intentionally, or with deliberate disregard for its property rights, the plaintiff was limited to the recovery of compensatory damages. This limitation on punitive damages was both significant and unique: although some states impose caps on punitive damages or bar them entirely, no state other than Minnesota had abolished punitive damages for injury to property while allowing punitive damages for personal injury. In March 2001, all that changed. In *Jensen v. Walsh*,<sup>1</sup> the Minnesota Supreme Court explicitly limited its earlier decisions in *Eisert v. Greenberg Roofing & Sheet Metal Co.*<sup>2</sup> and *Independent School District No. 622 v. Keene Corp.*,<sup>3</sup> which had declined to allow punitive damages claims in the absence of personal injury. In so doing, the court

† Partner, Dorsey & Whitney LLP, Minneapolis, Minnesota. J.D. 1992, University of Wisconsin Law School; B.A. 1988, University of Michigan, Ann Arbor, Michigan; law clerk to Hon. Barbara B. Crabb, Chief Judge, U.S. District Court Western District of Wisconsin, 1992-93. The author and George G. Eck, Dorsey & Whitney LLP, were the trial attorneys for plaintiff Kennedy Building Associates in *Kennedy Building Associates v. Viacom, Inc.*, No. 99-1833, slip op. (D. Minn. May 31, 2002) (judgment entered) discussed in this article. The views expressed in this article are those of the author only and not those of any client or of Dorsey & Whitney LLP.

1. 623 N.W.2d 247, 250-51 (Minn. 2001).

2. 314 N.W.2d 226, 228-29 (Minn. 1982).

3. 511 N.W.2d 728, 729 (Minn. 1994).

2003] PUNITIVE DAMAGES AFTER *JENSEN* v. *WALSH* 179

opened up the possibilities of many new punitive damages claims in cases solely involving damage to real property, including cases of environmental contamination.

These possibilities were realized in what may be the first case in Minnesota involving damage solely to property that applied *Jensen* and resulted in a significant punitive damages verdict. In *Kennedy Building Associates v. Viacom, Inc.*,<sup>4</sup> a jury in federal district court in Minnesota awarded \$5 million in punitive damages to the plaintiff for environmental contamination to property in the absence of personal injury. This punitive damages award is significant not only because it appears to be the first of its kind in Minnesota, but because it illustrates how *Jensen* has and will continue to have a profound effect on environmental litigation in the State of Minnesota. This article explains how the law of punitive damages has developed in Minnesota both before and after *Jensen*, and illustrates the significance of the *Jensen* case through a detailed discussion of the facts and outcome of the *Kennedy Building Associates* case.

Section II of this article discusses the purpose of punitive damages, the process in Minnesota by which a punitive damages claim may be added to a case, and the circumstances under which punitive damages may be awarded.<sup>5</sup> Section III of this article discusses the role of the courts in reviewing a jury's award of punitive damages in light of recent U.S. Supreme Court cases placing constitutional limits on punitive damages.<sup>6</sup> Section IV of this article discusses the development of the unique "personal injury" requirement for punitive damages claims in Minnesota and the Minnesota Supreme Court's subsequent abandonment of that requirement in *Jensen*.<sup>7</sup> Finally, Sections V and VI of this article discuss the *Kennedy Building Associates* case in detail, considering both the offensive possibilities and defensive risks posed by *Jensen* in environmental cases and other property damage cases where, until recently, the specter of punitive damages simply was not present.<sup>8</sup> This article concludes that by allowing punitive damages to be included in environmental contamination and other property

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4. *Kennedy Bldg. Assoc. v. Viacom, Inc.*, No. 99-1833, slip op. at 10 (D. Minn. May 31, 2002) (judgment entered).

5. *See infra* Part II.

6. *See infra* Part III.

7. *See infra* Part IV.

8. *See infra* Parts V-VI.

damages cases, the supreme court both reconciled its case law with the language of the state's punitive damages statute and, more importantly, has significantly increased the value of these cases for plaintiffs and significantly altered the risk assessment for defendants.

## II. DEVELOPMENT OF PUNITIVE DAMAGES LAW IN MINNESOTA

Punitive or "exemplary" damages have long been part of the American legal landscape, dating back to 1791, and, prior to that, part of the historic jurisprudence of England and ancient Rome and Greece.<sup>9</sup> The purpose of punitive damages, according to the Minnesota Supreme Court, is "to punish the perpetrator, to deter repeat behavior and to deter others from engaging in similar behavior."<sup>10</sup> Similar to criminal punishment, punitive damages serve important retributive and general deterrent functions.<sup>11</sup> In 1978, the Minnesota Legislature enacted Minnesota Statutes section 549.20, codifying the current common law approach governing punitive damages, which allowed for punitive damages where there was clear and convincing evidence of "willful

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9. For a discussion of the historical origins of punitive damages see 1 LINDA L. SCHLUETER & KENNETH R. REDDEN, PUNITIVE DAMAGES §§ 1.0-1.4, at 1-16 (4th ed. 2000) (noting the existence of punitive damages in the Code of Hammurabi in 2000 B.C., in ancient Greek and Roman law, Hittite law, and the Bible); Michael Rustad & Thomas Koenig, *The Historical Continuity of Punitive Damage Awards: Reforming the Tort Reformers*, 42 AM. U. L. REV. 1269, 1284-1304 (1993) (detailing punitive damages from ancient times to the English and American legal systems).

10. *Jensen v. Walsh*, 623 N.W.2d 247, 251 (Minn. 2001); *see also* *Hodder v. Goodyear*, 426 N.W.2d 826, 837 (Minn. 1990) (stating that the purpose of punitive damages is to punish and deter conduct); *Lundman v. McKown*, 530 N.W.2d 807, 816 (Minn. Ct. App. 1995) ("Punitive damages serve to punish wrongdoers and deter others from similar conduct.") (citing *Shetka v. Kueppers Von Feldt & Salmen*, 454 N.W.2d 916, 920 (Minn. 1990)).

11. The purposes of punitive damages are generally considered to be: (1) to punish the defendant for its actions and (2) to deter such conduct by others in the future. *See* W. PAGE KEETON ET AL., PROSSER & KEETON ON THE LAW OF TORTS § 2, at 9 (5th ed. 1984) (main purpose of punitive damages is to punish defendant and deter defendant and others from acting in a similar manner); SCHLUETER & REDDEN, *supra* note 9, at 19 (the most widely accepted purpose of punitive damages has been punishment and deterrence); Rustad & Koenig, *supra* note 9, at 1318-28 (purpose of punitive damages generally articulated by courts as punishment and deterrence, retribution, encouraging private attorneys general, and bridging the gap between criminal and tort law).

2003] PUNITIVE DAMAGES AFTER *JENSEN v. WALSH* 181

indifference to the rights or safety of others.”<sup>12</sup> Under Minnesota law, punitive damages are the province of the trier of fact. There is no statutory cap on punitive damages, nor automatic entitlement to such damages in private actions.<sup>13</sup> There are, however, limits to the jury’s discretion. While there are no specific caps or limits, courts are specifically authorized to reduce punitive damages when they are unreasonably excessive.<sup>14</sup>

A. *Standard for Adding and Recovering Punitive Damages Claims in Minnesota*

In Minnesota, a claim for punitive damages must present a case for deliberate disregard that is fully supported by admissible evidence. The reason for this is understandable: if a plaintiff is able to include a claim for punitive damages, it significantly and unpredictably increases the value of the plaintiff’s claims, making settlement more difficult.<sup>15</sup> Thus, Minnesota law provides by statute

12. MINN. STAT. § 549.20 (1978). In 1986, the statute was amended to include gender neutral terms. In 1990, “willful indifference” was changed to “deliberate disregard,” and “deliberate disregard” was defined further to clarify the conduct necessary for the imposition of punitive damages. See *infra* notes 26-29 and accompanying text. For a discussion of the history of punitive damages in Minnesota, see Tracy M. Borash, Note, *Punitive Damages in Non-Personal Injury Cases: Minnesota’s Approach to Punishment and Deterrence*, 24 WM. MITCHELL L. REV. 213, 220-22 (1997).

13. See, e.g., COLO. REV. STAT. § 13-21-1021(1)(a) (1987) (limiting punitive damages awards to the amount of actual damages); FLA. STAT. ANN. § 768.73(1)(a) (West 1997) (limiting punitive damages to three times the amount of compensatory damages); N.D. CENT. CODE § 32-03.2-11 (exemplary damages may not exceed two times the amount of compensatory damages or \$250,000, whichever is greater); *BMW of N. Am. v. Gore*, 517 U.S. 559, 614-19 (1996) (Ginsburg, J., dissenting) (appendix to dissenting opinion containing multistate survey of legislative caps and other restrictions on recovery of punitive damages).

14. MINN. STAT. § 549.20 (2002) (requiring courts to consider factors that “justly bear upon the purpose of punitive damages”). See also *infra* Part III (discussing constitutional limits on punitive damages).

15. There have been a significant number of recent articles on the actual and “perceived” impacts of punitive damages on litigation and settlement. See, e.g., Theodore Eisenberg et al., *The Predictability of Punitive Damages*, 26 J. LEGAL STUDIES 623, 629 (1997) (data on punitive damages suggests rationality and connection to compensatory damages at trial court level); Marc Galanter, *Real World Torts: An Antidote to an Anecdote*, 55 MD. L. REV. 1093 (1996) (reviewing empirical studies on punitive damages); Thomas Koenig, *The Shadow Effect of Punitive Damages on Settlements*, 1998 WIS. L. REV. 169, 208 (concluding that data showing rarity and predictability of punitive damages verdicts and difficulty of collecting them post-trial suggests fears of business community are exaggerated); Dan Quayle, *Civil Justice Reform*, 41 AM. U. L. REV. 559, 564-65 (1992) (arguing that to reduce threat

that plaintiffs may not allege punitive damages in their initial complaints but must first obtain leave of the court based upon a prima facie showing of entitlement.<sup>16</sup> Accordingly, Minnesota law essentially requires the trial court to direct a portion of the verdict against the plaintiff if the evidence of deliberate disregard is insufficient.<sup>17</sup> In reaching such a determination, the court makes no credibility rulings, nor does the court consider any challenge, by cross-examination or otherwise, to the plaintiff's proof.<sup>18</sup>

When presented with a motion to permit a punitive damages claim, the trial court must do more than "rubber stamp" the allegations in the motion papers. "Rather, the judge must ascertain whether there exists prima facie evidence that the defendants acted with [deliberate disregard]."<sup>19</sup> Thus, Minnesota judges perform an important gatekeeper function in determining the punitive damages claims that may go before a jury.

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of runaway juries, punitive damages should be restricted by requiring intentional conduct, capping awards, bifurcating proceedings, and having judges rather than juries set awards).

16. MINN. STAT. § 549.191 (2002). "Prima facie evidence is evidence which, if un rebutted, would support a judgment in the movant's favor." *Swanlund v. Shimano Indus. Corp.*, 459 N.W.2d 151, 154 (Minn. Ct. App. 1990) (citing BLACK'S LAW DICTIONARY 1071 (5th ed. 1979)). See also *Jensen v. Walsh*, 623 N.W.2d 247, 251 (Minn. 2001) (stating that section 549.20 of the Minnesota Statutes was enacted against a backdrop of concern over the increasing number of punitive damages awards in products liability cases and reflected an intent to limit punitive damages in civil actions).

17. *Ulrich v. City of Crosby*, 848 F. Supp. 861, 867 (D. Minn. 1994). Under Minnesota law, the standard for a directed verdict is that "the trial court *must consider the record as a whole* and treat as credible evidence for the adverse party and all inferences which may reasonably be drawn from that evidence." *Midland Nat'l Bank v. Perranoski*, 299 N.W.2d 404, 409 (Minn. 1980) (emphasis added).

18. *McCloud v. Norwest Bank Minn., N.A.*, 1996 WL 509846, at \*5 (Minn. Ct. App. Sept. 10, 1996) (stating that the court may not consider evidence presented by the defendant when determining whether the plaintiff met her burden of production for amending her complaint); *Swanlund*, 459 N.W.2d at 154.

19. *Swanlund*, 459 N.W.2d at 154 (citing *Shetka v. Kueppers, Kueppers, Von Feldt & Salmen*, 454 N.W.2d 916, 918 n.1 (Minn. 1990)). Although courts generally appear to limit review to information submitted by the plaintiff in support of a motion to amend, at least one court cited the "rubber stamp" language to support its review of deposition testimony not submitted by the plaintiff. See *Olson v. Snap Prod., Inc.*, 29 F. Supp. 2d 1027, 1033 (D. Minn. 1998) (refusing to allow amendment to add punitive damages claim).

2003] PUNITIVE DAMAGES AFTER *JENSEN v. WALSH* 183

*B. Conduct Required for Punitive Damages—“Clear and Convincing Evidence of Deliberate Disregard”*

Once a punitive damages claim is added to a case, such damages are recoverable “only upon clear and convincing evidence that the acts of the defendant show deliberate disregard for the rights or safety of others.”<sup>20</sup> “To be ‘clear and convincing,’ there must be ‘more than a preponderance of the evidence but less than proof beyond a reasonable doubt.’”<sup>21</sup> “Where the evidence is sufficient to permit the Jury to conclude that it is ‘highly probable’ that the defendant acted with deliberate disregard to the rights or safety of others, the ‘clear and convincing’ standard would be satisfied.”<sup>22</sup> The legislature enacted the higher standard of proof to provide additional safeguards for defendants because of the “quasi-criminal” nature of punitive damages.<sup>23</sup>

A defendant has acted with “deliberate disregard” if the defendant has “knowledge of facts or intentionally disregards facts that create a high probability of injury to the rights or safety of others” and the defendant “deliberately proceeds to act in conscious or intentional disregard of the high degree of probability of injury” or “deliberately proceeds to act with indifference to the high probability of injury . . . .”<sup>24</sup> As a result of this standard, “punitive damages may only be awarded when a defendant’s conduct reaches a threshold level of culpability.”<sup>25</sup>

Until 1990, Minnesota Statutes section 549.20 provided that punitive damages would be allowed in civil actions only upon clear and convincing evidence that the acts of defendants show a “willful indifference” to the rights or safety of others.<sup>26</sup> In interpreting this

20. MINN. STAT. § 549.20, subd. 1 (2002).

21. *Ulrich*, 848 F. Supp. at 868 (citing *Weber v. Anderson*, 269 N.W.2d 892, 895 (Minn. 1978)).

22. *Id.* (citing *Becker v. Alloy Hardfacing & Eng’g Co.*, 401 N.W.2d 655, 659 (Minn. 1987)).

23. *Hearing on H.F. 338 Before the Minnesota Senate Judiciary Comm.*, 1978 Minnesota Leg. Sess. Feb. 22, 1978 (audiotape); see also *Lewis v. Equitable Life Assurance Soc’y*, 389 N.W.2d 876, 891 (Minn. 1986) (“The concern of the legislature in enacting the punitive damages statute, section 549.20, was to limit the frequency and amounts of punitive damage awards.”) (citing *Minnesota-Iowa Television Co. v. Watonwan T.V. Improvement Ass’n*, 294 N.W.2d 297, 311 (Minn. 1980)).

24. MINN. STAT. § 549.20(b)(1)-(2).

25. *Ulrich*, 848 F. Supp. at 867.

26. § 549.20, subd. 1 (1979).

provision, Minnesota courts had held that “the mere existence of negligence or of gross negligence does not rise to the level of willful indifference so as to warrant a claim for punitive damages.”<sup>27</sup> Rather, a showing of malicious, willful, or reckless disregard for the rights of others was required.<sup>28</sup>

In 1990, the Minnesota Legislature amended section 549.20 by replacing the phrase “willful indifference” with “deliberate disregard.”<sup>29</sup> The term “deliberate disregard” is defined in the amended statute.<sup>30</sup> The Minnesota courts, without much explanation, have characterized the new standard as a “heightened one.”<sup>31</sup> The phrase “deliberate disregard” has been interpreted by the court of appeals as requiring “maliciousness, an intentional or willful failure to inform or act.”<sup>32</sup> Thus, mere indifference to a risk to the rights or safety of others is not a sufficient basis for punitive damages.<sup>33</sup> Instead, one must have knowledge of the risk and then

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27. *Wirig v. Kinney Shoe Corp.*, 461 N.W.2d 374, 381 (Minn. 1990); *accord* *Herbst v. N. States Power Co.*, 432 N.W.2d 463, 469 (Minn. Ct. App. 1988) (holding that although NSP was grossly negligent with respect to the explosion of natural gas in a transmission pipeline because it failed to locate and expose the pipeline, prohibited plaintiff’s employer from locating the pipeline, did not consider reducing the pressure in the pipeline, and lacked a safety program that met even minimal standards, these findings did not support a basis for a punitive damages award).

28. *Cobb v. Midwest Recovery Bureau Co.*, 295 N.W.2d 232, 237 (Minn. 1980) (citing *Huebsch v. Larson*, 291 Minn. 361, 364, 191 N.W.2d 433, 435 (1971) and *Vine v. Casmey*, 86 Minn. 74, 76, 90 N.W. 158, 158 (1902)).

29. § 549.20, subd. 1.

30. *See supra* note 24 and accompanying text.

31. *McCloud v. Norwest Bank Minn., N.A.*, 1996 WL 509846, at \*5 (Minn. Ct. App. Sept. 10, 1996); *Bougie v. Sibley Manor, Inc.*, 504 N.W.2d 493, 500 n.4 (Minn. Ct. App. 1993); *Hanks v. Hubbard Broad., Inc.*, 493 N.W.2d 302, 311 n.3 (Minn. Ct. App. 1993); *see also* *Jensen v. Walsh*, 623 N.W.2d 247, 250 (Minn. 2001) (“The 1990 amendment further limited punitive damages by defining deliberate disregard.”).

32. *Beniek v. Textron, Inc.*, 479 N.W.2d 719, 722-23 (Minn. Ct. App. 1992) (citing *Wikert v. N. Sand & Gravel, Inc.*, 402 N.W.2d 178, 183 (Minn. Ct. App. 1987)). Arguably the omission of the term “reckless disregard” from the case law definition of “deliberate disregard” as compared to “willful indifference” is illustrative of the “heightened standard” alluded to by the courts. It appears, however, that the post-amendment case limiting “deliberate disregard” to willful or intentional acts actually relied on a pre-amendment case interpreting “willful indifference” for support. *Compare Cobb*, 295 N.W.2d at 237 *with Beniek*, 479 N.W.2d at 722-23 (citing *Wikert*, 402 N.W.2d at 178).

33. *See Wikert*, 402 N.W.2d at 183 (“Something more than mere indifference to the rights and safety of others . . . must be present to allow the ‘extraordinary’ remedy of punitive damages.”); *Gamma-10 Plastics, Inc. v. Am. President Lines, Ltd.*, 32 F.3d 1244, 1255 (8th Cir. 1994) (holding that more than “mere

2003] PUNITIVE DAMAGES AFTER *JENSEN v. WALSH* 185

consciously or “deliberately” decide to disregard the risk.<sup>34</sup>

*C. Statutory Factors Guiding the Award of Punitive Damages*

In Minnesota, the fact finder is directed to consider the following factors in determining an award of punitive damages:

- the seriousness of 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;
- the number and level of employees involved in causing or concealing the misconduct;
- the financial condition of the defendant; and
- the total effect of other punishment likely to be imposed upon the defendant as a result of the misconduct, including compensatory and punitive damages awards to the plaintiff and other similarly situated persons, and the severity of any criminal penalty to which the defendant may be subject.<sup>35</sup>

The courts, both trial and appellate, are to use these factors when reviewing a punitive damages award.<sup>36</sup> In Minnesota, the trial

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indifference” is required to support a prima facie case under section 549.20); *Johns v. Harborage I, Ltd.*, 585 N.W.2d 853, 863 (Minn. Ct. App. 1998) (reversing punitive damages award despite finding that defendant knew, and should have known, of its employee’s longstanding pattern of sexual harassment of female employees, and that defendant failed to take proper remedial action).

34. See *Olson v. Snap Prod. Inc.*, 29 F. Supp. 2d 1027, 1036-37 (D. Minn. 1998) (finding that evidence the manufacturer deceptively labeled its “fix a flat” tire inflator as “non-explosive” to preserve its market advantage, even though it knew of the high probability of tire welding-explosions, was sufficient under Minnesota law to entitle consumer to assert punitive damages claim for injuries sustained when the tire injected with the product exploded); *Gryc v. Dayton Hudson Corp.*, 297 N.W.2d 727, 739-40 (Minn. 1980) (awarding punitive damages after four-year-old girl was severely injured when her pajamas caught fire over a stove, where evidence showed that the manufacturer knew prior to the accident that the pajamas were highly flammable, but rejected an available flame resistant treatment for economic reasons).

35. MINN. STAT. § 549.20, subd. 3 (2002).

36. See MINN. STAT. § 549.20, subd. 5 (2002); *Kociemba v. G.D. Searle & Co.*, 707 F. Supp. 1517, 1537 (D. Minn. 1989) (holding that a \$7 million punitive damages award was not “shockingly excessive” based on profits defendant gained

court's review of punitive damages is often more rigorous than other types of damages, and it has broad discretion in determining whether to set aside a verdict as excessive.<sup>37</sup> A new trial or remittitur is appropriate if the trial court determines the jury's award of punitive damages is so grossly excessive as to "shock the conscience" of the court.<sup>38</sup> Generally, the trial court's authority to exercise its discretion in granting or denying remittitur within the statutory guidelines is reviewed deferentially and will be reversed only if there is a clear abuse of discretion.<sup>39</sup> The Court of Appeals for the Eighth Circuit, applying Minnesota law, has stated that it is appropriate for the court to set the remittitur so as to permit recovery of the highest amount that the jury could have awarded.<sup>40</sup>

### III. SUBSTANTIVE REVIEW OF PUNITIVE DAMAGES: CONSTITUTIONAL CONCERNS AND THE "THREE GUIDEPOSTS"

Any treatment of punitive damages in Minnesota or any other state is no longer complete without a discussion of the constitutional limits that have been placed on punitive damages awards in recent years. The constitutional constraints on a jury's award of punitive damages have recently been the subject of considerable debate, both in the courts and in scholarly

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from selling intrauterine device that caused plaintiff's infertility, defendant's disregard of risks, and defendant's financial condition).

37. See *Mrozka v. Archdiocese of St. Paul & Minneapolis*, 482 N.W.2d 806, 813 (Minn. Ct. App. 1992) (stating "open-ended and volatile nature of punitive damages requires a reviewing court to exercise close supervision over the award") (citing *Estate of Hartz v. Nelson*, 437 N.W.2d 749, 757 (Minn. Ct. App. 1989) and *Hodder v. Goodyear Tire & Rubber Co.*, 426 N.W.2d 826, 835 (Minn. 1990)).

38. See MINN. R. CIV. P. 59.01; *Foster v. Time Warner Entm't Co.*, 250 F.3d 1189, 1194 (8th Cir. 2001) (citing *Am. Bus. Interiors, Inc. v. Haworth, Inc.*, 798 F.2d 1135, 1146 (8th Cir. 1986)); see also *Am. Bus. Interiors, Inc.*, 798 F.2d at 1146 (stating that although state law principles govern whether punitive damages are available for a state law claim, the proper role of federal courts in reviewing the size of jury verdicts is a matter of federal law).

39. See *Mrozka*, 482 N.W.2d at 813. But see *Cooper Indus., Inc. v. Leatherman Tool Group, Inc.*, 532 U.S. 424, 435 (2001) (regarding the appellate court's obligation to conduct de novo review in cases where punitive damages implicate constitutional concerns).

40. *Kociemba*, 707 F. Supp. at 1536 & n.19 (stating that although state law governs the issue of the excessiveness of a verdict in a diversity action, the issue of whether the appellate court should grant a new trial on remittitur is a procedural question to be decided under federal law).

publications.<sup>41</sup> This is because, in the past ten years, several significant decisions addressed the court's constitutional review of the jury's punitive damages award, including a U.S. Supreme Court case decided just this year. These constitutional constraints are a dramatic departure from traditional punitive damages review which, until 1991, was virtually the sole province of state law.

Constitutional limitations on punitive damages were first articulated by the U.S. Supreme Court in *Pacific Mutual Life Insurance Co. v. Haslip*,<sup>42</sup> elaborated on in *TXO Production Corp. v. Alliance Resources Corp.*,<sup>43</sup> and given real force first in the landmark case of *BMW of North America, Inc. v. Gore*,<sup>44</sup> and then again this year in *State Farm Mutual Automobile Insurance Co. v. Campbell*.<sup>45</sup> In *BMW*, a case involving a fraud claim based on an automobile dealer's failure to disclose that an automobile had been repainted prior to delivery, the U.S. Supreme Court struck down a state court punitive damages award for the first time in history, finding the award excessive and in violation of the Due Process Clause (both the Fifth and Fourteenth Amendments) of the Constitution and remanding the case to the Alabama state court for determination of the appropriate amount of punitive damages.<sup>46</sup> In reaching this decision, the Court reviewed the reasonableness of the punitive damages award by examining three "guideposts": (1) the degree of reprehensibility of the defendant's conduct; (2) the ratio of the punitive damages award to the actual harm inflicted on the plaintiff; and (3) comparing the punitive damages award and the civil or criminal penalties that could be imposed for comparable

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41. For recent treatment of the constitutional review of punitive damages awards see, for example, Mark A. Kugheit, "Where the Rubber Meets the Road": *Theoretical Justification vs. Practical Outcomes in Punitive Damages Litigation*, 52 SYRACUSE L. REV. 803 (2002); Lisa Litwiller, *Has the Supreme Court Sounded the Death Knell for Jury Assessed Punitive Damages? A Critical Re-examination of the American Jury*, 36 U.S.F. L. REV. 411 (2002); Amanda L. Maxfield, *Punitive Damages: Cooper Industries v. Leatherman Tool Group: Will a Constitutional Objection to the Excessiveness of a Punitive Damages Award Save Defendants from Oklahoma's Punitive Damages Statute?*, 55 OKLA. L. REV. 449 (2002); Paul M. Sykes, *Marking a Road to Nowhere? Supreme Court Sets Punitive Damages Guideposts in BMW v. Gore*, 75 N.C. L. REV. 1084 (1997).

42. 499 U.S. 1 (1991).

43. 509 U.S. 443 (1993).

44. 517 U.S. 559 (1996).

45. 123 S. Ct. 1513 (2003).

46. *BMW of N. Am. v. Gore*, 517 U.S. 559, 586 (1996).

misconduct.<sup>47</sup>

The remainder of this Section addresses each of the Court's "guideposts" in the context of the key U.S. Supreme Court cases that have been decided both before and after the decision in *BMW*. A review of these cases indicates that while the Court has now established some outer constitutional limits on punitive damages, significant leeway remains for juries to implement state directives on punitive damages and significant discretion to grant such awards based on the specific facts of each case.

A. *The Degree of Reprehensibility of the Defendant's Conduct*

In *BMW*, the Supreme Court stated that "[p]erhaps the most important *indicium* of the reasonableness of a punitive damages award is the degree of reprehensibility of the defendant's conduct."<sup>48</sup> The Court's views on the first *BMW* guidepost are best illustrated in *TXO Production Corp.*, as well as in *BMW* itself and this year's decision in *State Farm Mutual Automobile Insurance Co. v. Campbell*.

1. *TXO Production Corp. v. Alliance Resources Corp.*

In *TXO*, the Court found that a significant punitive damages award was not excessive in violation of the Due Process Clause of the Fourteenth Amendment in a common law slander of title action brought originally in West Virginia state court.<sup>49</sup> The respondents obtained a judgment against the petitioner TXO

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47. *Id.* at 574-83. In 2001, the Supreme Court issued another significant punitive damages decision, *Cooper Indus., Inc. v. Leatherman Tool Group, Inc.*, 532 U.S. 424 (2001), in which it held in a trademark infringement case that when a punitive damages award implicates constitutional concerns, the appellate court reviews the constitutionality of the award de novo rather than under an abuse of discretion standard. *Cooper*, 523 U.S. at 443. See also *Honda Motor Co., Ltd. v. Oberg*, 512 U.S. 415, 418 (1994) (holding an amendment to the Oregon Constitution prohibiting judicial review of the amount of punitive damages awarded by a jury "unless the court can affirmatively say there is no evidence to support the verdict" violates the Due Process Clause of the Fourteenth Amendment).

48. *BMW*, 517 U.S. at 575 (citing *Day v. Woodworth*, 13 How. 363, 371 (1852) (emphasis added)); see also *Browning-Ferris Indus., Inc. v. Kelco Disposal, Inc.*, 492 U.S. 257, 301 (1989) (O'Connor, J., concurring in part and dissenting in part) (reviewing court "should examine the gravity of the defendant's conduct and the harshness of the award of punitive damages").

49. *TXO Prod. Corp.*, 509 U.S. at 466.

Production Corp. for \$19,000 in actual damages and \$10 million in punitive damages.<sup>50</sup> TXO had approached Alliance Resources with what seemed like a “phenomenal offer” for buying of oil and gas royalties.<sup>51</sup> TXO then investigated the background of the property and represented to Alliance Resources that it was possible that a 1958 deed had conveyed oil and gas royalties to another party even though TXO knew this to be untrue.<sup>52</sup> TXO then obtained the 1958 deed from the other party and brought a declaratory judgment action to quiet title to the oil and gas royalties.<sup>53</sup> The West Virginia Supreme Court of Appeals found that TXO “‘knowingly and intentionally brought a frivolous declaratory judgment action’ when its ‘real intent’ was ‘to reduce the royalty payments under a 1,002.74-acre oil and gas lease,’ and thereby ‘increas[e] its interest in the oil and gas rights.’”<sup>54</sup> The West Virginia court found that TXO had asserted a claim to title to the oil and gas under the property by virtue of the quitclaim deed “but that the deed was a ‘nullity.’”<sup>55</sup>

Alliance’s counterclaim for slander of title was subsequently tried to a jury, resulting in a verdict of \$19,000 in compensatory damages and \$10 million in punitive damages.<sup>56</sup> In addition to the evidence that TXO knew that Alliance had good title to the oil and gas and that TXO had acted in bad faith when it advanced a claim on the basis of the worthless quitclaim deed in an effort to renegotiate its royalty arrangement, Alliance also introduced evidence showing that TXO was a large company in its own right and a wholly owned subsidiary of an even larger company; that the anticipated gross revenues from oil and gas development—and therefore the amount of royalties that TXO sought to renegotiate—were substantial; and that TXO had engaged in similar nefarious activities in its business dealings in other parts of the country.<sup>57</sup>

Based on these facts, the Court held that even though the punitive damages award was 526 times as large as the actual

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50. *Id.* at 450.

51. *Id.* at 447.

52. *Id.* at 448-49.

53. *Id.* at 449.

54. *Id.* (quoting *TXO Prod. Corp. v. Alliance Res. Corp.*, 419 S.E.2d 870, 875, 877 (W. Va. 1992)).

55. *Id.*

56. *Id.* at 450.

57. *Id.* at 450-51.

damages award, the award did not violate the Due Process Clause based in part on the petitioner's "malicious and fraudulent course to win back, either in whole or in part, the lucrative stream of royalty it had ceded to Alliance."<sup>58</sup> The Court found that the punitive damages were appropriate because:

[I]n light of the amount of money potentially at stake, the bad faith of petitioner, the fact that the scheme employed in this case was part of a larger pattern of fraud, trickery and deceit, and petitioner's wealth we are not persuaded that the award was so 'grossly excessive' as to be beyond the power of the State to allow.<sup>59</sup>

The Court also addressed TXO's contention that the admission of evidence of similar wrongdoing in other parts of the country, as well as the evidence of its impressive net worth, led the jury to base its award on impermissible passion and prejudice.<sup>60</sup> The Court found that it was "well-settled law . . . [that] factors such as these are typically considered in assessing punitive damages."<sup>61</sup> Thus, in *TXO*, the Court made clear that the conduct of the defendant, rather than the damage resulting from that conduct, must be the primary focus of any assessment of punitive damages.

## 2. BMW of North America v. Gore

The *BMW* case was a significant turning point for the Court, in that it was the first time the Court struck down a state punitive damages award on constitutional grounds.<sup>62</sup> In *BMW*, the plaintiff brought an action against the foreign automobile manufacturer, American distributor, and dealer based on the distributor's failure to disclose that the automobile he had purchased had been repainted after being damaged prior to delivery.<sup>63</sup> Originally the jury had awarded \$4 million in punitive and \$4000 in compensatory damages.<sup>64</sup> The Alabama Supreme Court found the punitive damages were excessive and decreased the amount of punitive damages to \$2 million for a 500:1 ratio between punitive and

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58. *Id.* at 462.

59. *Id.*

60. *Id.* at 462 n.28.

61. *Id.*

62. *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 563 (1996).

63. *Id.*

64. *Id.* at 565.

2003] PUNITIVE DAMAGES AFTER *JENSEN* v. *WALSH* 191

compensatory damages.<sup>65</sup>

In vacating the award, the Court found that “none of the aggravating factors associated with particularly reprehensible conduct [were] present” in the case.<sup>66</sup> The plaintiff suffered only economic harm, “the presale refinishing . . . had no effect on [the car’s] performance or safety features, or . . . appearance,” and there was no evidence of BMW’s “indifference to or reckless disregard for the health and safety of others.”<sup>67</sup> The Court further concluded that the punitive damages were excessive because the record did not show any “deliberate false statements, acts of affirmative misconduct, or concealment of evidence of improper motive as were present in *Haslip* and *TXO Production Corporation*.”<sup>68</sup>

### 3. State Farm Mutual Automobile Insurance Co. v. Campbell

Earlier this year, the Court refined the reprehensibility analysis, holding that evidence of misconduct by the defendant in other jurisdictions that was not similar to the conduct specifically directed toward the plaintiffs could not form the primary basis of a finding of reprehensible conduct.<sup>69</sup> *Campbell* involved a claim in Utah state court for bad faith, fraud, and intentional infliction of emotional distress brought by the Campbells, holders of automobile insurance, against their insurer State Farm.<sup>70</sup> The Campbells brought this suit against State Farm, which had refused to accept reasonable settlement offers for a fatal car crash while representing the Campbells under subrogation.<sup>71</sup> The car crash case resulted in a judgment against the Campbells for \$135,849 beyond the policy limits, which State Farm initially refused to cover.<sup>72</sup> Despite State Farm’s later acquiescence to cover the amount in excess of the policy limits, the Campbells proceeded to sue State Farm for bad faith, fraud, and intentional infliction of emotional distress based on the previous case.<sup>73</sup> In the second case,

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65. *Id.* at 567.

66. *Id.* at 576.

67. *Id.*

68. *Id.* at 579-80.

69. State Farm Mut. Auto. Ins. Co. v. Campbell, 123 S. Ct. 1513, 1526 (2003).

70. *Id.* at 1518.

71. *Id.*

72. *Id.*

73. *Id.*

the Utah Supreme Court affirmed a compensatory damage award of \$1 million for intentional infliction of emotional distress and reinstated the jury's original verdict of \$145 million in punitive damages.<sup>74</sup>

The U.S. Supreme Court reversed the punitive damages award and remanded the case to the Utah courts to recalculate punitive damages.<sup>75</sup> On the issue of reprehensibility, the Court stated that "[w]hile we do not suggest there was error in awarding punitive damages based upon State Farm's conduct toward the Campbells, a more modest punishment for the reprehensible conduct could have satisfied the State's legitimate objectives, and the Utah courts should have gone no further."<sup>76</sup> The basis for this statement was the Court's conclusion that the punitive damages award was not based on the conduct directed toward the Campbells, but on extensive expert testimony admitted into evidence that State Farm's actions in that case were merely part of a national scheme to meet corporate fiscal goals by capping payouts on claims companywide.<sup>77</sup>

In holding this evidence could not be used to determine reprehensibility, the Court focused on the fact that the evidence of nationwide conduct "bore no relation to the Campbells' harm,"<sup>78</sup> and thus could not be used to show motive or repeated misconduct.<sup>79</sup> Thus, while the Court left open the possibility that evidence of "other acts" similar to the misconduct at issue could be used to meet the reprehensibility element, unrelated bad acts by the defendant could not.<sup>80</sup>

*B. Ratio of the Punitive Damages Award to the Actual Harm Inflicted on the Plaintiff*

The second guidepost used to determine whether a punitive damages award is excessive is "its ratio to the actual harm inflicted

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74. The jury's original award was \$2.6 million in compensatory damages and \$145 million in punitive damages, which the trial court reduced to \$1 million and \$25 million respectively. *Id.* at 1519.

75. *Id.* at 1526.

76. *Id.* at 1521.

77. *Id.* at 1518-19.

78. *Id.* at 1523.

79. *Id.* at 1522.

80. *Id.* at 1523. Indeed, the Court specifically stated that "evidence of other acts need not be identical to have relevance in the calculation of punitive damages . . . ." *Id.*

on the plaintiff.”<sup>81</sup> In recent years, the Court has stressed the importance of a reasonable ratio between actual or potential harm to the plaintiff and punitive damages, but has declined to impose a maximum ratio across the board, leaving the state courts with considerable discretion in this area.<sup>82</sup> In *Haslip*, the Court concluded that even though a punitive damages award of “more than 4 times the amount of compensatory damages” might be “close to the line,” it did not “cross the line into the area of constitutional impropriety.”<sup>83</sup> In *TXO*, the Court refined the analysis by confirming that the proper inquiry is “whether there is a reasonable relationship between the punitive damages award and the harm likely to result from the defendant’s conduct as well as the harm that has actually occurred.”<sup>84</sup> Although at first glance it seems that the Supreme Court upheld a 526:1 ratio in *TXO*, the Court reasoned that the ratio was actually only 10:1 by examining the difference between the punitive damages award and the possible harm to the victim if the defendant had “succeeded in its illicit scheme.”<sup>85</sup> In *BMW*, the Court stressed that:

[L]ow awards of compensatory damages may properly support a higher ratio than high compensatory awards, if, for example, a particularly egregious act has resulted in only a small amount of economic damages. 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. “We need not, and indeed we cannot, draw a mathematical bright line between the constitutionally acceptable and the constitutionally unacceptable that would fit every

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81. *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 580 (1996) (citing *TXO Prod. Corp. v. Alliance Res. Corp.*, 509 U.S. 443, 459 (1993); *cf. Pac. Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1, 23 (1991) (holding that a punitive damages award for 200 times the out-of-pocket expenses of the respondent was proper because the award did not lack objective criteria).

82. Indeed, the Court has reiterated that it is appropriate for the states to continue to retain flexibility regarding additional factors juries may consider in awarding punitive damages, including the defendant’s financial condition and the profits that flowed from the misconduct. *State Farm Mut. Auto Ins. Co. v. Campbell*, 123 S.Ct. 1513, 1524 (2003); *see also TXO Prod. Corp.*, 509 U.S. at 464 n.29 (reaffirming that the financial condition of the defendant is one factor that may be taken into account in assessing punitive damages).

83. *Haslip*, 499 U.S. at 23-24.

84. *TXO Prod. Corp.*, 509 U.S. at 460 (quoting *Garnes v. Fleming Landfill, Inc.*, 413 S.E.2d 897, 909 (W. Va. 1991)).

85. *Id.* at 462.

case. We can say, however, that [a] general concer[n] of reasonableness . . . properly enter[s] into the constitutional calculus.”<sup>86</sup>

This variation in ratios is reflected in several recent and significant punitive damages awards. For example in *Romo v. Ford Motor Co.*,<sup>87</sup> the California Court of Appeals upheld an award of \$290 million in punitive damages and \$6.226 million in compensatory damages (a ratio of 40:1) for an SUV rollover killing three passengers. The court determined the award was appropriate because Ford’s conduct could have constituted involuntary manslaughter and the award only constituted 1.2 percent of its net worth. In another recent case, a Kansas trial court awarded \$15 million in punitive damages and \$198,400 in compensatory damages (a ratio of 80:1) against a cigarette manufacturer who was found to have intentionally misrepresented the dangers of smoking.<sup>88</sup> In another cigarette case, the Oregon Court of Appeals allowed a \$79.5 million punitive damages award to stand, equal to about two and half weeks of profits of the manufacturer (ratio of 97:1). The jury based its award on finding the manufacturer intentionally misrepresented the dangers of smoking.<sup>89</sup> Similarly, in October 2002, a California jury awarded a smoker \$28 billion in punitive damages and \$850,000 in compensatory damages based on theories of fraud and negligence by the defendant cigarette company.<sup>90</sup> The California Supreme Court subsequently reduced the punitive damages portion of the verdict to \$28 million (ratio of 33:1), calling the jury’s figure legally excessive.<sup>91</sup>

How these ratios hold up on appeal will depend in large part on the lower courts’ application of the Supreme Court’s recent *Campbell* decision. Since the *Campbell* decision was issued on April 7, 2003, it has had an immediate impact on pending punitive

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86. *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 582-83 (1996) (quoting *TXO Prod. Corp.*, 509 U.S. at 458). See also *Campbell*, 123 S. Ct. at 1524.

87. 122 Cal. Rptr. 2d 139 (2002), *rev. denied* (Cal. 2002), *vacated*, 123 S.Ct. 2072 (May 19, 2003).

88. See *Burton v. R.J. Reynolds Tobacco Co.*, 205 F. Supp. 2d 1253 (D. Kan. 2002).

89. *Williams v. Philip Morris Inc.*, 51 P.3d 670 (Or. Ct. App. 2002), *rev. denied*, 61 P.3d 938 (Or. 2002).

90. *Bullock v. Philip Morris, Inc.*, No. BC249171, 2002 WL 31833905, at \*1 (Cal. Dec. 18, 2002).

91. *Id.* at \*3.

damages cases.<sup>92</sup> Indeed, the Supreme Court has granted several petitions for writ of certiorari in punitive damages cases, vacated the judgments, and remanded those cases to the lower courts for further consideration in light of *Campbell*.<sup>93</sup>

It is important to keep in mind that even in *Campbell*, the Court reaffirmed that it has been “reluctant to identify concrete constitutional limits on the ratio between harm, or potential harm, to the plaintiff and the punitive damages award” and again expressly declined to impose a “bright-line” ratio that a punitive damages award cannot exceed.<sup>94</sup> The Court indicated that in practice, “[s]ingle-digit multipliers are more likely to comport with due process” but recognized there were exceptions to this practice, such as where a particularly egregious act results in only a small amount of harm.<sup>95</sup> The Court repeated that “[t]he precise award in any case, of course, must be based upon the facts and circumstances of the defendant’s conduct and the harm to the plaintiff.”<sup>96</sup> In applying these rules to the case at bar, the Court stated that it had “no doubt that there is a presumption against an award that has a 145 [to] 1 ratio.”<sup>97</sup> Moreover, the compensatory award was substantial (\$1 million for a year and a half of emotional distress), it resulted from solely economic harm rather than personal injury, and the type of injury compensated (emotional distress) already included a punitive element and so the purposes of punitive damages had already been met through the compensatory award.<sup>98</sup>

Thus, despite the Court’s rejection of the 145 to 1 ratio in

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92. See, e.g., *McClain v. Metabolife Int’l, Inc.*, 259 F.Supp. 2d 1225, 1228-29 (N.D. Ala. 2003); *Eden Elec., Ltd. v. Amana Co.*, 258 F. Supp. 2d 985, 960-61 (N.D. Iowa 2003); *TVT Records & TVT Music v. The Island of Jam Music Group*, 257 F. Supp. 2d 737, 743-44 (S.D.N.Y. 2003); *In re Richard Homes Bldg. Co., LLC*, 291 B.R. 727, 738-39 (Bankr. E.D. Mich. 2003).

93. See, e.g., *Anchor Hocking Inc. v. Waddill*, 123 S. Ct. 1781 (2003) (mem.); *Cass v. Stephens*, 123 S. Ct. 2213 (2003) (mem.); *DeKalb Genetics Corp. v. Bayer CropScience*, 123 S. Ct. 1828 (2003) (mem.); *Ford Motor Co. v. Romo*, 123 S. Ct. 2072 (2003) (mem.); *Ford Motor Co. v. Smith*, 123 S. Ct. 2072 (2003) (mem.); *Key Pharm. Inc. v. Edwards*, 123 S. Ct. 1781 (2003) (mem.); *Nat’l Union Fire Ins. Co. v. Textron Fin. Corp.*, 123 S. Ct. 1783 (2003) (mem.); *San Paolo U.S. Holding Co. v. Simon*, 123 S. Ct. 1828 (2003) (mem.).

94. *State Farm Mut. Auto. Ins. Co. v. Campbell*, 123 S. Ct. 1513, 1524 (2003).

95. *Id.*

96. *Id.*

97. *Id.*

98. *Id.*

*Campbell* based on the specific facts of that case, the Court did not depart from its precedent of consistently rejecting “the notion that the constitutional line is marked by a simple mathematical formula, even one that compares actual *and potential* damages to the punitive award.”<sup>99</sup> In the end, the analysis of whether a punitive damages award is excessive is still a case-by-case determination, and the range of award ratios between punitive damages and compensatory damages may still vary significantly.

C. *Comparison of the Punitive Damages Award and the Civil or Criminal Penalties that Could Be Imposed for Comparable Misconduct*

As the Court stated in *BMW*, “[c]omparing the punitive damages award and the civil or criminal penalties that could be imposed for comparable misconduct provides a third indicium of excessiveness.”<sup>100</sup> The rationale underlying this guidepost is the type of notice the defendant has that its conduct may subject it to a certain level of liability.<sup>101</sup> In *BMW*, “the maximum civil penalty authorized by the Alabama Legislature for a violation of its Deceptive Trade Practice Acts was \$2,000.”<sup>102</sup> In other states the maximum fine ranged from \$50 for first offenses to \$10,000.<sup>103</sup> The Court reasoned that none of these fines would have given the defendant fair notice that violations would subject it to a multimillion dollar penalty and, therefore, reversed the award on due process grounds.<sup>104</sup> Similarly, in *Campbell*, the Court found that the most relevant civil sanction under Utah law for the wrong done to the Campbells was a \$10,000 fine for an act of fraud, “an amount dwarfed by the \$145 million punitive damages award.”<sup>105</sup>

While these recent Supreme Court cases and their articulation of the “three guideposts” in no way displace Minnesota Statutes

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99. *Id.* (emphasis added) (quoting *BMW of N. Am. v. Gore*, 517 U.S. 559, 582 (1996) and *TXO Prod. Corp. v. Alliance Res. Corp.*, 509 U.S. 443, 446 (1993)); see also *TXO Prod. Corp.*, 509 U.S. at 466 (Kennedy, J., concurring) (“The Constitution identifies no particular multiple of compensatory damages as an acceptable limit for punitive awards; it does not concern itself with dollar amounts, ratios, or the quirks of juries in specific jurisdictions.”).

100. *BMW*, 517 U.S. at 583.

101. *Id.* at 584.

102. *Id.*

103. *Id.*

104. *Id.*

105. *State Farm Mut. Auto. Ins. Co. v. Campbell*, 123 S. Ct. 1513, 1526 (2003).

2003] PUNITIVE DAMAGES AFTER *JENSEN* v. *WALSH* 197

section 549.20 in governing awards of punitive damages in Minnesota, they do form an outer constitutional boundary on the reasonableness of such damages. However, as *Haslip*, *TXO*, *BMW*, and even *Campbell* all make clear, there will continue to be significant variation in punitive damages awards from case to case based on the various factors state laws direct juries to consider and the specific facts of each case.

#### IV. FROM *GRYC* TO *JENSEN*: THE PERSONAL INJURY REQUIREMENT

Apart from the constitutional limitations on punitive damages awards, a unique and unusual limitation on such awards existed in Minnesota until very recently. Until the *Jensen v. Walsh*<sup>106</sup> decision in 2001, a line of Minnesota Supreme Court cases appeared to preclude punitive damages in any case that did not involve personal injury. Because this limitation is not obvious from the punitive damages statute itself, a brief review of the statute and opinions prior to *Jensen* interpreting the statute is helpful.

First, the statute itself provides that punitive damages are available with proof of “deliberate disregard” for the “rights *or* safety of others.”<sup>107</sup> Nothing in the statute explicitly limits punitive damages to cases involving personal injury. In fact, the use of the phrase “rights *or* safety” seems to suggest that harm to “rights” even without harm to “safety” can support a punitive damages claim.

For approximately twenty years prior to *Jensen*, however, the Minnesota courts did not broadly apply the statute. In order to understand the concern that led to the courts’ narrow reading of the state punitive damages statute, we must start with *Gryc v. Dayton Hudson Corp.*<sup>108</sup> The Minnesota Supreme Court decided *Gryc* in 1980, shortly after the statute was enacted, and then spent the next twenty years gradually developing its punitive damages jurisprudence until 2001, when it shifted course dramatically in *Jensen*.

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106. 623 N.W.2d 247 (Minn. 2001).

107. MINN. STAT. § 549.20, subd. 1(b) (2002) (emphasis added).

108. 297 N.W.2d 727, 741 (Minn. 1980) (products liability action brought against manufacturer of flannelette pajamas for injuries to child when the pajamas caught fire).

A. *The Expansion and Contraction of Punitive Damages: From Gryc to Eisert and Keene*

*Gryc* was decided in 1980, shortly after the Minnesota Legislature codified the law of punitive damages. In *Gryc*, a young child was badly burned when her pajamas ignited and burned rapidly when lit by a stovetop burner.<sup>109</sup> The evidence at trial showed that the cotton used in the pajamas was highly flammable, there were commercially available chemicals that could have increased the safety of the product or alternative fabrics that could have been used, and the manufacturer was aware of the risk.<sup>110</sup> The jury awarded the plaintiff \$750,000 in compensatory damages and \$1 million in punitive damages.<sup>111</sup> In reviewing the case, the Minnesota Supreme Court considered for the first time whether punitive damages may be awarded in a strict products liability action.<sup>112</sup> After reviewing authority in other jurisdictions as well as the policy reasons for and against allowing such damages, the supreme court held that punitive damages may properly be awarded in strict products liability actions.<sup>113</sup> In reaching this decision, the supreme court cited “the vital state interest of protecting persons against personal injury.”<sup>114</sup>

Although *Gryc* focused on the need for deterrence in the context of protecting citizens from personal injury, nothing in *Gryc* expressly precluded awarding punitive damages in cases that did not involve personal injury. Two years later, however, in *Eisert v. Greenberg Roofing & Sheet Metal Co.*,<sup>115</sup> the supreme court appeared to take that step. *Eisert* involved claims of strict products liability against manufacturers, sellers, and applicators of insulation and paint for property damage resulting from a fire.<sup>116</sup> In affirming the

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109. *Id.* at 729.

110. *Id.* at 730-31.

111. *Id.* at 729.

112. *Id.* at 732-33.

113. *Id.*

114. *Id.* at 737. Based on this “vital state interest” the supreme court rejected respondent’s argument that the federal Flammable Fabrics Act pre-empted the state punitive damages remedy. *Id.*

115. 314 N.W.2d 226 (Minn. 1982).

116. *Id.* at 227. The fire also killed two high school students. The decedents’ heirs brought separate claims for punitive damages but those claims were denied because Minnesota law at the time prohibited punitive damages in wrongful death claims. *Id.* at 227-28. The Minnesota legislature has since amended the wrongful death statute to allow punitive damages. MINN. STAT. § 573.02, subd. 1 (2002).

trial court's refusal to allow the plaintiffs to assert a claim for punitive damages, the supreme court held that punitive damages "are not recoverable under a strict products liability theory for property damage" and affirmed the trial court's denial of the motion to amend.<sup>117</sup> The court cited the analysis in *Gryc*, which focused on the vital state interest of protecting persons against personal injury.<sup>118</sup> The court elaborated on that principle as follows:

The interests implicated in strict liability actions for injury solely to property are not so great as to warrant extension of this controversial remedy to those actions. "[T]he very power of the remedy demands that judges exercise close control over the imposition and assessment of punitive damages." Although the nature of the plaintiff's injury is not always listed as a factor in determining how to assess punitive damages, . . . it may reasonably be taken into account in deciding where punitive damages will be allowed . . . . Where that injury is limited to property damage, the public interest in punishment and deterrence is largely satisfied by the plaintiff's recovery of compensatory damages. Punitive damages represent an extraordinary measure of deterrence. Denying their imposition in this case, after allowing punitive damages in strict liability actions for personal injury, reflects the higher value our society places on the safety of persons than it does on the security of property.<sup>119</sup>

The next case in which the supreme court addressed the availability of punitive damages for claims not involving personal injury was *Independent School District Number 622 v. Keene Corp.*<sup>120</sup> in 1994. A school district asserted strict products liability and other claims against manufacturers and others for the cost of removing asbestos from a high school.<sup>121</sup> At trial, the jury awarded both compensatory and punitive damages.<sup>122</sup> The Minnesota Court of Appeals reduced the punitive damages award but otherwise affirmed the case.<sup>123</sup> On appeal to the supreme court, the school

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117. *Eisert*, 314 N.W.2d at 228.

118. *Id.*

119. *Id.* at 229 (citations omitted).

120. 511 N.W.2d 728 (Minn. 1994).

121. *Id.* at 729.

122. *Id.* at 730.

123. *Id.*

district argued that *Eisert* did not bar punitive damages because unlike *Eisert*, which only involved strict products liability claims, the school district had succeeded at trial on claims of negligence and fraud in addition to the strict products liability claim.<sup>124</sup>

The Minnesota Supreme Court rejected the distinction and, citing *Eisert*, reversed the award of punitive damages.<sup>125</sup> The court stated that “[w]e believe now as we did in *Eisert* that denying punitive damages where a plaintiff suffers only property damage reflects the greater importance society places on protecting people.”<sup>126</sup> Thus, in *Keene*, the supreme court appeared to hold that the nature of the plaintiff’s injury—in addition to the defendant’s conduct—was not only a relevant consideration but a necessary predicate to allowing punitive damages.

#### B. *Confusion in the Courts: Phelps and Molenaar*

Two cases decided after *Keene* in the mid-1990s backed away from the apparent bright-line rule announced in *Keene*. First, in 1995, in *Phelps v. Commonwealth Land Title Insurance Co.*,<sup>127</sup> the supreme court affirmed an award of punitive damages in an employment discrimination case without any reference to *Eisert* or *Keene*. Building on this apparent redirection, the court of appeals, in *Molenaar v. United Cattle Co.*,<sup>128</sup> held that punitive damages were available in a case not involving personal injury where the defendant had engaged in conversion of the plaintiff’s cattle. In *Molenaar*, the trial court allowed the plaintiff to add to a claim for punitive damages, and then after the jury awarded the plaintiff \$59,375 in compensatory damages and \$400,000 in punitive damages, granted the defendant’s motion for JNOV on the grounds that punitive damages could not be recovered absent personal injury.<sup>129</sup>

Reversing the trial court’s JNOV and reinstating the punitive damages claim, the court of appeals engaged in a detailed analysis of Minnesota punitive damages law and the statute itself, and held that *Keene* was limited to products liability actions.<sup>130</sup> The court

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124. *Id.* at 732.

125. *Id.*

126. *Id.*

127. 537 N.W.2d 271 (Minn. 1995).

128. 553 N.W.2d 424 (Minn. Ct. App. 1996).

129. *Id.* at 426.

130. *Id.* at 428.

2003] PUNITIVE DAMAGES AFTER *JENSEN v. WALSH* 201

focused on the fact that Minnesota Statutes section 549.20 allows recovery of punitive damages for violation of “rights” or “safety” and that violations of rights do not necessarily involve personal injury.<sup>131</sup> The court went on to recognize that “[a]bsent punitive damages, one who intentionally and wrongfully takes another’s property has little to fear,” and that abolishing punitive damages “improves the profitability of theft.”<sup>132</sup> Finally, the court noted that while some states had restricted or restructured punitive damages, the court was not aware of any state in the nation that has abolished punitive damages for injury to property while allowing punitive damages for personal injury.<sup>133</sup>

Compounding the uncertainty created by *Phelps* and *Molenaar*, in 1998 the U.S. District Court for the District of Minnesota rejected the *Molenaar* analysis in *Luigino’s Inc. v. Pezrow Cos.*<sup>134</sup> Based on a broad reading of *Keene*, personal injury was held a requirement for *all* punitive damages cases under Minnesota law.<sup>135</sup> Thus, throughout the 1990s, there was significant uncertainty regarding the availability of punitive damages in cases involving property damage and significant disagreement within Minnesota courts on how to apply *Eisert* and *Keene*.

### C. A New Direction: *Jensen v. Walsh*

In March 2001, the supreme court explicitly disclaimed its prior focus on the plaintiff’s injury and adopted the narrower reading of *Eisert* and *Keene*. In *Jensen v. Walsh*, a houseboat owner sued a neighbor alleging intentional infliction of emotional distress and intentional damage to property involving a dispute over river access.<sup>136</sup> The trial court denied a motion to amend the complaint to add a claim for punitive damages because the damage was only to property.<sup>137</sup> The court of appeals affirmed and the en banc

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131. *Id.* at 428-29.

132. *Id.* at 429.

133. *Id.* at 429.

134. 178 F.R.D. 523 (D. Minn. 1998) (expressing “serious reservations” concerning analytical soundness of *Molenaar* and refusing to allow punitive damages to be asserted in breach of contract and fraud claims).

135. *Id.*; see also *Soucek v. Banham*, 524 N.W.2d 478 (Minn. Ct. App. 1994) (applying broad interpretation of *Keene* and holding punitive damages not available for killing the plaintiff’s dog).

136. *Jensen v. Walsh*, 623 N.W.2d 247, 248-49 (Minn. 2001).

137. *Id.* at 249.

supreme court reversed.<sup>138</sup> The supreme court held that a plaintiff could recover punitive damages in an action that involved only property damage so long as the claim was not one for strict products liability.<sup>139</sup> The court examined both the common law history of punitive damages as well as the court's historic concern regarding the large number of punitive damages verdicts in products liability suits:

While *Eisert* and *Keene* reflect an intent to control escalating lawsuits and awards in product liability actions where the only damage is to property, other claims of property damage may be protected through an award of punitive damages. Section 549.20 allows punitive damages where there is deliberate disregard of the rights or safety of others. Minn. Stat. 549.20, subd. 1. Use of the disjunctive "or" indicates that the legislature intended to safeguard rights other than those relating to a person's safety. Therefore, section 549.20 does not limit its application to claims of personal injury.<sup>140</sup>

Thus, the court returned to the plain language of the statute itself, essentially conducting the same analysis used by the court of appeals in *Molenaar*, and reached the same conclusion. The supreme court went on to explain that its holding was based on the reality that "[w]ithout punitive damages, one who acts with deliberate disregard of the rights or safety of others faces no greater penalty than a well-meaning but negligent offender."<sup>141</sup> The supreme court attempted to retain the core holdings of *Eisert* and *Keene* in products liability cases while ensuring that the punitive and deterrent functions of punitive damages could still be used in other cases involving damage to property. The supreme court expressly gave weight to the historic concerns that the threat of large punitive damages in products liability cases would impede the development of beneficial products to the marketplace.<sup>142</sup>

The impact of *Jensen* is significant. In the last twenty years, punitive damages, an amazingly powerful force in litigation, have

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138. *Id.* at 248-49.

139. *Id.* at 251.

140. *Id.*

141. *Id.*

142. *See id.* (discussing the controversy surrounding punitive damages awards in products liability cases at the time *Eisert* and *Keene* were decided and citing Justice O'Connor's concurring and dissenting opinion in *Browning-Ferris Industries, Inc. v. Kelco Disposal, Inc.*, 492 U.S. 257, 282 (1989)).

simply been absent from a significant number of cases in Minnesota ranging from fraud and misrepresentation to environmental damage to property.<sup>143</sup> As a result, many such cases with modest compensatory damages were never brought in the first place or were quickly settled for minimal amounts. Likewise, egregious behavior in the context of real estate or personal property transactions was seldom punished (as opposed to compensated) through the civil justice system. *Jensen* has changed all that, opening a new chapter in civil damages law in the state.

V. THE IMPACT OF *JENSEN* IN ENVIRONMENTAL CASES:  
*KENNEDY BUILDING ASSOCIATES v. VIACOM, INC.*

A recent case in Minnesota federal court illustrates *Jensen*'s immediate impact in the context of a case involving environmental contamination.<sup>144</sup> In *Kennedy Building Associates v. Viacom, Inc.*,<sup>145</sup> the owner of a commercial building in northeast Minneapolis, Kennedy Building Associates ("KBA"), brought suit in the U.S. District Court for the District of Minnesota against Viacom, Inc., the successor to the building's previous owner, Westinghouse Electric Corp.,<sup>146</sup> who had used the building to repair electrical

143. As an illustration, none of the cases that led to the U.S. Supreme Court opinions discussed *supra* in Section III could even have been brought in Minnesota prior to *Jensen*. See *Cooper Indus., Inc. v. Leatherman Tool Group*, 532 U.S. 424 (2001) (addressing trademark infringement); *BMW of N. Am. v. Gore*, 517 U.S. 559 (1996) (dealing with fraud relating to repainting automobile); *TXO Prod. Corp. v. Alliance Res. Corp.*, 509 U.S. 443 (1993) (addressing slander of title); *Pacific Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1 (1991) (involving fraud against an insurance company).

144. Although *Jensen* was decided in 2001, there are only two published decisions applying *Jensen*. In *In re Silicone Implant Insurance Coverage Litigation*, 652 N.W.2d 46 (Minn. Ct. App. 2002), *aff'd in part, rev'd in part on other grounds*, 667 N.W.2d 405 (Minn. 2003), the Minnesota Court of Appeals held that *Jensen* did not change the longstanding rule in Minnesota that punitive damages are not available in breach of contract actions absent an independent tort. *Id.* at 74-76. In *Williamson v. Prasciunas*, 661 N.W.2d 645 (Minn. Ct. App. 2003), the court of appeals cited *Jensen* in a conversion case for the basic principle that "[p]unitive damages are available to a plaintiff even where the only damage is to property and are not limited to cases of personal injury." *Id.* at 653. The only other decision applying *Jensen* is an unpublished decision, *Bratner Farms, Inc. v. Gardner*, 2002 WL 1163559, at \*2 (Minn. Ct. App. June 4, 2002), where the court of appeals upheld a trial court award of \$50,000 in punitive damages based on a claim of trespass, in which \$819 in rental value was awarded in compensatory damages.

145. No. 99-1833 (D. Minn. May 31, 2002) (judgment entered).

146. Westinghouse was the original owner of the site, but after Viacom bought Westinghouse (which changed its name to CBS Corp. after it purchased CBS in

transformers for sixty years.<sup>147</sup> When KBA went to sell the building in 1997, a standard environmental site assessment was performed, which revealed PCB<sup>148</sup> contamination in the soil, groundwater, and interior of the building.<sup>149</sup> After working with the Minnesota Pollution Control Agency to determine the scope and extent of the contamination, KBA sued Viacom under state and federal environmental cleanup laws and asserted common law tort claims to recover the money spent investigating the site, for damages for diminution in property value, and for an injunction to force Viacom to clean up the site.<sup>150</sup>

The *Jensen* decision was issued near the end of discovery, and KBA moved to amend its complaint to add a claim for punitive damages. KBA cited evidence that Westinghouse was aware of extensive PCB contamination on the site when it sold the site in 1980 to a third party and, by concealing the contamination, acted with deliberate disregard for the rights and safety of others.<sup>151</sup> KBA's motion was granted based on the recent change in the law and the case was tried to a jury over two weeks in January and February 2002. The jury awarded KBA \$5 million in punitive damages and \$325,000 in compensatory damages and response costs.<sup>152</sup> The district court entered judgment in favor of KBA for these amounts and also ordered Viacom to clean up the property to a level where it would not require any deed restrictions on future use.<sup>153</sup>

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the late 1990s), it became a successor in interest to Westinghouse's liabilities. *Id.*, slip op. at 2.

147. *Id.*

148. PCBs, or polychlorinated biphenyls, were first developed in the 1920s to serve as insulating liquid because of their stable, non-flammable characteristics. In 1971, in response to growing concerns regarding the toxicity of PCBs and their ability to bioaccumulate in the environment, Monsanto Co., the sole U.S. producer of PCBs, voluntarily restricted sales of PCBs for all uses except the manufacture of sealed electrical equipment. Kurt A. Strasser, *Cleaner Technology, Pollution Prevention and Environmental Regulation*, 9 *FORDHAM ENV'T'L L.J.* 1, 12 (1997). In 1976, in connection with Congress' enactment of the Toxic Substances Control Act, 15 U.S.C. §§ 2601-2692 (2002) ("TSCA"), the U.S. Environmental Protection Agency severely restricted the continued use of PCBs. *See* 43 Fed. Reg. 7150 (Feb. 17, 1978); 44 Fed. Reg. 31514 (May 31, 1979).

149. *Kennedy Bldg. Assocs.*, No. 99-1833, slip op. at 2.

150. *Id.* at 4-5.

151. *See infra* Section V.A. for discussion.

152. *Kennedy Bldg. Assocs.*, No. 99-1833, slip op. at 7, 9.

153. *Id.* at 9-10. The case is currently on appeal to the U.S. Court of Appeals for the Eighth Circuit.

The remaining sections of this article describe in more detail the facts and procedural history of the *Kennedy Building Associates* case as a way of illustrating both how the legal landscape has changed in cases involving damage to property as a result of *Jensen*, as well as how the facts of this particular case support a punitive damages award.

A. *Westinghouse's Use of PCBs at the Site and Deliberate Disregard of Risks*

Westinghouse operated an electrical transformer repair facility on the site from the late 1920s until 1980.<sup>154</sup> Westinghouse's operations at the site consisted of the repair of both PCB transformers and mineral oil transformers.<sup>155</sup> PCBs, first developed for commercial use in the late 1920s, are viscous oily liquids that do not conduct electricity, are fire resistant, and are chemically stable.<sup>156</sup> While PCBs were originally thought by Westinghouse and others in the electrical industry to be an ideal insulator for transformers because of these characteristics, it became apparent by at least the late 1960s that PCBs posed a serious threat to human health and the environment.<sup>157</sup> Due to this threat, the federal government placed severe restrictions on the use and handling of PCBs starting in the mid-1970s and ultimately prohibited their production entirely.<sup>158</sup>

The PCB transformers Westinghouse repaired at the site between approximately 1930 and 1980 were as large as eight feet tall, six feet long, and four feet wide, and contained up to 600 gallons of PCB fluid such as Inerteen, Westinghouse's particular brand of PCB fluid.<sup>159</sup> To repair these transformers, Westinghouse employees opened up the transformers and removed the coils immersed in the PCB fluid inside. Routine spills and leaks occurred during this process.<sup>160</sup> The evidence presented at trial established that Westinghouse operations also released PCBs into

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154. *Id.* at 2.

155. *Id.*

156. *Id.*

157. *Id.*

158. *Id.*

159. See Testimony of Gerald Fisher at 117-18, *Kennedy Bldg. Assoc. v. Viacom, Inc.*, No. 99-1833 (D. Minn. May 31, 2002) (judgment entered) (on file with author) [hereinafter Fisher].

160. *Id.* at 103-06.

the environment both through overflows from an above-ground storage tank located outside the building containing PCB-contaminated waste oil and during the burning of PCB-contaminated oil in the building's furnace.<sup>161</sup>

In the early 1970s, as awareness about the harmful effects of PCBs grew and the need for strict PCB regulations came under consideration, Westinghouse conducted a study of PCB contamination around some of its largest facilities in order to determine whether authorities would be able to trace the PCB contamination in the rivers, streams, and biota near Westinghouse facilities back to those Westinghouse plants.<sup>162</sup> According to Dr. Thomas Munson, the former Westinghouse chemist who supervised that study, the question to be answered by the study was not whether Westinghouse facilities were releasing PCBs (that, according to Dr. Munson, was a given), but rather the extent of the contamination and whether authorities would be able to trace it back to Westinghouse facilities.<sup>163</sup> With respect to Westinghouse transformer repair facilities, Dr. Munson testified at trial that Westinghouse knew that:

It simply wasn't possible to handle gallon quantities of PCBs, pumping them into transformers, draining them out of transformers, without having some spillage. And it was just a given at that time that every facility that had been doing that [repair operations] for any length of time would have spilled considerable amounts of PCBs.<sup>164</sup>

Dr. Munson testified that he urged top-level Westinghouse managers to report PCB contamination during the 1970s, but that a corporate decision was made not to reveal such contamination because the potential legal liability was too great.<sup>165</sup> By 1976, Westinghouse management was also aware that mineral oil

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161. *Id.* at 118-21.

162. Testimony of Dr. Thomas Munson at 77, *Kennedy Bldg. Assoc. v. Viacom, Inc.*, No. 99-1833 (D. Minn. May 31, 2002) (judgment entered) (on file with author) [hereinafter *Munson*].

163. *Id.* ("And it was a given that the plants were contaminated. The question was what do we do? And my part of it was to, ah, do the studies as to whether the contamination would be easily traceable back to the plants.").

164. *Id.* at 107. *See also Kennedy Bldg. Assocs.*, No. 99-1833, slip op. at 3.

165. *Munson*, *supra* note 162, at 64-65, 107 (testifying that Westinghouse had a corporate practice of not reporting the release of PCBs into the environment and that he was told if he spoke with anyone regarding the results of his PCB studies he could be prosecuted, assessed fines and jailed); *see also Kennedy Bldg. Assocs.*, No. 99-1833, slip op. at 3.

2003] PUNITIVE DAMAGES AFTER *JENSEN v. WALSH* 207

transformers repaired at such facilities were often heavily contaminated with PCBs, making the likelihood of PCB contamination at those facilities even greater.<sup>166</sup> In a 1979 rule implementing the Toxic Substances Control Act,<sup>167</sup> EPA discussed the hazards of servicing PCBs transformers and banned the practice of “rebuilding” transformers that had taken place at the KBA site for five decades.<sup>168</sup>

Despite Westinghouse’s knowledge by 1980 of the environmental and health risks caused by PCBs and of the virtually certain PCB contamination at its long-term repair facilities, Westinghouse sold the KBA site without conducting any investigation, decontamination, or cleanup of PCBs.<sup>169</sup> Local Westinghouse employees, with no assistance from Westinghouse management, no training in cleaning up PCBs or decontaminating the site and little or no knowledge of the harmful nature of PCBs, were left to move the necessary equipment to a new facility and sweep out the floors of the old building before turning over the keys.<sup>170</sup> In 1980, Westinghouse sold the site to a real estate developer who, in turn, sold the site to KBA in 1982.<sup>171</sup>

*B. The Discovery and Investigation of Contamination at the Site*

In 1997, KBA entered into negotiations to sell the site.<sup>172</sup> An environmental investigation conducted by the potential buyer’s consultant indicated the presence of PCBs on the property. After further investigation by KBA confirmed the presence of PCBs, KBA reported the existence of the contamination to the Minnesota Pollution Control Agency (“MPCA”) and entered MPCA’s

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166. *Kennedy Bldg. Assocs.*, No. 99-1833, slip op. at 3.

167. *See supra* note 148.

168. *See* 44 Fed. Reg. at 31531 (“Considering the PCB exposure that would result if such servicing [including rebuilding] was permitted, EPA believes that these costs [of prohibiting rebuilding] are justified by the increased risk of harm to human health and the environment and concludes that such servicing of PCB Transformers presents an unreasonable risk.”).

169. Fisher, *supra* note 159, at 112-15 (stating Westinghouse never told the workers at the KBA site that they were working in a contaminated environment, never told workers that PCBs were toxic prior to 1980 when the government came out with restrictions on PCB use, and provided no engineers or other support to clean or decontaminate the building).

170. *Id.*

171. *Kennedy Bldg. Assocs.*, No. 99-1833, slip op. at 4.

172. *Id.* at 5.

Voluntary Investigation and Cleanup (“VIC”) Program.<sup>173</sup> As a result of the contamination and the uncertainty associated with it, the buyer withdrew its offer to purchase the site.<sup>174</sup> Under the guidance of the MPCA and the Minnesota Department of Health, KBA continued to investigate and delineate the PCB contamination in the soil, groundwater, and building interior at the site, incurring MPCA-approved costs of \$106,393.23.<sup>175</sup>

*C. Current Contamination at the Site*

The investigation conducted by KBA’s environmental consultant under MPCA supervision revealed extensive contamination of the soil, groundwater, and building interior at the site.<sup>176</sup> The concentration of PCBs in the soil at the site ranged as high as 9100 mg/kg, compared to the MPCA’s allowable limit for PCB concentration in soil of 1.2 mg/kg.<sup>177</sup> The concentration of PCBs in the groundwater at the site ranged as high as 37,000 µg/liter, compared to the MPCA’s allowable limit for PCB concentration in groundwater of 0.04 µg/liter.<sup>178</sup> Levels of PCBs in wipe samples taken from the interior of the building ranged up to 200 µg/cm<sup>2</sup>, compared to a limit on acceptable PCB levels set by the U.S. Environmental Protection Agency and adopted by the Minnesota Department of Health at 10 µg/cm<sup>2</sup>.<sup>179</sup> Evidence at trial established that approximately 18,000 pounds of PCBs had been spilled on the site, based on the amount of PCB contamination present.<sup>180</sup> The PCB contamination at the site has continued to migrate in the soil and groundwater due to the presence of transformer mineral oil constituents acting as solvents in the soil and groundwater.<sup>181</sup>

*D. Procedural History and Addition of Punitive Damages*

After KBA’s efforts to have Viacom take full responsibility for

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173. *Id.*

174. *Id.*

175. *Id.* at 5-6.

176. *Id.* at 2.

177. *Id.* at 6.

178. *Id.*

179. *Id.*

180. *Id.*

181. *Id.*

2003] PUNITIVE DAMAGES AFTER *JENSEN v. WALSH* 209

the site failed, KBA filed a lawsuit in the U.S. District Court for the District of Minnesota seeking declaratory and injunctive relief, recovery of response costs, compensatory damages, and attorneys fees under the Comprehensive Environmental Response, Compensation and Liability Act,<sup>182</sup> the Minnesota Environmental Response and Liability Act,<sup>183</sup> the Minnesota Environmental Rights Act,<sup>184</sup> and under theories of nuisance, negligence, and strict liability.<sup>185</sup>

After discovery had closed, the Minnesota Supreme Court decided *Jensen v. Walsh*.<sup>186</sup> At that time, KBA moved the court for leave to amend its complaint to add a claim of punitive damages based on the change in Minnesota law. The court granted the motion and allowed limited discovery on the issue of punitive damages, through which KBA obtained additional information on Westinghouse's knowledge regarding both the risks of PCBs and the near certainty of PCB contamination at the site prior to its sale. This evidence, along with evidence of Viacom's financial status, was presented to the jury during a trial in federal court in Minneapolis that began in late January 2002.

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182. 42 U.S.C. §§ 9601-9675 (2002) ("CERCLA"). A party is liable for declaratory relief and for recovery of "response costs" under CERCLA if it is a "responsible person" (i.e., the current or prior owner of a facility contaminated with hazardous substances arranged for the disposal or treatment of a hazardous substance or transported a hazardous substance), there is a release or threatened release of a hazardous substance from a facility, and the response costs incurred are consistent with the National Contingency Plan ("NCP"). See 42 U.S.C. §§ 9605, 9607(a) (2002).

183. MINN. STAT. §§ 115B.01-175 (2002) ("MERLA"). MERLA, the Minnesota counterpart to CERCLA, contains very similar liability provisions to CERCLA except that current owners are only "responsible persons" if they themselves "generate[d], stor[ed], transport[ed], treat[ed] or dispose[d] of a hazardous substance at the facility, . . . knowingly permitted others [to do so], . . . or took action which significantly contributed to the release after [knowing of the presence of the] hazardous substance." See § 115B.03, subd. 3.

184. MINN. STAT. §§ 116B.01-13 (2002) ("MERA"). MERA provides for declaratory and injunctive relief to prevent the pollution, impairment, or destruction of natural resources in the state. *Id.* "Natural resources" include "all mineral, animal, botanical, air, water, land, timber, soil quietude, recreational and historic resources." § 116B.02, subd. 4.

185. *Kennedy Bldg. Assocs.*, No. 99-1833, slip op. at 1.

186. 623 N.W.2d 247, 251 (Minn. 2001) (overruling *Indep. Sch. Dist. No. 622 v. Keene Corp.*, 511 N.W.2d 728 (Minn. 1996)) (holding that plaintiff may seek punitive damages to property where damage was to property alone).

*E. Trial, Verdict, and Judgment*

After two weeks of testimony that elicited the facts set forth in the previous sections, the jury found that Viacom was 100 percent liable under MERLA and 95 percent liable under CERCLA for the PCB contamination at the site.<sup>187</sup> The jury also found Viacom liable under MERA and strictly liable for the contamination at the site.<sup>188</sup> The jury awarded \$106,393.23 in response costs under CERCLA and MERLA, \$225,000 in compensatory damages based on diminution in value to property, and \$5 million in punitive damages.<sup>189</sup>

On May 31, 2002, the district court issued Findings of Fact, Conclusions of Law and Judgment in the case.<sup>190</sup> In its Judgment, the court adopted the jury's conclusions in all respects, but instead of finding Viacom 95 percent liable under CERCLA, it found Viacom 100 percent liable under CERCLA and declared that Viacom was liable for all future response costs under both CERCLA and MERLA.<sup>191</sup> With regard to the MERA claim, the district court held that KBA had prevailed on that claim under Minnesota Statutes section 116B.07, and affirmatively enjoined Viacom to remediate the site's soil, groundwater, and building interior so that the previously placed deed restriction could be removed.<sup>192</sup> As for the damages, the district court found there was "sufficient evidence adduced at trial" to support the jury's findings on KBA's common law claims, compensatory damages, and punitive damages.<sup>193</sup> Finally, the district court held that KBA was entitled to recover prejudgment interest, costs, disbursements, and attorneys fees incurred in the case.<sup>194</sup>

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187. *Kennedy Bldg. Assocs.*, No. 99-1833, slip op. at 7-8.

188. *Id.* at 8-9.

189. *Id.* at 9.

190. Because the CERCLA, MERLA, and MERA claims are all considered equitable claims, the jury's verdict on those claims was advisory only, and the court was required to issue its own findings on those claims. *Id.* at 7.

191. *Id.* at 7-10.

192. *Id.* at 8-9.

193. *Id.* at 9.

194. *Id.* at 10. Unlike CERCLA, which does not allow for the recovery of attorneys fees incurred in pursuing a lawsuit (*see Key Tronic Corp. v. United States*, 511 U.S. 809, 816 (1994)), MERLA specifically allows for the recovery of "costs, disbursements and reasonable attorneys fees and witness fees" to the prevailing party. MINN. STAT. § 115B.14 (2002). In an order dated Feb. 4, 2003, the district court adopted the Report and Recommendation of the U.S. Magistrate Judge awarding KBA \$1,113,915.00 in attorney fees, expert witness fees and costs, and

2003] PUNITIVE DAMAGES AFTER *JENSEN* v. *WALSH* 211*F. Lessons Learned*

The *Kennedy Building Associates* case is a textbook example of the impact of the *Jensen* decision in environmental cases. Prior to *Jensen*, deliberate concealment in Minnesota of environmental harms in the past posed little risk of significant exposure from private lawsuits. At the start of the *Kennedy Building Associates* case, Westinghouse's past misconduct was relevant only for purposes of establishing simple liability on the claims themselves but had little to no relevance in the damages phase of the case. As a result of *Jensen*, however, Westinghouse's knowledge of the risks of contamination and deliberate disregard of those risks played a significant role in all aspects of the case, including damages.<sup>195</sup> In doing so, punitive damages served their purpose—to punish bad behavior and deter similar misconduct in the future.

## VI. PUNITIVE DAMAGES IN MINNESOTA: A LOOK AT THE FUTURE

The punitive damages landscape in Minnesota has changed significantly since *Jensen*.<sup>196</sup> By abandoning the personal injury requirement, the Minnesota Supreme Court has allowed the number and types of cases where punitive damages may be available to increase substantially. For instance, because so many environmental contamination cases result solely in damage to property (toxic tort cases are the obvious exception to this rule), parties faced with defending such lawsuits generally have not had any need to factor punitive damages into their risk calculations. By the same token, parties seeking to recover for property damages caused by environmental contamination often are forced to face the reality that the cost of bringing a civil lawsuit to trial will cost more than the amount necessary to remediate the property.

The *Jensen* case, as demonstrated in *Kennedy Building Associates v. Viacom*, changes this equation dramatically in environmental and other property damage cases in Minnesota. When the case began, KBA's maximum recovery was limited to recovery of response costs, damages for diminution in property value, and costs and attorneys fees under MERLA. Although these amounts were not

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\$41,677.89 in prejudgment interest. See *Kennedy Bldg. Assocs.*, No. 99-1833, slip op. (D. Minn. Dec. 10, 2002) and slip op. (D. Minn. Feb. 4, 2003).

195. *Kennedy Bldg. Assocs.*, No. 99-1833, slip op. at 7-8.

196. 623 N.W.2d 247 (Minn. 2001).

insubstantial, the case, as a matter of law, could do no more than return to KBA some of the costs and damages that had been incurred as a result of Westinghouse's contamination of the site.

Once *Jensen* was decided, however, these same injuries took on a new significance—creating significant additional financial value to KBA and significant additional risk to Viacom. Even beyond these implications for the parties, the case may deter others who might deliberately ignore or conceal contamination in the future or fail to live up to obligations imposed by contamination they caused in the past. Now that the damages may take into account the financial status of the defendant (which, in Viacom's case, was substantial), defendants have additional incentives to take responsibility for past contamination before a lawsuit is brought because losing the case means more than being faced with an order to work with the state environmental agency to remediate the site. While reasonable people will continue to disagree over the types of cases in which punitive damages should be awarded, there can no longer be any disagreement that punitive damages will need to be part of the risk equation in environmental and other property damage cases arising in the State of Minnesota.