IMPORTANT NOTICE

NOT TO BE PUBLISHED OPINION

THIS OPINION IS DESIGNATED "NOT TO BE PUBLISHED." PURSUANT TO THE RULES OF CIVIL PROCEDURE PROMULGATED BY THE SUPREME COURT, CR 76.28 (4) (c), THIS OPINION IS NOT TO BE PUBLISHED AND SHALL NOT BE CITED OR USED AS AUTHORITY IN ANY OTHER CASE IN ANY COURT OF THIS STATE.

MODIFIED: DECEMBER 21, 2006
RENDERED: AUGUST 24, 2006
NOT TO BE PUBLISHED

FINAL

Supreme Court of Kentucky

2004-SC-000250-DG

DATE 12-21-06 EVA Grauman PC

STEVE ROBERIE; AND JOYCE ROBERIE — APPELLANTS

v.

ON REVIEW FROM COURT OF APPEALS
2002-CA-001940-MR
OWEN CIRCUIT COURT NO. 99-CI-00124

ROBERT VONBOKERN; VICTORIA VONBOKERN; LARRY GODERWIS; JOAN GODERWIS; AND COUNTY OF OWEN — APPELLEES

OPINION OF THE COURT BY JUSTICE ROACH

AFFIRMING IN PART AND REVERSING IN PART

I. INTRODUCTION

This case concerns a dispute over access to an unimproved dirt road in Owen County, Kentucky. Appellants, Steve Roberie and Joyce Roberie, husband and wife, appeal a judgment of the Owen Circuit Court, which determined that the road is a public road and awarded punitive damages of $5,000.00 to the primary Appellees, their neighbors Robert VonBokern and Victoria VonBokern. The Roberies make two arguments in this appeal: (1) that the VonBokerns' cause of action was improper in that it amounted to an action to quiet title in a third party, and (2) that there was no legal or factual basis for the trial court's award of punitive damages. The Court of Appeals rejected both of these arguments in the initial appeal, though it did remand the case to the Circuit Court for an evaluation of the punitive damages award. We granted the

Roberies' motion for discretionary review and now hold that this was a proper cause of action, though for a different reason than was given by the Court of Appeals, and that the punitive damages award to the VonBokerns was appropriate given the circumstances.

II. BACKGROUND

In May 1996, the Roberies purchased an approximately 35-acre tract from the Goderwis family, which had subdivided a single piece of property into three smaller tracts. The Roberie property contained a home and was situated between the two remaining Goderwis tracts—one lying to the east, and the other lying to the northwest and not relevant to this dispute. All three properties are bordered on the northeast by Fairview Road, which is open to the public. The unimproved dirt road, which is the subject of this dispute, runs from Fairview Road in a roughly southerly direction and forms the boundary between the Roberies' property to the west and the Goderwises' property to the east. The disputed road continues to the south, forming the eastern border of a farm owned by the VonBokerns. Although the VonBokerns' property is not landlocked, the disputed road provides the best access to the northern section of the farm.

Around the time of the sale,[1] Goderwis informed the Roberies that their neighbors to the south, the VonBokerns, believed the unimproved dirt road was a county road and that they routinely used it to access their property. The Roberies

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[1] Whether this information was disclosed before or after the "closing" is not apparent from the record.

contend that they were not told of the VonBokerns' claim until after the sale was consummated.

By all accounts, the parties seem to have coexisted peaceably for some months after the Roberies purchased the property. During this time, the VonBokerns occasionally used the road, though they did so, at least initially, with the permission of the Roberies. Later the VonBokerns began to use the road without permission. Eventually, the two families became embroiled in a dispute over access to the road.

Sometime in 1998, Mr. VonBokern told the Roberies that he believed the unimproved dirt road was actually a county road. The conflict escalated after Mr. Roberie observed Mr. VonBokern taking measurements of the road, presumably to make improvements to it. Mr. Roberie ordered Mr. VonBokern to leave his property and used threatening language, prompting Mr. VonBokern to call the state police. Next, Mr. VonBokern graded a portion of the road with his bulldozer. Mr. Roberie again objected and questioned county officials as to whether the county had any claim to the road, but they were unable to give him any information on its status. The Roberies erected fenceposts along their side of the road to prevent Mr. VonBokern from widening the road, but this did not prevent Mr. VonBokern from spreading a load of gravel on the road. Additional incidents occurred between the families, including exchanges of harsh language and at least one incident of allegedly harassing behavior by the Mr. Roberie—Mrs. VonBokern testified that on one occasion Mr. Roberie had frightened her deliberately by driving closely behind her on a winding road. Finally, the Roberies erected fenceposts at the entrance of the road completely blocking access.

In September 1999, the VonBokerns filed suit against the Roberies and Goderwises in Owen Circuit Court contending that the road mentioned in the deeds to

their property was a turnpike road that was owned by the county and was, therefore, open to public use. The VonBokerns demanded a declaration of rights, injunctive relief, and compensatory damages. Attached to the complaint was a deed which they alleged was proof that the road had been sold by the Clay Lick Turnpike Company to the Owen Fiscal Court in 1897.

The Roberies filed their answer to the complaint, counterclaiming against the VonBokerns for trespass and demanding injunctive relief, compensatory damages, and punitive damages. The Roberies' answer also contained a cross-complaint against the Goderwises, their codefendants, for damages suffered due to a breach of warranty of title. However, the trial court granted the Goderwises summary judgment on that claim; that decision was subsequently upheld by the Court of Appeals and was not presented in this appeal.

In December 2000, the VonBokerns amended their complaint, naming the County of Owen as an additional defendant, despite the fact that the county refused to actively participate in the lawsuit and denied any claim to the road. The VonBokerns again amended their complaint in January 2001, demanding punitive damages from the Roberies for a course of conduct that was "designed and calculated to intimidate" them from using the disputed road. In April 2002, the trial court granted the VonBokerns' motion to temporarily open the road, but that order was overturned in an interlocutory appeal to the Court of Appeals.

The case came to trial in July 2002. Although the VonBokerns argued that several legal theories supported their claim for access to the road, testimony from the parties and their expert witnesses focused primarily on whether the disputed road was, in fact, the Pleasant Home and Clay Lick Turnpike as the VonBokerns had alleged.

Ultimately, the jury found that the disputed road was the same road which had been acquired by the county pursuant to the 1897 deed. In addition, the jury awarded $5,000 in punitive damages to the VonBokerns, presumably for the Roberies' intimidating, abusive behavior and for blocking access to the road. Despite the award of punitive damages, the jury did not award compensatory damages to the VonBokerns.

The Roberies appealed the trial court's decision to the Court of Appeals, raising several claims of error. In a lengthy opinion, the Court of Appeals affirmed the judgment of the trial court but remanded the case to the trial court for a review of the punitive damage award in light of the three guideposts set forth in BMW of North America v. Gore, 517 U.S. 559 (1996). As to the Roberies' primary claim of error—that the VonBokerns' claim was an attempt to quiet title in a third party—the Court of Appeals concluded that the pleadings were sufficient to establish a claim for a declaratory judgment on behalf of the VonBokerns and that this was an appropriate means of resolving the issue.

We granted the Roberies' motion for discretionary review to consider two questions:[2] (1) whether the VonBokerns' cause of action was improper in that it amounted to an action to quiet title in a third party, and (2) whether the trial court's punitive damages award was appropriate in this case. As to the first question, we affirm the decision of the Court of Appeals insofar as it concluded that the VonBokerns stated a valid cause of action. However, we believe that the claim is more appropriately

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[2] Although the Roberies allude to several underlying issues in their brief, many of which are disputed issues of fact already decided by the trial court, those issues have not been preserved for this appeal.

categorized as a public nuisance action. Second, we reverse the Court of Appeals' decision to remand the case to the trial court for further consideration of the $5,000.00 punitive damages award and would, instead, simply affirm the judgment of the trial court.

III. ANALYSIS

A. Nature of the Underlying Action

The fundamental issue in this case is whether the VonBokerns stated a valid cause of action against the Roberies. As noted above, the Roberies contend that the suit was improper in that it was essentially an effort to quiet title in a third party. It is impossible to address this contention without first identifying the legal theory underlying the VonBokerns' claim. The Court of Appeals held that the suit was most appropriately characterized as an action for a declaration of rights pursuant to KRS 418.040. While the VonBokerns' complaint unquestionably contained a claim for a declaration of rights, we believe it also contained a tort claim—namely, that they were entitled to damages and injunctive relief from the Roberies for blocking a public road. The two causes of action are not mutually exclusive, and it was the tort claim that was submitted to the jury. Though the underlying tort was not described as such by the parties, we believe the VonBokerns' claim is valid and amounts to a private action for public nuisance.

The Restatement Second, Torts § 821B defines the term "public nuisance" as follows:

> (1) A public nuisance is an unreasonable interference with a right common to the general public.
>
> (2) Circumstances that may sustain a holding that an interference with a public right is unreasonable include the following:

> (a) Whether the conduct involves a significant interference with the public health, the public safety, the public peace, the public comfort or the public convenience, or
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> (b) whether the conduct is proscribed by a statute, ordinance or administrative regulation, or
>
> (c) whether the conduct is of a continuing nature or has produced a permanent or long-lasting effect, and, as the actor knows or has reason to know, has a significant effect upon the public right.

In the commentary following that section which discusses the meaning of the phrase "interference with a public right," the drafters note that

> Conduct does not become a public nuisance merely because it interferes with the use and enjoyment of land by a large number of persons. There must be some interference with a public right. A public right is one common to all members of the general public. It is collective in nature and not like the individual right that everyone has not to be assaulted or defamed or defrauded or negligently injured. . . . It is not, however, necessary that the entire community be affected by a public nuisance, so long as the nuisance will interfere with those who come in contact with it in the exercise of a public right or it otherwise affects the interests of the community at large. The obstruction of a public highway is a public nuisance, although no one is travelling upon the highway or wishes to travel on it at the time.

Restatement (Second) of Torts § 821B, cmt. g (1979). Viewed in this context, the Roberies' contention that the suit amounted to an action to quiet title in a third party does not matter in light of the underlying tort claim. Although the jury did find "that the unimproved dirt road on the Roberies' property is the 'Pleasant Home and Clay Lick Turnpike' which was deeded to Owen County in the 1897 deed," such a determination was necessary to resolve the VonBokerns' tort claim as it was the best evidence that a public right existed to use the road.

It must be noted, however, that the class of individuals that is eligible to maintain a private action for public nuisance is limited.

> (1) In order to recover damages in an individual action for a public nuisance, one must have suffered harm of a kind different from that suffered by other members of the public exercising the right common to the general public that was the subject of interference.
>
> (2) In order to maintain a proceeding to enjoin to abate a public nuisance, one must
>
> > (a) have the right to recover damages, as indicated in Subsection (1), or
> >
> > (b) have authority as a public official or public agency to represent the state or a political subdivision in the matter, or
> >
> > (c) have standing to sue as a representative of the general public, as a citizen in a citizen's action or as a member of a class in a class action.

Restatement (Second) of Torts § 821C (1979). Simply stated, "a private individual has no tort action for the invasion of the purely public right, unless his damage is to be distinguished from that sustained by other members of the public." Id. at cmt. a. Our predecessor court also recognized this limitation, stating, "[i]t is well established that an individual may bring an action to abate a public nuisance, when he has sustained or will sustain damages of a special character therefrom, distinctly different from the injuries suffered by the public generally." East Cairo Ferry Co. v. Brown, 233 Ky. 299, 25 S.W.2d 730, 731 (1930); see also Maxwell v. Fayette Nat. Bank of Lexington, 186 Ky. 625, 217 S.W. 690, 691 (1919) ("[A] public nuisance is not the subject of a suit by a private individual, unless he has sustained some special injury thereby.").

In this case, the VonBokerns alleged that the disputed dirt road was actually a public turnpike that was owned by the county and that the Roberies' efforts to prevent their access to the road amounted to an "interference with a public right." The VonBokerns also alleged that the Roberies' act of blocking the road interfered with the use and enjoyment of their property in that it prevented one means of access to their

farm. This is precisely the sort of special harm envisioned by the drafters of the Restatement who note the following in the comments to § 821C:

> The right of access to land, that is, the right of reasonable and convenient ingress and egress, is itself a property right in the land. If the public nuisance interferes with immediate ingress and egress to the plaintiff's land, the nuisance is a private as well as a public one and the harm suffered by the plaintiff is particular harm differing in kind from that suffered by the general public, so that the plaintiff can recover for the public nuisance. Complete deprivation of access, so that the land of the plaintiff is completely cut off is obviously sufficient particular damage. But the deprivation need not be complete and it is enough that the ingress or egress is made unreasonably burdensome or inconvenient or unsafe. Access by a particular entry is still a valuable property right even though there may be another entry left open; and the fact that there is access from the north left open does not prevent the recovery when the plaintiff is deprived of access from the south.

Restatement (Second) of Torts § 821C, cmt. f (1979). This same approach is set forth in Taylor v. Barnes, 303 Ky. 562, 198 S.W.2d 297 (1946), wherein the court stated,

> In [Maxwell] the Court quoted from several other opinions, and cited many more, which clearly establish the rule recognized in this jurisdiction that an individual seeking relief against a public nuisance must show an injury distinct from that suffered by the general public. Of course, the owner of property adjacent to an obstructed road has an interest distinct from the public in general, and may obtain the relief herein sought; but one who is not an adjacent landowner, and can show no other special damage by reason of the obstruction, may not be granted an injunction requiring the obstruction to be removed.

Id. at 298. In light of the foregoing, we hold that the VonBokerns' claim was a valid private action for public nuisance. Having determined that the VonBokerns' claim amounted to a valid tort action, we now address the Roberies' argument that the jury's punitive damages award was inappropriate.

B. Appropriateness of the Punitive Damage Award

The Roberies claim that the punitive damages award was flawed because, given the circumstances in this case, such damages were not available under Kentucky law.

Though stated broadly, the Roberies' claim actually consists of a series of several subclaims, including that the jury ignored the jury instructions, and that there was insufficient pleading and proof of malice and oppression. The Roberies also claim the punitive damages violate due process because no compensatory damages were awarded.

We begin by addressing the Roberies' claim about the jury instructions. They argue that the jury's decision to award punitive damages after declining to award compensatory damages violated Jury Instruction 3, which read:

> If you are satisfied from the evidence that the Roberies . . . acted toward the VonBokerns . . .with oppression or malice, you may in your discretion award punitive damages against the Roberies in addition to the [compensatory] damages awarded . . . above.

The Roberies specifically claim that the instruction's use of the phrase "in addition to" required any punitive damages award to be preceded by a compensatory damage award. This is an incorrect reading of the instruction. While the "in addition to" language is a qualifying phrase, it does not mean that compensatory damages are a condition precedent for a punitive damages award. Rather, the phrase served to further distinguish compensatory and punitive damages and thus to underscore that they were separate awards.

The Roberies argue that the factual basis for punitive damages in the VonBokerns' amended complaint was insufficient. Specifically, the Roberies claim that the amended complaint only requests punitive damages for the "virtual prohibition" of the VonBokerns' use of their own property that resulted from the blocking of the road. This argument, however, ignores the fact that Kentucky requires only notice pleading, which means that courts construe complaints liberally and leniently. Smith v. Isaacs,

777 S.W.2d 912, 915 (Ky. 1989). The amended complaint, which incorporated the allegations from the original complaint, alleged a variety of tortious conduct—including that the Roberies knew that the road was a public road, that they intentionally blocked access to the road, and that they engaged in a pattern of intimidating behavior. Together, these factual allegations were sufficient, in terms of pleading requirements, to support a claim for punitive damages.

The Roberies also claim that there was insufficient proof that they acted with malice or oppression as required by KRS 411.184 as a condition for an award of punitive damages. They claim to have only engaged in benign conduct, namely, placing poles at the entrance of the road to prevent access. This argument ignores that the factual question of whether they acted with malice or oppression was submitted to the jury, which answered the question in the affirmative. We grant such factual findings a high degree of deference: "[A]n appellate court must not substitute its findings of fact for those of the jury if there is evidence to support them." Horton v. Union Light, Heat and Power Co., 690 S.W.2d 382, 385 (Ky. 1985). The VonBokerns presented evidence that the Roberies intentionally blocked a public road, and that they did so with the specific goal preventing the VonBokerns from using the road. While this alone may not have risen to the level of malice or oppression, we cannot ignore that the VonBokerns also presented evidence of a pattern of harassing conduct by the Roberies that went above and beyond merely blocking the road. The jury heard evidence that during one encounter Mr. Roberie confronted Mr. VonBokern on the road and said, "Get the f—k off my property or I am going to shoot you." Mr. VonBokern claimed that on another occasion, Mr. Roberie called him a bastard; Mr. VonBokern's eleven-year old son was present during this second incident and heard the profanity. Mrs. VonBokern also

alleged that on one occasion, Mr. Roberie closely followed her in his truck while driving on a winding road. She claims that Mr. Roberie got so close to her car that she could not see the front end of his truck and that when she finally stopped she was so scared, her legs were shaking, and she was nauseous. In light of this evidence, we cannot say that the jury's finding of malice or oppression is clearly erroneous.[3]

In a related claim, the Roberies argue that the lack of proof of injury to the VonBokerns and the jury's failure to award compensatory damages barred the punitive damages award. However, this argument ignores several cases from this jurisdiction that have upheld punitive damage awards in the absence of a corresponding award for compensatory damages, at least under certain conditions. As our predecessor court noted: "The correct rule, we think, is that if a right of action exists—that is, if the plaintiff has suffered an injury for which compensatory damages might be awarded, although nominal in amount—he may in a proper case recover punitive damages." Louisville & Nashville R.R. Co. v. Ritchel, 148 Ky. 701, 147 S.W. 411, 413-14 (Ky. 1912). We recently reiterated this view: "Where the plaintiff has suffered an injury for which compensatory damages, though nominal in amount[,] may be awarded, the jury may in a proper case[] award punitive damages as well." Commonwealth Dept. of Agriculture v. Vinson, 30 S.W.3d 162, 166 (Ky. 2000). Neither case requires that compensatory damages be awarded as a prerequisite to an award of punitive damages. In fact, those cases recognize that the direct impact of the tortious conduct is sometimes difficult to

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[3] The Court of Appeals noted that the definition of "malice" used in the jury instructions tracks the language of KRS 411.184(1)(c), which we have held to be unconstitutional as too restrictive a definition under the jural rights doctrine. Williams v. Wilson, 872 S.W.2d 260 (Ky. 1998). Though neither party has raised this issue, we agree with the Court of Appeals that this error was harmless.

quantify and may best be addressed by punitive damages. See id. ("The mere fact that no compensatory damages were awarded to [the defendants] does not mean that they did not have compensable injuries. The fact that there is not a quantifiable monetary damage award[] . . . does not mean that injury did not occur."). The only requirement for punitive damages in this regard is that the injury be the sort for which compensatory damages, even if only nominal, are available. Given the nature of the conduct in which the jury found the Roberies engaged, we conclude that under Kentucky law the jury could have awarded at least nominal damages, thus punitive damages were also available.

The Roberies' final claim—that an award of punitive damages without an award of compensatory damages is a per se violation of due process—presents a more difficult question. In determining whether a punitive damages award violates due process, the United States Supreme Court has relied heavily on a comparison between the amounts of compensatory and punitive damages, noting that "in practice, few awards exceeding a single-digit ratio between punitive and compensatory damages, to a significant degree, will satisfy due process." State Farm Auto Ins. Co. v. Campbell, 538 U.S. 408, 425 123 S.Ct. 1513, 1524 (2003).

The Roberies state that "[a] complete absence of compensatory damages . . . exceeds all ratios." While this is perhaps mathematically correct, it ignores the fact that the Supreme Court has "consistently rejected the notion that the constitutional line is marked by a simple mathematical formula . . . ." BMW of N. Amer., Inc. v. Gore, 517 U.S. 559, 582, 116 S.Ct. 1589 (1996). Rather than being a test of pure mathematical calculus, the due process analysis is one into which "[a] general concer[n] of reasonableness . . . properly enter[s] . . . ." Id. at 583, 116 S.Ct. at 1602 (quoting TXO

Production Corp. v. Alliance Resources Corp., 509 U.S. 443, 458, 113 S.Ct. 2711, 2770 (1993) (quoting Pacific Mut. Life Ins. Co. v. Haslip, 499 U.S. 1, 18, 111 S.Ct. 1032, 1043 (1991)) (brackets and first ellipsis in original). In light of this, the Court has recognized that the analysis must take into account the circumstances in a given factual scenario:

> Indeed, low awards of compensatory damages may properly support a higher ratio than high compensatory awards, if, for example, a particularly egregious act has resulted in only a small amount of economic damages. A higher ratio may also be justified in cases in which the injury is hard to detect or the monetary value of noneconomic harm might have been difficult to determine.

Gore, 517 U.S. at 583, 116 S.Ct. at 1602. The Supreme Court has also consistently recognized that potential damages and harm may be taken into account in the due process review of a punitive damages award. See TXO, 509 U.S. at 460, 113 S.Ct. at 2721-22 (1993) ("It is appropriate to consider the magnitude of the potential harm . . . ." (emphasis in original)); Gore, 517 U.S. at 583, 116 S.Ct. at 1602 ("Of course, we have consistently rejected the notion that the constitutional line is marked by a simple mathematical formula, even one that compares actual and potential damages to the punitive." (emphasis in original)). This notion fits well with our own precedent, discussed above, that allows punitive damages in some cases despite a lack of compensatory damages, so long as compensatory damages are at least available. With this discussion in mind, we conclude that an award of punitive damages absent compensatory damages is not a per se violation of due process.

This is not to say, however, that all awards of punitive damages where no compensatory damages have been awarded are reasonable and satisfy due process. All such awards must be evaluated under three "guideposts" or factors: "(1) the degree of reprehensibility of the defendant's misconduct; (2) the disparity between the actual or

potential harm suffered by the plaintiff and the punitive damages award; and (3) the difference between the punitive damages awarded by the jury and the civil penalties authorized or imposed in comparable cases." Campbell, 538 U.S. at 418, 123 S.Ct. at 1520 (paraphrasing the guideposts from Gore, 517 U.S. at 575; 116 S.Ct. at 1598-99).

It is in the application of these guideposts that we disagree with the Court of Appeals. The Supreme Court has "mandated appellate courts to conduct de novo review of a trial court's application of [the guideposts] to the jury's award." See Campbell, 538 U.S at 418, 123 S.Ct. at 1520. The Court of Appeals read this language as requiring that the trial court first have an opportunity to apply the Gore factors and, therefore, remanded the case to the trial court for reconsideration of the punitive damages award in light of those factors. Though Campbell makes clear that the trial court is charged with independently reviewing punitive damage awards, because they are reviewed de novo on appeal, such trial level review is not an indispensable step. As such, we find it unnecessary to remand this matter to the trial court to review the punitive damages award under the Gore factors. Instead, we will review the award for compliance with due process.

As was noted in Gore, the "most important indicium of the reasonableness of a punitive damages award is the degree of reprehensibility of the defendant's conduct. 517 U.S. at 575, 116 S.Ct. at 1599. One consideration in determining reprehensibility is "whether . . . the harm was the result of intentional malice, trickery, or deceit, or mere accident." Campbell, 538 U.S. at 419, 123 S.Ct. at 1521. As discussed above, the jury found that the Roberies behaved with malice or oppression. Moreover, there was ample evidence to support this finding. This, we think, satisfies the first Gore factor. And while the Roberies' conduct was not so reprehensible as to support unlimited

punitive damages, we cannot say that the award $5000 in this case was so out of step with the degree of reprehensibility as to be unreasonable.

We have already discussed the second Gore factor to some extent in determining whether punitive damages are available absent an award of compensatory damages. Without repeating that discussion, we note simply that two factors weigh in favor finding that the award in this case was reasonable: (1) that at least nominal damages were justified by the jury's verdict, and (2) that the injury here is one that is difficult "to detect or the monetary value of [the] noneconomic harm might have been difficult to determine." Gore, 517 U.S. at 583, 116 S.Ct. at 1602. We note that even after Gore and Campbell, several other courts have found similar punitive damage awards combined with compensatory awards of only nominal damages to pass constitutional muster under the requisite due process review. See, e.g., Williams v. Kaufman County, 352 F.3d 994, 1016 (5th Cir. 2003) (upholding punitive damages of $15,000 after award of $100 in nominal damages—a 150 to 1 ratio—as reasonable); Provost v. City of Newburgh, 262 F.3d 146, 164 (2d Cir. 2001) (upholding $10,000 punitive damages award where there was not compensable injury and nominal damages of $1, but noting "the $10,000 punitive damages sum approaches the limits of what we would deem consistent with constitutional constraints"). While the VonBokerns were not awarded even nominal damages in this case, there is little difference between nominal damages and no damages.

The final factor is more difficult to evaluate because we are unaware of any civil penalty for blocking a public road.[4] Because we can find no civil penalty for this act, this factor raises more concern than the others. Had the punitive damages award in this case been much higher, this guidepost alone might lead us to conclude that the award was unreasonable.

Ultimately, we conclude that the punitive damages award did not violate due process. The benchmark is whether the award was reasonable in light of and proportionate to the conduct of the defendants. Though it is likely that the award in this case was near the limits of what due process allows, our consideration of the Gore factors leads us to believe that it did not exceed those limits.

All concur.

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[4] With regard to the second guidepost, we note that the Supreme Court has noted that "[t]he existence of a criminal penalty does have bearing on the seriousness with which a State views the wrongful action." Campbell, 538 U.S. at 428, 123 S.Ct. at 1526. Thus, we note the act of blocking a road can form the basis for a criminal charge. See KRS 525.140 (making it a class B misdemeanor to "intentionally or wantonly render[] any highway or public passage impassable without unreasonable inconvenience or hazard" without a legal privilege to do so). Other behavior by Mr. Roberie falls at least vaguely under our criminal statutes. For example, his threat to shoot Mr. VonBokern could serve as the basis for a charge of third-degree terroristic threatening, a class A misdemeanor. See KRS 508.080. However, the criminal nature of the acts if of little guidance here:

> When used to determine the dollar amount of the award, however, the criminal penalty has less utility. Great care must be taken to avoid use of the civil process to assess criminal penalties that can be imposed only after the heightened protections of a criminal trial have been observed, including, of course, its higher standards of proof. Punitive damages are not a substitute for the criminal process, and the remote possibility of a criminal sanction does not automatically sustain a punitive damages award.

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Campbell, 538 U.S. at 428, 123 S.Ct. at 1526. As such, we accord little weight to the fact that there is a vague chance that the Roberies' actions could serve as the basis of criminal charges.

Supreme Court of Kentucky

2004-SC-0250-DG

STEVE ROBERIE; AND JOYCE ROBERIE — APPELLANTS

V.

ON REVIEW FROM COURT OF APPEALS
2002-CA-1940-MR
OWEN CIRCUIT COURT NO. 99-CI-00124

ROBERT VONBOKERN; VICTORIA VONBOKERN; LARRY GODERWIS; JOAN GODERWIS; AND COUNTY OF OWEN — APPELLEES

ORDER DENYING REHEARING AND MODIFYING OPINION

The motion for rehearing filed by appellant is DENIED.

The opinion is modified to the extent that it is ORDERED depublished. The original opinion rendered August 24, 2006, is modified by the substitution of a new page 1 as attached hereto. This modification does not affect the holding of the case.

All concur.

Entered: December 21, 2006

Chief Justice