

DA 17-0537

IN THE SUPREME COURT OF THE STATE OF MONTANA

2019 MT 10

IN THE MATTER OF THE ESTATE OF:
JOHN P. COTE, SR.,

Deceased,

JOHN P. COTE, JR., individually, KATHERIN
CLEMMENCE, individually, and KATHERIN
CLEMMENCE and BARBARA C. McEWEN,
as Trustees of the RUTH COTE TRUST,

Plaintiffs and Appellees,

v.

JANICE SMITH-COTE, individually and as
Personal Representative of the ESTATE OF
JOHN P. COTE, SR., and John Does 1-10,

Defendants,

and

FARMERS STATE FINANCIAL CORP.,

Defendant and Appellant.

APPEAL FROM: District Court of the Twenty-First Judicial District,
In and For the County of Ravalli, Cause No. DP-12-72
Honorable John W. Larson, Presiding Judge

COUNSEL OF RECORD:

For Appellant:

David L. Jackson, John H. Grant, Murry Warhank, Jackson, Murdo
& Grant, P.C., Helena, Montana

Shannon Wells Stevenson, James R. Henderson, Davis Graham & Stubbs
LLP, Denver, Colorado

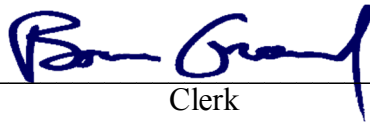
For Appellees:

Robert Terrazas, Dana A. Henkel, Jesse Froehling, Terrazas Clark Henkel,
P.C., Missoula, Montana

Submitted on Briefs: November 14, 2018

Decided: January 15, 2019

Filed:



A handwritten signature in blue ink, appearing to read "Ben Grand", is written over a horizontal line. The signature is stylized and cursive.

Clerk

Justice James Jeremiah Shea delivered the Opinion of the Court.

¶1 Farmers State Financial Corporation (Farmers) appeals the Order of the Twenty-First Judicial District Court, Ravalli County, awarding punitive damages against Farmers for fraudulent stock conversion.

¶2 We restate the issues as follows:

Issue One: Whether the District Court Order restoring John Cote, Jr.'s converted Stock constituted an award of compensatory damages for purposes of determining an award of punitive damages.

Issue Two: Whether the District Court erred by finding that Farmers was subject to punitive damages because it acted with actual malice.

Issue Three: Whether the award of punitive damages was excessive.

¶3 We affirm.

PROCEDURAL AND FACTUAL BACKGROUND

¶4 This appeal arises from an estate contest between Janice Smith-Cote, wife of John P. Cote, Sr. (John Sr.), John P. Cote, Jr. (John Jr.), and other members of the Cote family. This Court affirmed an earlier appeal in which the District Court replaced Smith-Cote as personal representative of John Sr.'s estate. *See In re Estate of Cote*, No. DA 16-0295, 2017 MT 11N, ¶¶ 2, 16, 2017 Mont. LEXIS 13.¹ The current appeal involves shares of Farmers' Stock that John Jr. owned with his father, John Sr., and Farmers' disposition of shares of that stock relative to John Jr.

¹ This Court affirmed the District Court's determination that Smith-Cote breached her fiduciary duty, warranting her removal as personal representative of John Sr.'s Estate, and upheld the attorney fees award against Smith-Cote. *In re Estate of Cote*, ¶¶ 14-16.

¶5 On November 27, 1995, Farmers (then called Alpha-Omega Holding Company) issued stock to John Sr. and John Jr. as joint tenants with right of survivorship (JTWROS). On March 26, 1997, John Sr. and John Jr. jointly owned 181.619 shares pursuant to Farmers' Stock Certificate No. 20, which identified the owners as "John P. Cote, Sr., or John P. Cote, Jr., JTWROS."²

¶6 In January 2011, John Sr. and Smith-Cote were living in Renton, Washington. Farmers communicated with Smith-Cote about transferring Stock ownership from John Sr. and John Jr. to John Sr. only. On January 19, 2011, Farmers' Executive Secretary sent Smith-Cote an e-mail with an attached "Stock Power Form" recognizing John Sr. and John Jr. as owning the Stock as JTWROS. The same day, Farmers' President sent an e-mail to the Executive Secretary regarding the proposed transfer of Stock ownership:

[W]ill you find out ihow [sic] [Smith-Cote] wants the [S]tock titled? Will it be just in her name or if John Jr. will be on it also as he is now?? He doesn't need to be, I just want to make sure it is how [John Sr.] wants it. [I]f so whether it is joint with survivorshilp [sic] or as tennats [sic] in common. . . .

¶7 John Sr. purportedly signed two stock power forms, one dated January 21, 2011, and the other dated February 3, 2011. Farmers' policies and procedures require each stock owner's signature on a stock power form to be accompanied by a medallion signature guarantee to effectuate transfer of Farmers' stock. A medallion signature guarantee is an endorsement affixed to a request to transfer a security by the transferring financial institution that guarantees the genuineness of the signature and the legal capacity of the

² John Jr. acquired the Stock when his grandmother, Ruth Cote, distributed it to John Jr. and John Sr. through the Ruth Cote Trust.

signatory. John Jr. and John Sr.'s Stock required an Edward Jones' medallion signature guarantee.³ The January 21, 2011 Stock Power Form (January Form) was sent to Edward Jones' offices in St. Louis, Missouri. No Edward Jones' employee authorized to affix the medallion signature guarantee witnessed the execution of the January Form. However, several days after John Sr. allegedly signed the January Form, an Edward Jones employee affixed a medallion signature guarantee to the Form. Farmers claimed it never received the January Form, and the January Form was not found in Farmers' records. On February 2, 2011, Farmers contacted Smith-Cote to notify her no signed form had been received.

¶8 On February 3, 2011, John Sr. purportedly received and signed a second Stock Power Form (February Form) in an attempt to transfer all 181.619 shares of the Stock to Smith-Cote. Edward Jones has no records of any employee being present to witness the execution of the February Form. On February 5, 2011, John Sr. passed away. On February 7, 2011, the local branch of Edward Jones transmitted the February Form to the Edward Jones' St. Louis office. At an uncertain point in time, the February Form was also stamped with a medallion signature guarantee issued by Norman Eaker, CEO of Edwards Jones, although Eaker was not present to witness John Sr. sign the Form. Edward Jones transmitted the February Form to Farmers. Farmers then canceled the Stock held by John Sr. and John Jr. and transferred all 181.619 shares to Smith-Cote.

³ The record shows Farmers contacted its counsel about the requirements for transferring the Stock. On January 20, 2011, Farmers' counsel advised that John Sr. was required to sign a stock power form "in the presence of a person authorized to give a Medallion guarantee"

The Stock Certificate cancellation and reissue date was February 3, 2011. The February Form Farmers accepted had been altered from the form Farmers originally provided to Smith-Cote.

¶9 In November 2012, John Jr. requested records from Farmers related to the Stock. John Jr. learned of the Stock transfer to Smith-Cote when Farmers responded in December 2012. Farmers determined that it had erred in transferring all 181.619 shares to Smith-Cote, declaring that it should have only transferred half the Stock. On December 21, 2012, Farmers requested that Smith-Cote return the Stock Certificate, which she did on June 24, 2014.

¶10 On February 28, 2013, John Jr. and the Cote family initiated litigation against Smith-Cote. *See In re Estate of Cote*, ¶ 4. On June 30, 2014, John Jr. and the Cotes filed an Amended Petition, alleging claims of undue influence and lack of capacity, conversion, fraud, and unjust enrichment against Smith-Cote regarding the Stock transfer. *In re Estate of Cote*, ¶ 4. The Amended Petition also stated claims against Farmers for negligent violation of fiduciary duties and conversion. On March 28, 2014, Farmers wrote to John Jr. and advised him that in exchange for a release of liability, Farmers would issue John Jr. a certificate for half of the Stock, or 90.8095 shares. John Jr. declined to sign a release, and Farmers did not issue a stock certificate. Farmers answered with a counterclaim and cross-claim for interpleader against John Jr. John Jr. responded and reiterated his claims against Farmers, alleging breach of the duty of care owed to a stockholder, breach of the fiduciary duty owed to a stockholder, breach of the duty of good faith and fair dealing, and requesting punitive damages. Around August 14, 2015, Farmers filed a motion for

summary judgment, arguing that Smith-Cote and John Jr. each owned equal shares of the 181.619 shares of Farmers' Stock as tenants in common.

¶11 The District Court conducted two bench trials: on August 31-September 1, 2015, and on April 19-20, 2016. On April 11, 2016, the District Court granted John Jr.'s motion for partial summary judgment against Smith-Cote and Farmers. The District Court held that John Jr. is the sole owner of all 181.619 shares of Stock because Farmers did not transfer the Stock to Smith-Cote until after John, Sr.'s death. The District Court found there was no genuine dispute as to the following material facts: (1) John Jr. did not provide his consent to transfer all shares of the jointly held Farmers' Stock at issue to Smith-Cote; (2) the medallion signature guarantee, which was a requirement on Farmers' own form, was not provided until sometime after February 7, 2011, regardless of when the stamp was affixed; (3) the February Form was not transmitted to Farmers in order to effectuate the transfer until sometime after John Sr.'s death; and (4) Farmers' admission that it erred is an additional ground showing that the attempted transfer is invalid in its entirety. On March 2, 2017, Farmers represented to the District Court that it paid the remaining 2012-2016 dividends on the Stock and has now paid all the dividends on the 181.619 shares of Stock to John Jr., together with interest.

¶12 On March 16, 2017, the District Court issued an order requiring Farmers to pay John Jr. (1) any and all outstanding dividends with ten percent interest that has not already been paid on the 181.619 shares of Stock, including any dividends distributed to stockholders between February 3, 2011 and the order date; (2) \$1.1 million in punitive damages to John Jr.; and (3) John Jr.'s costs in pursuing recovery of the Stock. Farmers filed a motion to

vacate or reduce the award of punitive damages. The District Court denied Farmers' motion. Farmers appeals.

STANDARDS OF REVIEW

¶13 This Court reviews a district court's conclusions of law de novo for correctness. *Folsom v. Mont. Pub. Emps. Ass'n*, 2017 MT 204, ¶ 18, 388 Mont. 307, 400 P.3d 706; *Giambra v. Kelsey*, 2007 MT 158, ¶ 28, 338 Mont. 19, 162 P.3d 134. A district court's interpretation and application of statutes presents a question of law. *See Kulstad v. Maniaci*, 2009 MT 326, ¶ 50, 352 Mont. 513, 220 P.3d 595. We review a district court's decision to award punitive damages for an abuse of discretion. *Osman v. Cavalier*, 2011 MT 60, ¶ 7, 360 Mont. 17, 251 P.3d 686. We review a district court's findings under the statute setting out requirements for awards of punitive damages, § 27-1-221, MCA, to determine whether the findings are clearly erroneous. *Marie Deonier & Assocs. v. Paul Revere Life Ins. Co.*, 2004 MT 297, ¶ 39, 323 Mont. 387, 101 P.3d 742. "A district court's findings are clearly erroneous if they are not supported by substantial credible evidence, if the [district] court misapprehended the effect of the evidence, or if a review of the record leaves this Court with the definite and firm conviction that a mistake has been committed." *Beaver v. Mont. Dep't of Nat. Res. & Conserv.*, 2003 MT 287, ¶ 79, 318 Mont. 35, 78 P.3d 857; *Marie Deonier & Assocs.*, ¶ 39. This Court's review of a district court's application of §§ 27-1-220, -221, MCA, is plenary. *Osman*, ¶ 7. This Court reviews de novo the constitutionality of punitive damages awards. *McCulley v. U.S. Bank of Mont.*, 2015 MT 100, ¶ 20, 378 Mont. 462, 347 P.3d 247 (citing *Seltzer v. Morton*, 2007 MT 62, ¶ 152, 336 Mont. 225, 154 P.3d 561).

DISCUSSION

¶14 *Issue One: Whether the District Court Order restoring John Cote, Jr.'s converted Stock constituted an award of compensatory damages for purposes of determining an award of punitive damages.*

¶15 Compensatory damages are designed to compensate the injured party for an actual loss or injury. *Sunburst Sch. Dist. No. 2 v. Texaco, Inc.*, 2007 MT 183, ¶ 40, 338 Mont. 259, 165 P.3d 1079; *Seltzer*, ¶ 148; *State Farm Mut. Auto Ins. Co. v. Campbell*, 538 U.S. 408, 416, 123 S. Ct. 1513, 1519 (2003) (“[c]ompensatory damages are intended to redress the concrete loss that the plaintiff has suffered by reason of the defendant’s wrongful conduct. . . .”) (internal citations omitted); *Semenza v. Bowman*, 268 Mont. 118, 126, 885 P.2d 451, 456 (1994); § 27-1-317, MCA; Restatement (Second) of Torts, § 903 cmt. a (Am. Law Inst. 1979) (“[w]hen there has been harm only to the pecuniary interests of a person, compensatory damages are designed to place him in a position substantially equivalent in a pecuniary way to that which he would have occupied had no tort been committed. . . .”). The “proper measure of compensatory damages must be determined solely based on the facts of each case.” *Seltzer*, ¶ 96. By contrast, “punitive damages serve a broader function; they are aimed at deterrence and retribution.” *Campbell*, 538 U.S. at 416, 123 S. Ct. at 1519.

¶16 A party may recover lost profits if the profits can be established with some certainty and proof of source. *DeTienne v. Sandroock*, 2018 MT 269, ¶¶ 14, 18, 393 Mont. 249, ___ P.3d ___ (citing § 27-1-317, MCA); *Delaney & Co. v. City of Bozeman*, 2009 MT 441, ¶¶ 41-42, 354 Mont. 181, 222 P.3d 618. Dividends are a portion of a company’s profits distributed to shareholders in the form of money or additional shares. *Dividends, Black’s*

Law Dictionary (10th Ed. 2014). Here, the withheld dividends amount to lost profits and can be established with complete certainty of amount and source.

¶17 Interest as damages is includable in a judgment. Section 27-1-211, MCA (“[e]ach person who is entitled to recover damages certain or capable of being made certain by calculation and the right to recover which is vested in the person upon a particular day is entitled also to recover interest on the damages from that day . . .”). Securities have an immediate “use” value, like money. Including interest in the calculation of damages reflects a defendant’s use of a plaintiff’s money (or securities) that must be included in a judgment to ensure a plaintiff is fully compensated. *Byrne v. Terry*, 228 Mont. 387, 391, 741 P.2d 1341, 1343 (1987) (citing § 27-1-211, MCA). As the Dissent correctly points out, the interest on the Stock was compensatory damages designed to compensate John Jr. for Farmers’ wrongful detention of John Jr.’s money. Dissent, ¶ 62.

¶18 Under Montana’s adopted version of the Uniform Commercial Code, “[a]n issuer that is liable for wrongful registration of transfer . . . on demand shall provide the person entitled to the security with a like certificated or uncertificated security, and any payments or distributions that the person did not receive as a result of the wrongful registration.” Section 30-8-414(2), MCA.

¶19 The District Court found that Farmers is an issuer and is liable for wrongful registration of the transfers of Stock to Smith-Cote. The District Court relied on a Delaware case applying a statute identical⁴ to Montana’s adopted provisions, § 30-8-414(2), MCA,

⁴

An issuer that is liable for wrongful registration of transfer . . . on demand shall

and interpreting official comments that are consistent with Montana’s official comments. The Delaware Court held that the “right to elect damages instead of the return of duplicate securities does not exist under ordinary circumstances . . . where the issuer acts with reasonable promptness.” *Tuggle v. Am. Fin. Sys.*, 1978 Del. Ch. LEXIS 659, at *7 (Del. Ch. June 22, 1978). However, “[t]he draftsmen’s official comments to [§ 8-404] note that the case law has also recognized the right to elect between an equitable action to compel issue of a new security and an action for damages.” *Tuggle*, 1978 Del. Ch. LEXIS at *6. Applying the Delaware Court’s rationale, the District Court determined that Farmers did not act with “reasonable promptness.” Despite Farmers’ representations to the District Court and John Jr.’s repeated demands, it took Farmers nearly five years from the time Farmers admitted to John Jr. that it improperly transferred the Stock until it finally returned the Stock to John Jr. Thus, the District Court concluded Farmers was not entitled to the statutory protections or limitations on damages under § 30-8-414, MCA, and was obligated to make John Jr. whole. The District Court concluded John Jr. was entitled to compensatory damages in the form of the Farmers stock, interest, and dividends, and that Farmers was not entitled to the statutory limitation of remedies.

¶20 Farmers argues the remedy for wrongful registration of a security is not compensatory damages, and the District Court erred in awarding punitive damages to John

provide the person entitled to the security with a like certificated or uncertificated security, and any payments or distributions that the person did not receive as a result of the wrongful registration.

Del. Code Ann. tit. 6, § 8-404.

Jr. Farmers contends that the proper remedy under § 30-8-414(2), MCA, is requiring the financial institution to reissue the security, along with any payments or distributions the aggrieved party did not receive as a result of the wrongful registration. Farmers argues it complied with the statute when it returned the Stock. John Jr. counters the District Court correctly identified the Stock, dividends, and interest as “compensatory damages” in the amount of at least \$477,846.85. We agree.

¶21 In pleadings and in the District Court’s order regarding partial summary judgment, Farmers conceded it is an issuer and is liable for “wrongful registration of transfer” of the Stock to Smith-Cote. *See* § 30-8-414, MCA

¶22 When Farmers wrongfully transferred the Stock, John Jr. clearly suffered damages. Farmers refused John Jr.’s repeated demands for the return of all 181.619 shares of Stock. Nearly five years passed between when Farmers admitted to John Jr. that it improperly transferred John Jr.’s Stock to Smith-Cote and when Farmers represented to the District Court that it had paid all shares of Stock, plus interest and dividends, to John Jr. Farmers forced John Jr. to seek a judicial remedy to compel Farmers to return the other half of the Stock, plus interest and dividends. Throughout this period, John. Jr. was deprived of the use and value of his Stock.

¶23 Compensatory damages are designed to make a party whole, and a court should determine compensatory damages based on the facts of each case. *Seltzer*, ¶¶ 96, 148. Here, the Stock is equivalent to compensatory damages. *See Campbell*, 538 U.S. at 416, 123 S. Ct. at 1519. The Stock is fungible, transferrable, and with a redeemable,

immediately liquid ascertainable cash value that serves as compensation for a pecuniary loss. *See Seltzer*, ¶ 148; *Campbell*, 538 U.S. at 416, 123 S. Ct. at 1519.

¶24 Unlike a court-ordered return of a unique piece of property, wrongful registration of a security under § 30-8-414(2), MCA, requires that the party who wrongfully registered the security provide the wronged party “with a *like* certificated or uncertificated security, and any payments or distributions that the person did not receive as a result of the wrongful registration.” (Emphasis added.) The issuance of the Stock constituted an immediate restoration of monetary value to John Jr.: the value of the certificated Stock, plus accrued interest and dividends. The interest and dividends were necessary to fully restore John Jr. for his detriment suffered at the hands of Farmers. *See* §§ 27-1-201, -202, MCA. The Dissent contends that the issuance of the Stock is an equitable remedy and one not equivalent to, or interchangeable with, compensatory damages. Dissent, ¶¶ 47-49. However, we have consistently held that “the purpose of compensatory damages . . . is to redress the concrete loss that a plaintiff has suffered by reason of a defendant’s wrongful conduct.” *Seltzer*, ¶ 148 (citing *Campbell*, 538 U.S. at 416, 123 S. Ct. at 1519). That is precisely what occurred in this case. John Jr. suffered a concrete loss by reason of Farmers’ wrongful conduct. The District Court redressed Farmers’ wrongful conduct by requiring Farmers to issue a like security, along with payment for the ancillary pecuniary loss John Jr. suffered as a result. Based on the contemporaneous value of the Stock, the parties and the District Court were able to calculate *to the penny* John Jr.’s concrete losses. Further, on the day John Jr. received the Stock certificates, he could have immediately converted the Stock to cash, no different than he could have deposited a check for the damages he

suffered. If something “looks like a duck, walks like a duck and quacks like a duck, it must be a duck.” *Wild v. Fregein Constr.*, 2003 MT 115, ¶ 31, 315 Mont. 425, 68 P.3d 855. In both form and substance, the District Court’s award in this case was a duck.

¶25 The Dissent points to a comment to § 30-8-414, MCA, that, historically, when an issuer wrongfully registered a security transfer, some courts allowed the registered owner to elect between the issuance of new stock and a claim for monetary damages, which § 30-8-414, MCA, does not provide. Dissent, ¶ 49. The Dissent then makes the unsupported leap that the elimination of an *election* of remedies means that the statutorily prescribed remedy is necessarily an equitable one. Dissent, ¶ 49. Since both remedies were designed to redress the concrete loss suffered by the wronged party, however, the elimination of one remedy is less proof of an intent to constrain the redress obtained, and more a recognition that the remedies are just two ducks of a different color.

¶26 Finally, during the April 19-20, 2016 bench trial and in its September 2016 proposed Supplemental Findings of Fact and Conclusions of Law, Farmers framed the dispute over the return of Stock as “damages” and called its March 2014 offer to return half the Stock a way for John Jr. to “mitigate [his] damages.” Farmers points out that its mitigation argument was in refence to the financial pressure John Jr. felt relating to litigation costs,⁵ the fact that potential acceptance of half the Stock at an earlier stage in the proceeding

⁵ John Jr. testified he declined to sign the initial Stock Power Form that would have transferred half the Stock, plus dividends and interest, into his possession because he feared such action would result in the other half of his shares being withheld or forfeited.

could have been used to solve John Jr.'s financial concerns goes to Farmers' treatment of the Stock as monetary damages.

¶27 The District Court did not err when it concluded John Jr. was entitled to the compensatory damages in the form of all the shares of Farmers' Stock, plus appropriate dividends and interest. *See Kulstad*, ¶ 50; *Giambra*, ¶ 28. This award of compensatory damages thus enabled the District Court to consider punitive damages against Farmers. *See Folsom*, ¶ 51 (“punitive damages are not available as a matter of law absent an award of compensatory damages on a predicate cause of action from which the actual malice or actual fraud arose. . . .”).

¶28 *Issue Two: Whether the District Court erred by finding that Farmers was subject to punitive damages because it acted with actual malice.*

¶29 It should be presumed that a plaintiff “has been made whole for his injuries by compensatory damages, so punitive damages should only be awarded if the defendant’s culpability . . . is so reprehensible as to warrant the imposition of further sanctions to achieve punishment or deterrence.” *Campbell*, 538 U.S. at 419, 123 S. Ct. at 1521; *Seltzer*, ¶ 134 (the purpose of punitive damages “is to have an impact on the defendant in the form of punishment and deterrence. . . .”).

¶30 “[R]easonable punitive damages may be awarded when the defendant has been found guilty of actual fraud or actual malice.” Section 27-1-221(1), MCA. Actual malice exists where a defendant

has knowledge of facts or intentionally disregards facts that create a high probability of injury to the plaintiff and:

- (a) deliberately proceeds to act in conscious or intentional disregard of the high probability of injury to the plaintiff; or
- (b) deliberately proceeds to act with indifference to the high probability of injury to the plaintiff.

Section 27-1-221(2), MCA. When assessing an award for punitive damages, the district court “shall clearly state the reasons for making the award in findings of fact and conclusions of law, demonstrating consideration of each of the following matters”:

- (i) the nature and reprehensibility of the defendant’s wrongdoing;
- (ii) the extent of the defendant’s wrongdoing;
- (iii) the intent of the defendant in committing the wrong;
- (iv) the profitability of the defendant’s wrongdoing, if applicable;
- (v) the amount of actual damages awarded by the jury;
- (vi) the defendant’s net worth;
- (vii) previous awards of punitive or exemplary damages against the defendant based upon the same wrongful act;
- (viii) potential or prior criminal sanctions against the defendant based upon the same wrongful act; and
- (ix) any other circumstances that may operate to increase or reduce, without wholly defeating, punitive damages.

Section 27-1-221(7)(b), MCA. All elements of the claim for punitive damages must be proven by clear and convincing evidence, which “is more than a preponderance of evidence but less than beyond a reasonable doubt.” Section 27-1-221(5), MCA.

¶31 It is well established that a “joint tenant with the right of survivorship automatically gains the other tenant’s interest in the property upon the other tenant’s death, as a matter of law.” *In re Estate of Afrank*, 2012 MT 289, ¶ 9, 367 Mont. 334, 291 P.3d 576 (citations omitted); § 70-1-307, MCA (a “joint interest is one owned by several persons in equal shares by a title created by a single will or transfer, when expressly declared in the will or transfer to be a joint tenancy or when granted or devised to executors or trustees as joint tenants. . . .”). A joint tenant’s interest ceases upon his death, and the joint property immediately passes to the surviving joint tenant. *Vogele v. Estate of Schock*, 229 Mont. 259, 263, 745 P.2d 1138, 1140 (1987) (citing § 70-1-307, MCA).

¶32 The District Court concluded that Farmers acted with actual fraud and actual malice, and that John Jr. was entitled to punitive damages. In its initial order awarding punitive damages and in its order denying Farmers’ motion to vacate or reduce the award of punitive damages, the District Court justified its award and analyzed relevant statutory considerations under § 27-1-221(7)(b), MCA. The District Court reasoned that Farmers blatantly disregarded its own policies and procedures regarding stock transfer and the rights associated with JTWROS. Especially egregious was Farmers’ backdating of the Stock Power Form. Further, even after Farmers discovered its error, it initially refused to return the Stock to John Jr.

¶33 Farmers argues that it made a good-faith mistake and promptly and repeatedly attempted to fix it. Farmers argues it had no possible motive to harm John Jr., benefit Smith-Cote, or benefit itself. Farmers further contends that, ultimately, John Jr. was not harmed and incurred no compensatory damages, rendering him ineligible for punitive

damages. Farmers argues the District Court's findings of actual fraud and actual malice were based solely on the erroneous conclusion that Farmers misrepresented the stock transfer date during litigation. John Jr. counters Farmers acted with actual fraud and actual malice and proceeded with deliberate indifference toward John Jr. John Jr. argues Farmers conduct was not an isolated incident but was the result of a series of repeated, intentional, and deliberate acts designed to deprive John Jr. of his Stock.

¶34 The record supports the District Court's determination that Farmers had knowledge of, or intentionally disregarded, facts that created a high probability of injury and deliberately proceeded to act in conscious or intentional disregard to the high probability of injury to John Jr. *See* § 27-1-221(2), MCA. The District Court found that Farmers made multiple misrepresentations regarding the ineffective Stock transfer and concealed the fact that it backdated the Stock transfer. Farmers knew John Jr. owned the Stock and knew, or should have known, based on the advice of its own counsel and its own policy requirements that a stock power form must be affixed with a valid medallion signature guarantee before stock can be transferred. Farmers knew before John Sr. died that the Stock Power Form had not been delivered to any Edward Jones office, and that the medallion signature guarantee was not affixed until after John Sr.'s death. John Jr. did not sign any stock power form, and Farmers admitted John Jr. did not consent to transferring the shares to Smith-Cote. Nevertheless, Farmers representatives still told Smith-Cote it could transfer the Stock to her and, ultimately, Farmers did transfer the Stock. It was only after Edward Jones produced records proving the transfer did not occur on February 3, 2011, that Farmers admitted it did not actually transfer the Stock before John Sr.'s death. Farmers also

admitted the Stock Power Form it accepted to make the improper transfer had been altered. The sheer implausibility of John Sr. receiving and signing the Stock Power Form in Washington, obtaining a medallion signature guarantee in Missouri, and transmitting the Form to Montana all on February 3, 2011, casts a further pall over Farmers' conduct that certainly supports the conclusion that Farmers intentionally disregarded the facts because it knew, or should have known, such a transfer was illegitimate, and the transfer led to John Jr.'s injury. *See* § 27-1-221(2), MCA.

¶35 Farmers further disregarded John Jr.'s rights as a shareholder when it failed to take any real steps to recover the Stock for several years. Farmers ignored John Jr.'s repeated demand for the return of the Stock, it initially requested that Smith-Cote retain the Stock Certificate, and it ignored its statutory obligation to reissue all 181.619 shares of Stock in John Jr.'s name. Farmers admitted it never notified John Jr. that it was in the process of transferring his interest in the 181.619 shares of Stock. John Jr. testified that it was not until he contacted Farmers in November 2012 that he learned of the improper conversion and Stock transfer. Although Farmers admitted to improperly transferring the Stock in December 2012, Farmers repeatedly claimed Smith-Cote was entitled to at least half of the shares. Farmers failed to fulfill its good faith obligation to John Jr. and deprived John Jr. of the benefit and use of the Stock. *See* § 27-1-221(2), MCA.

¶36 In direct contravention of its own policies and Montana law, Farmers allowed one stock owner who is a joint tenant with a right of survivorship to unilaterally terminate the other joint tenant's interest. *See In re Estate of Afrank*, ¶ 9; Cote Family Ex. List, Ex. 137 J, Farmers' Combined Disc. Requests, Farmers' Stock Transfer Policy ("[s]tock held by joint

tenants cannot be transferred without the consent of *all* the joint tenants named on the certificate. . . .”) (emphasis added). Thus, the termination of the JTWROS and transfer of all shares to John Sr., and then to Smith-Cote, was never accomplished. Instead, upon John Sr.’s death on February 5, 2011, all 181.619 shares of Stock transferred to John Jr. automatically. *See Vogele*, 229 Mont. at 262, 745 P.2d at 1140. Although Farmers backdated the February Form, Stock Certificate cancellation, and Stock transfer to Smith-Cote to February 3, 2011, the earliest date any transfer could have been completed was February 7, 2011. There is no excuse for Farmers’ willful disregard of its own policies and procedures, Montana law, and the rights associated with such stock.

¶37 We are satisfied that the District Court considered the relevant and applicable factors of § 27-1-221(7)(b), MCA, prior to awarding John Jr. punitive damages. Based on the record before it, the District Court thoroughly analyzed the nature and reprehensibility of Farmers’ wrongdoing; the extent of Farmers’ wrongdoing; the intent of Farmers in committing the wrong; the amount of the actual damages to John Jr.; Farmers’ net worth; previous awards of punitive or exemplary damages against Farmers based upon the same wrongful act; potential or prior criminal sanctions against Farmers based upon the same wrongful act; and any other circumstances that operated to increase or reduce punitive damages. *See* § 27-1-221(7)(b), MCA. The District Court’s findings are not clearly erroneous. *See Marie Deonier & Assocs.*, ¶ 39. Instead, the record clearly and convincingly shows Farmers acted with actual malice,⁶ *see* § 27-1-221(2), MCA, and

⁶ Because the statute is written in the disjunctive, we need not analyze whether Farmers committed actual fraud. *See* § 27-1-221(1), MCA.

Farmers' conduct warranted punitive damages, *see Campbell*, 538 U.S. at 419, 123 S. Ct. at 1521. The District Court did not abuse its discretion when it determined John Jr. was entitled to punitive damages. *See Osman*, ¶ 7.

¶38 *Issue Three: Whether the award of punitive damages was excessive.*

¶39 Punitive damages may be imposed “to further a State’s legitimate interests in punishing unlawful conduct and deterring its repetition.” *McCulley*, ¶ 43 (quoting *BMW of N. Am. v. Gore*, 517 U.S. 559, 568, 116 S. Ct. 1589, 1595 (1996)). However, a grossly excessive award may violate the Due Process Clause of the Fourteenth Amendment. *McCulley*, ¶¶ 43-44 (citing *Gore*, 517 U.S. at 562, 568, 116 S. Ct. at 1592, 1595). Courts should not employ a strict mathematical formula in determining whether an award is excessive under the Due Process Clause. *McCulley*, ¶¶ 43-44, 53-54 (quoting *Gore*, 517 U.S. at 582, 116 S. Ct. at 1602). Instead, a district court must consider first and foremost the degree of reprehensibility of the defendant’s conduct. *McCulley*, ¶¶ 44-45. Second, a district court must weigh the disparity, or ratio, between the actual or potential harms suffered by the plaintiff and the punitive damages award; “few awards exceeding a single-digit ratio between punitive and compensatory damages . . . will satisfy due process. . . .” *McCulley*, ¶¶ 44, 53 (quoting *Campbell*, 538 U.S. at 425, 123 S. Ct. at 1524). Finally, a district court should consider the difference between the punitive damages awarded by the jury and the civil penalties authorized or imposed in comparable cases. *McCulley*, ¶¶ 18, 43-44, 54-55 (upholding a punitive damages award of \$5 million where compensatory damages were \$1 million) (citing *Campbell*, 538 U.S. at 418, 123 S. Ct. at 1520); *Seltzer*, ¶¶ 1, 190, 199 (upholding a punitive damages award of

\$9.9 million). In Montana, punitive damages awards are also subject to statutory limitations: such awards “may not exceed \$10 million or [three percent] of a defendant’s net worth, whichever is less.” Section 27-1-220(3), MCA.

¶40 After determining Farmers acted with actual fraud and actual malice, the District Court awarded John Jr. \$1.1 million in punitive damages. Farmers argues the punitive damages award was excessive and unconstitutional and must therefore be reversed. John Jr. counters Farmers’ conduct was malicious, fraudulent, and especially reprehensible given its statutory obligations, and that the District Court’s punitive damages award was not unconstitutional or excessive and well within the statutory boundaries. We agree.

¶41 As previously discussed, the record contains ample evidence demonstrating Farmers acted with actual malice. *See McCulley*, ¶¶ 45, 51. Farmers knew or should have known about its own policy requirements regarding stock power forms, medallion signature guarantees, and valid stock transfers. Farmers even received advice from its own counsel in this regard. Despite this, Farmers proceeded with deliberate indifference to the harm caused to John Jr. The ineffective transfer was deliberately made in violation of Farmers’ policies, procedures, and requirements, and Montana law. Once confronted with its fraudulent activity, Farmers failed to retrieve the Stock from Smith-Cote for years. Further, the Stock records were in Farmers’ control, and yet Farmers has no records to document or support the transaction. *See McCulley*, ¶¶ 45, 51. The award is also not excessive when compared to awards imposed in comparable cases. *See McCulley*, ¶¶ 43-44, 55.

¶42 The award did not violate due process and fell within a single-digit ratio between the punitive and compensatory damages awarded. *See McCulley*, ¶¶ 45, 53-54, 56.

Farmers converted the Stock valued at \$477,846.85 for the full 181.619 shares. Although Farmers offered to refund half the Stock to John Jr. in fairly short order, it continued to withhold the other half based on fraudulently transferred stock certificates. Even to the extent that it withheld half, the value of that Stock is approximately \$238,923.43. Punitive damages were \$1.1 million. Regardless of whether the compensatory damages are calculated at \$477,846.85 or \$238,923.43, both values are well within the single-digit factor guidepost of *Gore* and *Campbell* and well below the \$10 million statutory cap pursuant to § 27-1-220(3), MCA. Further, Farmers admits a 2015 net worth of \$38,130,000. Thus the \$1.1 million in punitive damages is also less than three percent of Farmers' net worth.⁷ See § 27-1-220(3), MCA. By either measure—Montana statute or under a due process analysis—the punitive damage award was not excessive. The District Court correctly determined the amount of the award. See *Marie Deonier & Assocs.*, ¶ 39; *Osman*, ¶ 7. The award of punitive damages was not excessive and fell within acceptable constitutional and statutory parameters. See *McCulley*, ¶¶ 43-44, 54-55.

CONCLUSION

¶43 The District Court correctly held that the Stock return amounted to compensatory damages. This enabled the District Court to consider punitive damages against Farmers. The District Court did not err in awarding punitive damages to John Jr. against Farmers and did not abuse its discretion in determining the amount of the award. Finally, the award

⁷ Three percent of Farmers' net worth would be \$1,143,900. See § 27-1-220(3), MCA.

of punitive damages was not excessive and fell within acceptable constitutional and statutory parameters. We affirm.

/S/ JAMES JEREMIAH SHEA

We Concur:

/S/ MIKE McGRATH
/S/ DIRK M. SANDEFUR
/S/ INGRID GUSTAFSON

Justice Laurie McKinnon, dissenting.

¶44 Fundamental to this case are the definition of compensatory damages and the *Gore* ratio—“the disparity between the actual or potential harm suffered by the plaintiff and the punitive damages award.” *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 418, 123 S. Ct. 1513, 1520 (2003) (citing *BMW of N. Am. v. Gore*, 517 U.S. 559, 575, 116 S. Ct. 1589, 1598 (1996)). A precise definition of compensatory damages is critical here—absent an award of compensatory damages, we may not uphold an award of punitive damages. *Folsom*, ¶ 52. The reissuance of stock certificates and dividends is not monetary compensation and, therefore, is not compensatory damages. Nevertheless, the interest awarded on the dividends here—a minor sum compared to the value of the stock and dividends—was.

¶45 Punitive damages may be predicated in-part on John Jr.’s interest award, but the punitive damages must also comport with Farmers’ due process rights. Because of the comparatively modest value of John Jr.’s compensatory damages (only the interest award), the ratio between the compensatory damages and punitive damages—a common indicator

of an award's constitutionality—would almost certainly denote a violation of Farmers' substantive due process rights. Nevertheless, in appropriate cases such as this, courts should compare the punitive damages award to both actual *and potential* harm. Here, that may have been the value of John Jr.'s stock and dividends. Accordingly, I would reverse and remand this case with instructions to the District Court to reevaluate the punitive damages award based on the ensuing analysis.

¶46 *1. Compensatory damages may only be based in money.*

¶47 Stock certificates and money are distinct. The language of § 27-1-202, MCA, which grants the right to compensatory damages, is plain: “Every person who suffers detriment from the unlawful act or omission of another may recover from the person in fault a compensation therefor *in money*, which is called damages.” (Emphasis added.) Clearly, the statute does not allow the party at fault to compensate the aggrieved party with some other asset like inventory, equipment, or real property—let alone stock certificates. Money is “[t]he medium of exchange authorized or adopted by a government as part of its currency.” *Money, Black’s Law Dictionary* (10th ed. 2014); *see also* § 30-1-201(2)(y), MCA (defining money in Montana’s version of the Uniform Commercial Code as “a medium of exchange currently authorized or adopted by a domestic or foreign government”). Unlike money, stock certificates represent ownership of equity in a corporation; they grant their holder the right to participate in the corporation’s management; and they often allow their holder to vote on corporate matters, receive dividends, and share in corporate assets upon liquidation. *Stock, Black’s Law Dictionary* (10th ed. 2014). The Court attempts to obfuscate these differences by citing numerous

sources that, while explaining the overall goal of compensatory damages (compensation), ignore the statutory mechanism for actually compensating aggrieved parties. Opinion, ¶ 15. Only one asset may satisfy an award for compensatory damages—money. Section 27-1-202, MCA. The Court’s conclusion to the contrary is unsupported by any cognizable theory of compensatory damages.¹

¶48 An action brought under § 30-8-414, MCA, is in many ways functionally similar to an action for the return and delivery of personal property under § 27-1-432, MCA.² The reissuance of stock is not monetary compensation any more than an order for the return of a bicycle is. It is a form of specific relief through which a court may compel one party “to do that which ought to be done”—delivery of the personal property to the person entitled to its possession. Section 27-1-402, MCA; *see* § 27-1-432, MCA (“A person having the possession or control of a particular article of personal property of which the person is not the owner may be compelled specifically to deliver it to the person entitled to its immediate

¹ *E.g.*, Dan B. Dobbs & Caprice L. Roberts, *Law of Remedies*, § 3.1 (3d ed. 2018) (hereinafter “Dobbs, *Law of Remedies*”) (“The damages remedy is a judicial award in money, payable as compensation to one who has suffered a legally recognized injury or harm.”); *see also, e.g.*, *Mertens v. Hewitt Assocs.*, 508 U.S. 248, 255, 113 S. Ct. 2063, 2068 (1993) (“[W]hat petitioners in fact seek is nothing other than compensatory *damages*—monetary relief for all losses their plan sustained as a result of the alleged breach of fiduciary duties. Money damages are, of course, the classic form of *legal* relief.” (emphasis in original)); Restatement of the Law, Torts 2d § 902 (Am. Law Inst. 1979) (“‘Damages’ means a sum of money awarded to a person”); Damages in Tort Actions § 1.01 (Matthew Bender) (“‘Damages’ is the term used to denote the amount awarded as compensation for loss”); *Damages, Black’s Law Dictionary* (10th ed. 2014) (“Money claimed by, or ordered to be paid to, a person as compensation for loss or injury.”).

² A claimant entitled to the immediate possession of personal property may seek specific relief for its return, whereby courts may compel the opposing party to specifically deliver the personal property to the claimant. Sections 27-1-401, -402, -432, MCA. Operating similarly, § 30-8-414(2), MCA, compels an issuer to deliver like certificated or uncertificated securities to a person entitled to them.

possession.”). This Court has never held that, within a remedy for the return of specific personal property, the personal property itself is compensatory damages. Moreover, this Court has never held that compensatory damages may be anything *but* money.

¶49 Further review of the statute’s remedial procedure evinces the same conclusion. The Official Comments to § 30-8-414, MCA, state that historically, when an issuer wrongfully registered a security transfer, some courts allowed the rightful owner to elect between either an equitable action to compel issue of a new security or an action for damages. Section 30-8-414, MCA, Official Comment 1; *see* 12 William Meade Fletcher, *Fletcher Cyclopedia of the Law of Private Corporations* § 5551, at 426 (Jennifer L. Berger & Carol A. Jones eds., 2004). Under pre-U.C.C. law, it was “well-settled . . . that if a corporation wrongfully refuse[d] to recognize and register a valid transfer of stock, and issue a new certificate to the transferee, the shareholder [could] maintain a bill *in equity* to compel it to do so.” 12 Fletcher, *supra*, § 5519, at 319-20 (emphasis added). Section 30-8-414, MCA, confines a rightful owner’s remedy under the statute to reissuance of like securities—an equitable remedy of specific relief. Section 30-8-414, MCA, Official Comment 1 (“[Title 30, chapter 8] does not allow such election. The true owner of a certificated security is required to take a new security . . .”). Moreover, the statute only allows the rightful owner to recover the *value* of the stock (in lieu of reissuance) as a last resort in one situation: where reissuance of the securities would exceed the amount the issuer has corporate power to issue and identical securities are not reasonably available for purchase. Sections 30-8-220, -414, MCA.

¶50 Statutes can codify equitable remedies. Even if a statutory remedy displaces a remedy previously available to courts in equity, the statutory remedy itself can still be equitable. Many statutes in Montana codify equitable remedies. Some examples include:

- specific performance, § 27-1-411, MCA;³
- injunctions, §§ 27-19-101 through -406, MCA;
- abatement as a remedy for public and private nuisances, §§ 27-30-202 and -301, MCA;
- partition, § 70-29-101, MCA;⁴
- mortgage foreclosure proceedings, § 71-1-222, MCA;⁵ and
- constructive trusts, § 72-38-123, MCA.⁶

Like these statutes, § 30-8-414, MCA, codified an equitable remedy.

¶51 Furthermore, statutory relief comes in both equitable and monetary forms. Whether a statute provides a remedy of compensatory damages depends on the nature of the relief a court ultimately provides through the statute. Thus, to determine whether a statutory remedy provides compensatory damages, a court needs only to ask whether the statutory

³ See *Boyne USA, Inc. v. Spanish Peaks Dev., LLC*, 2013 MT 1, ¶ 64, 368 Mont. 143, 292 P.3d 432 (“Specific performance constitutes an equitable remedy . . .”).

⁴ See *Britton v. Brown*, 2013 MT 30, ¶ 27, 368 Mont. 379, 300 P.3d 667 (“The right to partition real property is essentially equitable in nature . . .” (internal quotations omitted)).

⁵ See *Whitefish Credit Union v. Prindiville*, 2015 MT 328, ¶¶14-15, 381 Mont. 443, 362 P.3d 53 (“mortgage foreclosure proceedings are in the equity jurisdiction of the courts” (internal quotations omitted));

⁶ See *LeMond v. Yellowstone Dev., LLC*, 2014 MT 181A, ¶¶ 46-47, 375 Mont. 402, 336 P.3d 345 (“A constructive trust arises when a person holding title to property is subject to an equitable duty to convey it . . .”).

remedy is *monetary compensation* given to a party “who suffers detriment from the unlawful act or omission of another.” See § 27-1-202, MCA; see also Dobbs, *Law of Remedies* § 3.1 (“The stated goal of the damages remedy is compensation of plaintiff for legally recognized losses.”). For example, both an action for the return and delivery of personal property and an action for stock reissuance allow a court to order compensatory damages for the value of the property in limited scenarios.⁷ Although inapplicable to the case at issue, these remedial provisions illustrate how the same statute may afford differing types of relief; in a particular case, the type of statutory relief a District Court ultimately provides depends on how it applies the statute.

¶52 The Court also reasons that reissuance of stock under § 30-8-414, MCA, is different than a court-ordered return of a unique piece of property because it authorizes the issuer to provide “a *like* certificated or uncertificated security.” Opinion, ¶ 24 (quoting § 30-8-414, MCA) (emphasis in original). Thus, the Court implies that where a court orders

⁷ In an action for the return and delivery of personal property, “in case a delivery cannot be had,” a court may issue a judgment for the value of the property. Section 27-17-401, MCA. Furthermore, the property’s wrongful possessor has a duty “to return the property in as good condition as the property was when possession was taken” by her. Section 27-17-402, MCA. If the property becomes “materially injured or lessened in value by use or otherwise” before its return, the original owner may undertake an action “for the value thereof.” Section 27-17-403, MCA. Likewise, § 30-8-404, MCA, provides for monetary compensation in limited scenarios. The statute allows the stock’s rightful owner to recover the value of the stock where reissuance would exceed the amount the issuer has corporate power to issue and identical securities are not reasonably available for purchase. Sections 30-8-414, -220, MCA. Central to each remedy are compensatory damages—the ability of the “person who suffers detriment from the unlawful act or omission of another” to “recover from the person in fault a compensation therefor in money.” Section 27-1-202, MCA. Therefore, in these limited cases, these statutes provide a remedy of compensatory damages.

a defendant to provide a plaintiff with *similar* property as restitution instead of the plaintiff's original, specific property, such a remedy qualifies as compensatory damages.

¶53 The Court's line of reasoning is incompatible with the facts of the case: Farmers returned to John Jr. the specific, original stock he was entitled to—a specific remedy. Regardless, even remedies that allow one party to restore the other by providing fungible, equivalent property are not compensatory damages. They are equitable.⁸ Once again, compensatory damages must be paid in money. Section 27-1-202, MCA. The Court states, comparing the stock to money, the stock “looks like a duck, walks like a duck, and quacks like a duck,” so the award “was a duck.” Opinion, ¶ 24. But this ugly duckling is simply not a duck—it is a swan.

¶54 More nuanced, however, are the “payments or distributions” that § 30-8-414(2), MCA, compels an issuer to provide to an entitled party who did not receive them due to a wrongful registration. Payments and distributions received by a stock owner often take the form of a cash dividend. When they do, § 30-8-414(2) essentially requires the issuer to provide money to the entitled party, and that provision may or may not be compensatory damages.

⁸ The Restatements of the Law 3d, Restitution and Unjust Enrichment § 54 (Am. Law Inst. 2011) (hereinafter “Restatement of Restitution”) states that, generally, a party who has transferred money or other property to another pursuant to an invalid transaction is entitled to recover the property by rescission and restitution. Rescission requires a mutual restoration in which each party restores the other's property, “to the extent such restoration is feasible.” Restatement of Restitution § 54(2). A party may seek their specific personal property or “the fungible equivalent.” Restatement of Restitution § 54 cmt. f. In the case of securities, the “fungible equivalent” includes equivalent shares from the same corporation, Restatement of Restitution § 54 illus. 8. Although providing a fungible equivalent is a remedy using substitute property, the remedy is not for compensatory damages because it is not compensation in money given to a party who suffers a detriment.

¶55 While a party may only satisfy an award of compensatory damages with money, not all monetary awards are compensatory damages. *See* Dobbs, *Law of Remedies* § 3.1 (“The damages award is not the only money award courts make. Courts may also award restitution in money; they may order money payments in the exercise of ‘equity’ power.” (internal footnotes omitted)). The key distinction between a judgment for compensatory damages and an order to deliver specific funds is, once again, whether the remedy is *monetary compensation* given to a party “who suffers detriment from the unlawful act or omission of another.” *See* § 27-1-202, MCA. For example, a plaintiff asserting a preexisting ownership right in money taken by or transferred to the defendant seeks specific, equitable relief—return of the money. Instead of seeking monetary compensation for the property’s value and a claim for the defendant to pay damages out of the defendant’s general funds, the plaintiff seeks the return of the *specific* funds she is entitled to. *See* Colleen P. Murphy, *Money as a “Specific” Remedy*, 58 Ala. L. Rev. 119, 134-37, 146-52 (2006).

¶56 The United States Supreme Court has differentiated between compensatory damages and equitable relief for the return of specific funds through a series of cases analyzing the Employee Retirement Income Security Act (ERISA). ERISA-covered employee benefits plans frequently pay covered medical expenses, but the terms of the plans often include a subrogation clause requiring a participant to reimburse the plan if she later recovers money from a third party for her injuries. *Montanile v. Bd. of Trs. of the Nat’l Elevator Indus. Health Ben. Plan*, 577 U.S. ___, 136 S. Ct. 651, 655 (2016). ERISA allows plan fiduciaries to file civil suits “to obtain . . . appropriate equitable relief” to

enforce a covered employee benefits plan, often by enforcing equitable liens or constructive trusts against settlement funds. ERISA of 1974 § 502(a)(3), 29 U.S.C. § 1132(a)(3). ERISA limits the relief a fiduciary may seek to equitable relief. ERISA of 1974 § 502(a)(3), 29 U.S.C. § 1132(a)(3). Fiduciaries may not bring a civil action for compensatory damages, so in ERISA cases, the distinction between equitable relief and compensatory damages is significant.

¶57 In *Great-West*, the Supreme Court held that when a fiduciary sought enforcement of an equitable lien against third-party settlement funds the defendants did not actually possess, the fiduciary sought the legal remedy of damages instead of equitable relief. *Great-West Life & Annuity Ins. Co. v. Knudson*, 534 U.S. 204, 208-09, 213-14, 122 S. Ct. 708, 712, 714-15 (2002). The Court reasoned the plan could only seek to enforce an equitable lien where “money or property identified as belonging in good conscience to the plaintiff could clearly be traced to particular funds or property in the defendant’s possession.” *Great-West*, 534 U.S. at 213, 122 S. Ct. at 714. Next, in *Sereboff*, the Court held the underlying remedies a plan strived for were equitable remedies because it sought “recovery through a constructive trust or equitable lien on a specifically identified fund, not from the [plan participant’s] assets generally.” *Sereboff v. Mid Atl. Med. Servs.*, 547 U.S. 356, 363, 126 S. Ct. 1869, 1874 (2006). Finally, in *Montanile*, a plan participant received settlement funds but largely dissipated them on nontraceable items. *Montanile*, 577 U.S. at ___, 136 S. Ct. at 656. The Court held that a fiduciary could not recover dissipated funds from a plan participant’s general assets because, at that point, the remedy

sought was essentially for compensatory damages. *Montanile*, 577 U.S. at _____, 136 S. Ct. at 662. It observed,

a plaintiff could ordinarily enforce an equitable lien only against specifically identified funds that remain in the defendant’s possession or against traceable items that the defendant purchased with the funds (e.g., identifiable property like a car). A defendant’s expenditure of the entire identifiable fund on nontraceable items (like food or travel) destroys an equitable lien. The plaintiff then may have a personal claim against the defendant’s general assets—but recovering out of those assets is a legal remedy, not an equitable one.

Montanile, 577 U.S. at ____, 136 S. Ct. at 658.

¶58 Applying these principles to the case at hand, I would hold the dividends that § 30-8-414(2), MCA, required Farmers to pay John Jr. were not compensatory damages. As the dividends on John Jr.’s stock accrued while his stock ownership was in dispute, Farmers opened and maintained a separate account for them. Had Farmers dissipated the dividends on nontraceable items, John Jr. could have sought monetary compensation for their value. However, Farmers never dissipated the funds, and they were traceable at the time the District Court ordered Farmers to provide them to John Jr. John Jr. did not seek a claim against Farmers’ general assets; instead, he sought to recover specific funds in Farmers’ possession. Therefore, in this situation, § 30-8-414(2), MCA, functioned to provide John Jr. with the specific property—the dividends—that he was entitled to instead of monetary compensation for their value.

¶59 Notably, however, the District Court also awarded interest on the dividends to John Jr. In an action to recover personal property, § 27-17-401(1), MCA, allows the claimant to recover possession of the property (or its value if delivery is impossible) along

with “damages for the detention.” The statute does not define what, precisely, “damages for the detention” are.⁹ However, *Restatement of Restitution* § 53(1) states: “A person who is liable to make restitution of property or its value is liable for supplemental enrichment in the form of interest, rent, or other measure of use value, to the extent that such further enrichment is either realized in fact or appropriately presumed.” The property’s use value includes “ordinary income or accretion in respect of the original asset (dividends on shares, interest on bonds, rent on land, a calf born to a cow).” *Restatement of Restitution* § 53 cmt. c. Therefore, the wrongful possessor of stock belonging to another party must return both the stock and any cash dividends that accrued while the wrongful possessor held the stock.

¶60 If a wrongful possessor returns property, courts typically cannot also award interest as damages for the property’s detention by virtue of the property’s value alone. Most property does not produce additional value; before a court may impose further liability beyond delivery of the property (e.g., the value of interest or rent), the original owner must show the wrongful possessor realized interest, rent, proceeds, consequential gains, or some other form of use value.

⁹ In this Court’s pre-MCA jurisprudence, we held that damages for the wrongful detention of property include interest, but we only included interest when plaintiffs sought damages for the value of their property. *See Wilber v. Wilber*, 63 Mont. 587, 588-89, 207 P. 1002, 1002-03 (1922) (holding, in an action to recover the value of farm equipment and livestock, that the court may award interest for the wrongful detention of property); *Webster v. Sherman*, 33 Mont. 448, 459, 84 P. 878, 881-82 (1906) (holding, in an action to recover the value of horses, livestock, and other property, “Our Code does not define the measure of damages in a case of this character; but, upon reason, it would appear to be analogous to the action in conversion, and that the rule applicable in such an action should be applied”; therefore, “damages for detention” include “interest on the amount recovered from the date of seizure of the property to the time the verdict was returned”).

¶61 Nevertheless, in the case of *money* wrongfully held by a conscious wrongdoer, “[l]iability for the [money’s] use value . . . may be imposed by an award of prejudgment interest, consistent with applicable statutes.” *Restatement of Restitution* § 53(4). “The function of prejudgment interest in such a case is simultaneously to compensate the claimant for the interim loss of use of the damage award, and to eliminate the unjust enrichment (and the incentive to delay) that would otherwise result from the defendant’s retention of the same funds.” *Restatement of Restitution* § 53, cmt. e. In Montana, when one party breaches an obligation to pay money to another, the latter party’s detriment is the amount owed with interest. *See* § 27-1-312, MCA. The overriding purpose of awarding interest in addition to the amount owed is to fully compensate the injured party for losing the use of her money. *Byrne* 228 Mont. at 391, 741 P.2d at 1343.

¶62 In the present case, the dividends were not compensatory damages because they were traceable, specific personal property belonging to John Jr. *See Montanile*, 577 U.S. at ___, 136 S. Ct. at 658. However, unlike the dividends, the interest was an award of compensatory damages: it is monetary compensation given to John Jr. for damages for the detention of his money and John Jr.’s loss of its use value while Farmers wrongfully held it. *See* § 27-1-202, MCA; § 27-17-401, MCA. Accordingly, only the interest award can be categorized as compensatory damages.

¶63 Courts may not award punitive damages absent an award of compensatory damages. Section 27-1-220(1), MCA; *Folsom*, ¶ 52. Because I conclude the interest was an award of compensatory damages, I agree with the Court that punitive damages were available in this case. However, the value of compensatory damages I would find is only a fraction of

the value the Court has. The interest award is minimal compared to the value of the stock and dividends. Therefore, although I agree with the Court's decision to uphold the punitive damages, my evaluation of John Jr.'s compensatory damages necessitates an analysis—distinct from the Court's—of whether the punitive damages award comports with Farmers' due process rights.

¶64 2. *Punitive damages may be predicated in-part on potential harm.*

¶65 In Montana, a judge or jury may award punitive damages “for the sake of example and for the purpose of punishing a defendant.” Section 27-1-220, MCA; *see Seltzer v. Morton*, 2007 MT 62, ¶ 180, 336 Mont. 225, 154 P.3d 561 (affirming Montana has a “legitimate interest in punishment and deterrence” of highly reprehensible conduct). However, courts may not award punitive damages that violate a party's right to substantive due process. “The Due Process Clause of the Fourteenth Amendment prohibits the imposition of grossly excessive or arbitrary punishments on a tortfeasor.” *Campbell*, 538 U.S. at 416, 123 S. Ct. at 1519. When determining whether a punitive damages award is grossly excessive, this Court considers the United States Supreme Court's three *Gore* “guideposts”:

- (1) the degree of reprehensibility of the defendant's misconduct;
- (2) the disparity, or ratio, 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.

McCulley v. U.S. Bank, 2015 MT 100, ¶ 44, 378 Mont. 462, 347 P.3d 247 (citing *Campbell*, 538 U.S. at 418, 123 S. Ct. at 1520 (citing *Gore*, 517 U.S. at 575, 116 S. Ct. at 1598)).

¶66 Preliminarily, I address the third guidepost because, like the defendant in *McCulley*, there are not clear monetary civil penalties for Farmers’ conduct. *McCulley*, ¶ 55. The only civil remedy for wrongful stock registration is reissuance of the stock under § 30-8-414, MCA. Otherwise, considering Farmers’ *knowingly wrongful* transfer of John Jr.’s stock, the comparable penalty is a criminal one—a fine of up to \$50,000. Section 45-6-301(6), (7)(c), MCA (criminal penalties for embezzlement); *see also* § 45-2-311, MCA (criminal responsibility of corporations). Nevertheless, § 27-1-220(3), MCA, places a cap on punitive damages of either \$10 million or 3% of the defendant’s net worth. *See McCulley*, ¶ 55. The statutory cap provides “an indication of what the Legislature views as ‘grossly excessive.’” *McCulley*, ¶ 55. The punitive damages here neither exceed \$10 million nor 3% of Farmers’ net worth. Therefore, I would not hold the punitive damages excessive under the third *Gore* guidepost.

¶67 Next, the first guidepost: in *Gore*, the Supreme Court stated, “Perhaps the most important indicium of the reasonableness of a punitive damages award is the degree of reprehensibility of the defendant’s conduct.” *Gore*, 517 U.S. at 575, 116 S. Ct. at 1599; *accord McCulley*, ¶ 45. This Court examines the degree of reprehensibility of a defendant’s conduct by considering whether

the harm caused was physical as opposed to economic; the tortious conduct evinced an indifference to or a reckless disregard of the health or safety of others; the target of the conduct had financial vulnerability; the conduct involved repeated actions or was an isolated incident; and the harm was the result of intentional malice, trickery, or deceit, or mere accident.

McCulley, ¶ 45 (quoting *Campbell*, 538 U.S. at 419, 123 S. Ct. at 1521).

¶68 While John Jr. brought claims against Farmers for emotional distress, the District Court ultimately declined an award of compensatory damages for them. Thus, the record indicates any threat posed by John Jr.’s loss of his stock and dividends was solely economic, and Farmers’ conduct—which posed only a pecuniary threat to John Jr.—did not evince a reckless disregard to the health or safety of others. Furthermore, the District Court made no factual findings as to whether John Jr. had financial vulnerability or otherwise lacked financial sophistication. *See McCulley*, ¶ 48.

¶69 Nevertheless, the District Court found that Farmers’ conduct was, far from an isolated incident, a pattern of wrongdoing that deprived John Jr. of a substantial asset for nearly five years. The District Court’s findings are based on substantial evidence in the record and are not clearly erroneous. The deprivation John Jr. suffered “was the result of intentional malice, trickery, or deceit,” not “mere accident.” *See McCulley*, ¶¶ 51-52. Farmers maliciously backdated a stock transfer form and repeatedly misrepresented to John Jr. that the transfer occurred two days before his father’s death. With flagrant disregard for its own policies, Farmers intentionally and deliberately transferred all of John Jr.’s shares without his knowledge or permission; ignored John Jr.’s rights as a shareholder for nearly five years, paying no attention to his repeated demands for the stock’s return; and refused to acknowledge its own wrongdoing, even stating “So what if [the stock] was transferred to the wrong person . . . [n]othing happened to it, except it took a trip to Seattle and came back.” Therefore, while Farmers’ conduct posed only economic harm, its conduct was nonetheless reprehensible.

¶70 Finally, the second guidepost requires courts to evaluate the ratio “between the actual or potential harm suffered by the plaintiff and the punitive damages award.” *Campbell*, 538 U.S. at 418, 123 S. Ct. at 1520. Most often, courts accomplish this with a limited comparison between punitive damages and compensatory damages. *See, e.g., Gore*, 517 U.S. at 582, 116 S. Ct. at 1602 (holding unconstitutional a punitive damages award 500 times the amount of “actual harm as determined by the jury”); *Campbell*, 538 U.S. at 426, 123 S. Ct. at 1524-25 (reversing a punitive damages award 145 times the amount of a \$1 million compensatory damages award and finding the compensatory damages were “substantial” and “complete compensation”); *McCulley*, ¶¶ 53-54 (finding constitutional a 5:1 ratio between punitive and compensatory damages); *Seltzer*, ¶¶ 189, 196-99 (upholding a district court’s reduction of a punitive damages award to comport with a ratio of 9:1 where compensatory damages were “substantial”). However, the ratio also permits consideration of *potential* damages. *Gore*, 517 U.S. at 582, 116 S. Ct. at 1602.

¶71 In a pre-*Gore* plurality opinion, the Supreme Court upheld a ratio of 10:1 between punitive damages and actual and potential damages in *TXO Prod. Corp. v. Alliance Res. Corp.*, 509 U.S. 443, 459, 466, 113 S. Ct. 2711, 2721, 2724 (1993) (plurality). TXO, attempting to pressure Alliance to renegotiate an oil and gas royalty agreement between the two companies, manufactured a title deficiency regarding a tract of land and advanced a baseless action against Alliance seeking declaratory judgment for certain oil and gas rights after negotiations fell through. A jury awarded Alliance \$19,000 in actual damages (the cost of defending the action) along with \$10 million in punitive damages against TXO. *TXO*, 509 U.S. at 447-51, 113 S. Ct. at 2714-17. A plurality of the Court wrote that, while

a disparity between actual and punitive damages could result in an unconstitutional punitive damages award, any constitutional analysis should take into account both actual and potential harm: “While petitioner stresses the shocking disparity between the punitive award and the compensatory award, that shock dissipates when one considers the potential loss to respondents, in terms of reduced or eliminated royalties payments, had petitioner succeeded in its illicit scheme.” *TXO*, 509 U.S. at 462, 113 S. Ct. at 2722. Alliance argued that, had TXO accomplished its scheme, Alliance’s potential damages from reduced royalties would have amounted to between \$5 million and \$8.3 million. The plurality did not determine precisely what the potential damages were, but it nonetheless held, “even if the actual value of the ‘potential harm’ to respondents is not between \$5 million and \$8.3 million, but is closer to \$4 million, or \$2 million, or even \$1 million, the disparity between the punitive award and the potential harm does not, in our view, ‘jar one’s constitutional sensibilities.’” *TXO*, 509 U.S. at 462, 113 S. Ct. at 2722 (quoting *Pac. Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1, 18, 111 S. Ct. 1032, 1043 (1991)).

¶72 The Court could not reach a majority regarding the proper framework for comparing punitive damages to potential harm. Notwithstanding, the Court unanimously agreed punitive damages could be predicated on potential harm to the victim.¹⁰

¹⁰ Justices Scalia and Thomas concurred with upholding the punitive damages but disagreed with the notion that there is a substantive due process right that punitive damages be reasonable; nevertheless, they approved of the plurality’s decision to include potential harm in its comparison between actual and punitive damages: “today we decide that a 10-to-1 ratio between punitive damages and the potential harm of petitioner’s conduct passes muster—calculating that potential harm, very generously, to be more than 50 times the \$19,000 in actual damages that respondents suffered.” *TXO*, 509 U.S. at 470-72, 113 S. Ct. at 2726-27 (Scalia, J., with Thomas, J., concurring) (internal citations omitted). Justices O’Connor, White, and Souter, while dissenting for other reasons, also agreed with considering potential harm to the victim in a punitive damages

¶73 *Gore* and its progeny have continued to support the theory that potential harm may be predicated in-part on potential harm to the victim. In *Gore*, the Supreme Court struck down a 500:1 ratio between punitive damages and actual and potential harm. The Court found that, unlike the victim in *TXO*, the victim in *Gore* had not suggested he was threatened with any additional potential harm.¹¹ *Gore*, 517 U.S. at 582, 116 S. Ct. at 1602.

The Court stated,

[W]e 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 award. 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. It is appropriate, therefore, to reiterate our rejection of a categorical approach.

analysis:

I have no quarrel with the plurality that, in the abstract, punitive damages may be predicated on the potential but unrealized harm to the victim, or even on the defendant's anticipated gain. Linking the punitive award to those factors not only substantially furthers the State's weighty interests in deterrence and retribution, but also can be traced well back in the common law.

TXO, 509 U.S. at 484, 113 S. Ct. at 2734 (O'Connor, J., with White and Souter, JJ., dissenting). Justice Kennedy did not dispute whether punitive damages could be supported by potential harm, but he felt the potential harm at issue may have been too imprecise to include in the analysis; nevertheless, he agreed with upholding the award based on the degree of reprehensibility of *TXO*'s conduct. *TXO*, 509 U.S. at 468-69, 113 S. Ct. at 2725-26 (Kennedy, J., concurring).

¹¹ The Court also reasoned that *TXO* suggested an upper constitutional ratio of 10:1. *Gore*, 517 U.S. at 581, 116 S. Ct. at 1602 ("Thus, in upholding the \$10 million award in *TXO*, we relied on the difference between that figure and the harm to the victim that would have ensued if the tortious plan had succeeded. That difference suggested that the relevant ratio was not more than 10 to 1."). Notably, had *TXO* not included potential harm in its ratio, the ratio would have been 526:1, a higher ratio even than *Gore*. See *TXO*, 509 U.S. at 459, 113 S. Ct. at 2721. Since *Gore*, the Supreme Court has construed a 10:1 ratio as the likely ceiling for constitutionally permissible ratios. *Campbell*, 538 U.S. at 425, 123 S. Ct. at 1524 ("Single-digit multipliers are more likely to comport with due process, while still achieving the State's goals of deterrence and retribution, than awards with ratios in range of 500 to 1, or, in this case, of 145 to 1." (internal citations omitted)).

Gore, 517 U.S. at 582, 116 S. Ct. at 1602 (emphasis in original).

¶74 In *Campbell*, the Supreme Court once again instructed courts reviewing punitive damages to consider “the disparity between the actual or potential harm suffered by the plaintiff and the punitive damages award.” *Campbell*, 538 U.S. at 418, 123 S. Ct. at 1520. The *Campbell* court was critical of ratios in the double-digits but, relying on *Gore*, left open the possibility that higher ratios “may comport with due process where ‘a particularly egregious act has resulted in only a small amount of economic damages.’” *Campbell*, 538 U.S. at 425, 123 S. Ct. at 1524 (quoting *Gore*, 517 U.S. at 582, 116 S. Ct. at 1602). The Court cautioned, however, that the converse was also true: “When compensatory damages are substantial, then a lesser ratio, perhaps only equal to compensatory damages, can reach the outermost limit of the due process guarantee.”¹² *Campbell*, 538 U.S. at 425,

¹² At times in both *Campbell* and *Gore*, the Court used the ratio between punitive damages and compensatory damages and the ratio between punitive damages and actual and potential harm interchangeably. In either case, the Court did not specify whether the ratio only should include compensatory damages, and it did not clarify whether *Campbell* and *Gore* were departing from *TXO*. See *Campbell*, 538 U.S. at 424-26, 123 S. Ct. at 1524-25; *Gore*, 517 U.S. at 580-83, 116 S. Ct. at 1601-03. Limiting the denominator in the appropriate ratio to compensatory damages alone clearly results in a higher ratio overall. However, the Court has acknowledged that potential harm may support greater punitive damages under either approach. Thus, the distinction is nominal. In *Gore*, for example, the Court contemplated that potential damages may be included in the denominator of a ratio between punitive damages and harm, but it simultaneously stated low awards of compensatory damages may support a higher ratio if particularly egregious acts resulted in only small amounts of economic damages (i.e., potential harm may support either a greater denominator in the ratio or potential harm may support higher ratios *overall*). *Gore*, 517 U.S. at 582, 116 S. Ct. at 1602; cf. *Campbell*, 538 U.S. at 424-25, 123 S. Ct. at 1524. The Court left open the question of which analysis lower courts should use. Nevertheless, the result is the same—when appropriate, courts may use potential harm to support punitive damages awards.

Because the Supreme Court has yet to analyze a case where potential harm supports a higher ratio between punitive damages and compensatory damages, I rely on its original analysis from *TXO*: there, the Court included potential harm in the ratio’s denominator to reach a 10:1 ratio between punitive damages and actual and potential harm. See *Gore*, 517 U.S. at 581, 116 S. Ct. at 1602 (“Thus, in upholding the \$10 million award in *TXO*, we relied on the difference between that figure

123 S. Ct. at 1524. Nevertheless, it concluded, “The 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.” *Campbell*, 538 U.S. at 425, 123 S. Ct. at 1524.

¶75 Finally, in *Philip Morris USA v. Williams*, 549 U.S. 346, 354, 127 S. Ct. 1057, 1063 (2007), the Supreme Court limited potential harm that could support an award of punitive damages to potential harm to the plaintiff alone, not third parties. Although *Philip Morris* limited the scope of potential harm, its opinion reaffirmed that potential harm to the plaintiff may support an award of punitive damages. See *Philip Morris*, 549 U.S. at 354, 127 S. Ct. at 1063 (“We have said that it may be appropriate to consider the reasonableness of a punitive damages award in light of the potential harm the defendant’s conduct could have caused. But we have made clear that the potential harm at issue was harm potentially caused *the plaintiff*.” (internal citations omitted; emphasis in original)).

¶76 Under the guidance of *TXO*, *Gore*, *Campbell*, and *Philip Morris*, a number of state and federal courts have also held potential harm may predicate punitive damages awards.¹³

and the harm to the victim that would have ensued if the tortious plan had succeeded. That difference suggested that the relevant ratio was not more than 10 to 1.”). Following the Court’s *TXO* analysis, instead of using the potential harm to John Jr. (the value of his stock and dividends) to justify a greater ratio between punitive damages and compensatory damages, I include the value of the potential harm in the denominator for the ratio.

¹³ E.g., *Mathias v. Accor Economy Lodging, Inc.*, 347 F.3d 672, 677 (7th Cir. 2003) (justifying a large ratio between punitive and compensatory damages in-part because “the compensable harm done was . . . difficult to quantify”); *DiSorbo v. Hoy*, 343 F.3d 172, 187 (2d Cir. 2003) (stating the use of a ratio was “not the best tool” where punitive damages compared to nominal damages yielded “a staggering 650,000-to-1 ratio” (internal quotations and citations omitted)); *Holt v. Pennsylvania*, 2015 U.S. Dist. LEXIS 109311, *127 n. 58 (E.D. Pa. 2015), *rev’d in part on other grounds* 683 Fed. App’x. 151 (3rd Cir. 2017) (“We are reminded that in analyzing the second guidepost it is not purely the difference between the actual harm and the punitive damages that is at issue; rather, we must also consider the ‘potential harm.’” (quoting *Campbell*, 538 U.S. at 418,

If there are any real caveats, they appear to be that: (1) the record should factually support the value of potential harm the factfinder considered, and (2) the record should show the factfinder based the punitive damages in-part on the potential harm.¹⁴

¶77 In the present case, the District Court awarded John Jr. compensatory damages in the form of interest on his dividends of \$1,119.67. The District Court awarded punitive damages of \$1,100,000. Comparing John Jr.’s compensatory damages to his punitive

123 S. Ct. at 1520)); *Shannon v. Sasseville*, 684 F. Supp. 2d 169, 177-178 (D. Me. 2010) (upholding punitive damages for a defendant’s particularly egregious act because it produced “noneconomic damages from psychological trauma likely to persist for years to come”); *Kimble v. Land Concepts, Inc.*, 845 N.W.2d 395, 409-10 (Wis. 2014) (holding potential harm may support a punitive damages award, but potential harm must not merely be “speculative”); *Weinstein v. Prudential Prop. & Cas. Ins. Co.*, 233 P.3d 1221, 1255-56 (Idaho 2010) (distinguishing potential harm from deterrence but recognizing punitive damages may be predicated on potential harm to the plaintiff); *Simon v. San Paolo U.S. Holding Co., Inc.*, 113 P.3d 63, 71-72 (Cal. 2005) (determining the value of potential harm to the plaintiff for a comparison to punitive damages); *In re New Orleans Train Car Leakage Fire Litigation* 795 So. 2d 364, 386 (La. Ct. App. 2001) (assessing punitive damages relative to not only actual harm, but also potential harm, because had a train car leaking flammable gas exploded, “whole city blocks of a residential area could have been destroyed”).

¹⁴ In *TXO*, the dissent rested its disagreement on two arguments: (1) the record contained insufficient evidence regarding the potential harm of TXO’s conduct for the Court to include an estimate for it in the Court’s comparison of harm to punitive damages; and (2) even if the record had contained sufficient evidence of the potential harm, the jury instructions did not instruct the jury to consider potential harm when considering a punitive damages award. *TXO*, 509 U.S. at 484-89, 113 S. Ct. at 2733-36 (O’Connor, J., with White and Souter, JJ., dissenting) (“The question is not simply whether *this Court* might think the award appropriate in light of its estimate of potential harm. The question is also whether *the jury* might have relied on such an estimate” (emphasis in original)); see also *TXO*, 509 U.S. at 467-69, 113 S. Ct. at 2725-26 (Kennedy, J., concurring in part and concurring in the judgment) (disagreeing with the plurality’s contention that the record supported consideration of potential harm: “[A] jury is bound to consider only the evidence presented to it in arriving at a judgment. Justice O’Connor demonstrates that the record in this case does not contain evidence, argument, or instructions regarding the potential harm from TXO’s conduct”). The Wisconsin Supreme Court has set a similar condition for predicating punitive damages on potential harm. *Kimble*, 845 N.W.2d at 409-10 (holding potential harm may support a punitive damages award, but potential harm must not merely be “speculative”).

damages alone yields a ratio of 982:1. This ratio clearly exceeds the single-digit ratios the Supreme Court has held most often mark the outermost limit of due process. *See Campbell*, 538 U.S. at 425, 123 S. Ct. at 1524.

¶78 Most at stake throughout this litigation, however, was John Jr.'s stock. John Jr.'s compensatory damages—the interest on his dividends—was minimal compared to the value of his stock. Farmers first wrongfully transferred John Jr.'s stock in February 2011 after the death of his father. Farmers subsequently refused to reissue John Jr. his stock for nearly five years, even as the stock drastically increased in value. Had Farmers succeeded in permanently transferring his stock, John Jr. may have lost its full value. Because John Jr. did not actually lose the full value of his stock, Farmers' egregious actions resulted in only a small amount of economic damages to John Jr., and the monetary value of any noneconomic harm is difficult to determine here. *See Gore*, 517 U.S. at 582, 116 S. Ct. at 1602.

¶79 Therefore, based on the current record, this case appears to be one in which potential harm should factor into an award of punitive damages. However, the District Court—here the factfinder—has not yet found whether the record factually supports a value for potential harm; what the value of any potential harm would be, considering among other things, the stock's fluctuating value over time; and has not stated whether punitive damages are based in-part on any potential harm. The District Court should reconsider the punitive damages award in light of the fact that the interest award is the only compensatory damages award, and it should give the parties the opportunity to argue the question of potential harm. I would reverse and remand the case with instructions that the District Court do so.

¶80 Finally, Farmers contends the punitive damages award is unsupported by the punitive damages factors under § 27-1-221(7)(b), MCA. When a judge acts as the factfinder when issuing an award of punitive damages, the judge must clearly state his reasons in findings of fact and conclusions of law, demonstrating consideration of the factors listed in § 27-1-221(7)(b), MCA:

- (i) the nature and reprehensibility of the defendant's wrongdoing;
- (ii) the extent of the defendant's wrongdoing;
- (iii) the intent of the defendant in committing the wrong;
- (iv) the profitability of the defendant's wrongdoing, if applicable;
- (v) the amount of actual damages awarded by the jury;
- (vi) the defendant's net worth;
- (vii) previous awards of punitive or exemplary damages against the defendant based upon the same wrongful act;
- (viii) potential or prior criminal sanctions against the defendant based upon the same wrongful act; and
- (ix) any other circumstances that may operate to increase or reduce, without wholly defeating, punitive damages.

¶81 Other than factors four and seven, I have already addressed the District Court's consideration of the punitive damages factors in my analysis of the *Gore* guideposts. The District Court's thorough findings of facts and conclusions of law demonstrate the court clearly found the reprehensibility of Farmers' conduct (i.e., factors one, two, and three) to be controlling in this case. Regarding factor four, the District Court noted Farmers' misconduct was unlikely driven by any significant profit motive, "other than to avoid litigation with Janice . . ."; and regarding factor seven, the District Court found no evidence of any previous award of punitive or exemplary damages against Farmers based upon the same act. However, Farmers' lack of a profit motive or a history of misconduct does not "reduce the high level of reprehensibility already established by the other aspects of

[Farmers'] misconduct.” *See Seltzer*, ¶ 174. Further, any potential harm Farmers’ conduct posed John Jr. would be a circumstance that could operate to increase punitive damages, fitting under factor nine. That potential harm is the only factor that requires further evaluation by the District Court in this case.

¶82 In conclusion, I disagree with the Court’s misguided holding that stock reissuance may be construed as compensatory damages. Moreover, I disagree with the contention that anything other than money may serve as compensatory damages. Instead, I would hold the District Court’s only award of compensatory damages was the interest on John Jr.’s dividends. However, the measure of John Jr.’s interest award may not be representative of the true potential harm Farmers’ conduct posed to him. Because punitive damages may be based in-part on potential harm, the District Court should evaluate whether the punitive damages here may be based on something more than the interest on John Jr.’s dividends—possibly, the total value of his stock and dividends. Accordingly, I would reverse and remand the case with instructions that the District Court reevaluate the punitive damages award based on the foregoing analysis of compensatory damages and potential harm.

/S/ LAURIE McKINNON

Justice Beth Baker and Justice Jim Rice join in the dissenting Opinion of Justice McKinnon.

/S/ BETH BAKER
/S/ JIM RICE