No. 27804 -- Radec, Inc. v. Mountainteer Coal Development Company, d/b/a Marrowbone Development Company

SCOTT, Justice, dissenting:

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I respectfully but emphatically dissent from the majority opinion. In conclusory fashion, and with limited evaluation of the issues, the majority affirms the submission of the punitive damages issue to the jury, finds no flaw in the failure to provide the jury with a Garnes instruction, and approves the jury's punitive damage award in the ratio of 17:1 to the compensatory award. I differ with the majority on each of these issues and deem the resulting affirmance of a $1.5 million punitive award appalling under the circumstances of this case and destructive of the public reputation of the judicial proceeding.

I. Submission to the Jury

An initial inquiry is whether the lower court erred in allowing the issue of punitive damages to go to the jury. This Court has explained that a lower court must evaluate the issue of whether a jury can consider an award of punitive damages in light of the following question:

> Do the facts and inferences in this case point so strongly and overwhelmingly in favor of the [defendant] to the extent that it did not act so maliciously, oppressively, wantonly, willfully, recklessly, or with criminal indifference to civil obligations that no reasonable jury could ... reach[ ] a verdict against the [defendant] on the issue of punitive damages?

Alkire v. First Nat. Bank of Parsons, 197 W. Va. 122, 129, 475 S.E.2d 122, 129 (1996); see also

Haynes v. Rhone-Poulenc, Inc., 206 W. Va. 18, 35, 521 S.E.2d 331, 348 (1999). I fail to discern any factual basis to support the determination that the Appellant acted maliciously, oppressively, wantonly, willfully, recklessly, or with criminal indifference to civil obligations that the lower court apparently perceived in the present case.[1]

II. Failure to Provide Garnes Instruction

Assuming for the sake of argument that the punitive damage issue was properly submitted to the jury, such presentation imposed upon the lower court the obligation to accurately and fully instruct the jury with regard to punitive damages. The majority correctly acknowledges that the lower court provided the jury with a punitive damage instruction; however, the majority ends its analysis too quickly, failing to recognize that the lower court told the jury only half the story.[2] The general punitives instruction was given, but the Garnes enunciation of factors to be utilized in determining an appropriate amount of damages was not provided. Thus, the jury was left with a standardless punitive damage instruction, failing to provide a framework for the punitive damages determination and omitting even the most basic tenet that, "[a]s a matter of fundamental fairness, punitive damages should bear a reasonable relationship to

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[1]This "issue of whether there is sufficient evidence to justify an award of punitive damages is a question of the law" for the court. Marshall v. El Paso National Gas Co., 874 F.2d 1373, 1384 (10th Cir. 1989).

[2]The lower court, in its final order, admitted that the Garnes instruction should have been given: "The court agrees with defendant that the Garnes instruction should have been given to the jury in this case. However, the court finds that the failure of giving the instruction did not lead to plain error with outrageous result."

compensatory damages." Garnes, 186 W. Va. at 658, 413 S.E.2d at 899, syl. pt. 3, in part. The lower court painted only a portion of the whole portrait. Its limited recitation of the law on punitives did not adequately reflect West Virginia law or properly guide the jury in its determination of punitives.

The Garnes factors are not so easily disregarded. Based upon the United States Supreme Court's decision in Pacific Mutual Life Insurance Co. v. Haslip, 429 U. S. 1 (1991), establishing due process standards for punitive damage awards,[3] the Garnes decision establishes a process for awarding and reviewing a punitive damages issue: "Under our system for an award and review of punitive damages awards, there must be: (1) a reasonable constraint on jury discretion. . . ." 186 W. Va. at 658, 413 S.E.2d at 899, syl. pt. 2, in part. There was no reasonable constraint in this case; in fact, there was no constraint at all.

Garnes also provided the following guidance regarding the jury instructions at syllabus point three, as follows:

> When the trial court instructs the jury on punitive damages, the court should, at a minimum, carefully explain the factors to be considered in awarding punitive damages. These factors are as follows:
>
> (1) Punitive damages should bear a reasonable relationship to the harm that is likely to occur from the

[3]This Court observed in Garnes that the United States Supreme Court in Haslip "attempted to establish criteria for determining whether a particular punitive damages award is outside legitimate due process boundaries." 186 W. Va. at 660, 413 S.E.2d at 901.

> defendant's conduct as well as to the harm that actually has occurred. If the defendant's actions caused or would likely cause in a similar situation only slight harm, the damages should be relatively small. If the harm is grievous, the damages should be greater.
>
> (2) The jury may consider (although the court need not specifically instruct on each element if doing so would be unfairly prejudicial to the defendant), the reprehensibility of the defendant's conduct. The jury should take into account how long the defendant continued in his actions, whether he was aware his actions were causing or were likely to cause harm, whether he attempted to conceal or cover up his actions or the harm caused by them, whether/how often the defendant engaged in similar conduct in the past, and whether the defendant made reasonable efforts to make amends by offering a fair and prompt settlement for the actual harm caused once his liability became clear to him.
>
> (3) If the defendant profited from his wrongful conduct, the punitive damages should remove the profit and should be in excess of the profit, so that the award discourages future bad acts by the defendant.
>
> (4) As a matter of fundamental fairness, punitive damages should bear a reasonable relationship to compensatory damages.
>
> (5) The financial position of the defendant is relevant.

Id. at 658-59, 413 S.E.2d at 899-900.

The Appellant objected to providing the jury with punitive damage instructions, including the Garnes instruction, presumably as part of a trial strategy to limit emphasis upon the jury's opportunity to award punitives. No objection was raised to the failure of the lower court to give the instruction. While

I am committed to the concept that a litigant should not be permitted to slumber on his rights or invite an error, I am equally committed to the fundamental right to a fair trial, necessitating clear and complete jury instructions. This Court has invoked the plain error doctrine to correct egregious errors denying the litigants the right to a fair trial, even where no objection was raised to the error below. As we stated in syllabus point one of Shia v. Chvasta, 180 W. Va. 510, 377 S.E.2d 644 (1988),

> "No party may assign as error the giving or the refusal to give an instruction unless he objects thereto before the arguments to the jury are begun, stating distinctly, as to any given instruction, the matter to which he objects and the grounds of his objection; but the court or any appellate court, may, in the interest of justice, notice plain error in the giving or refusal to give an instruction, whether or not it has been made subject of an objection." Rule 51, in part, W. Va. RCP.

Of course, not all instructional errors warrant intervention by means of the plain error doctrine. "'Where an objection is made to an instruction for the first time on appeal and such instruction is not so deficient so as to require invocation of the "plain error" rule, in consonance with Rule 51, W.Va.R.C.P., this Court will not consider the late objection.' Syl. Pt. 1, Jordan v. Bero, 158 W. Va. 28, 210 S.E.2d 618 (1974)." Syl. Pt. 1, Muzelak v. King Chevrolet, Inc., 179 W. Va. 340, 368 S.E.2d 710 (1988).

I believe that the omission of the Garnes instruction created a constitutionally defective jury charge which denied due process and which warrants intercession through the plain error doctrine. "Alleged errors of a constitutional magnitude will generally trigger a review by this Court under the plain error doctrine." State v. Salmons, 203 W. Va. 561, 571, 509 S.E.2d 842, 852, n.13. In syllabus point seven of State v. Miller, 194 W. Va. 3, 459 S.E.2d 114 (1995), this Court stated: "To trigger application

of the 'plain error' doctrine, there must be (1) an error; (2) that is plain; (3) that affects substantial rights; and (4) seriously affects the fairness, integrity, or public reputation of the judicial proceedings."

III. Excessiveness

The majority excuses this error of constitutional magnitude and proceeds to summarily dismiss the Appellant's contention that the punitive damage award was excessive. The excessiveness was, in all likelihood, a direct result of the failure of the lower court to provide the jury with the proper guidelines for the award of punitives, as contained in the omitted Garnes instruction. The majority once again launches its examination properly but ultimately falls short of a complete analysis. Indeed, as the majority cites, syllabus point fifteen of TXO Products Corp. v. Alliance Resources Corp., 187 W. Va. 457, 419 S.E.2d 870 (1992), provides the proper origin for our inquiry, as follows:

> The outer limit of the ratio of punitives to compensatory damages in cases in which the defendant has acted with extreme negligence or wanton disregard but with no actual intention to cause harm and in which compensatory damages are neither negligible nor very large is roughly 5 to 1. However, when the defendant has acted with actual evil intention, much higher ratios are not per se unconstitutional.

This Court's guidelines in Garnes impose an obligation upon the trial court to conduct a review of the punitive damages award. Syllabus point four provides:

> When the trial court reviews an award of punitive damages, the court should, at a minimum, consider the factors given to the jury as well as the following additional factors:

> (1) The costs of the litigation;
>
> (2) Any criminal sanctions imposed on the defendant for his conduct;
>
> (3) Any other civil actions against the same defendant, based on the same conduct; and
>
> (4) The appropriateness of punitive damages to encourage fair and reasonable settlements when a clear wrong has been committed. A factor that may justify punitive damages is the cost of litigation to the plaintiff.
>
> Because not all relevant information is available to the jury, it is likely that in some cases the jury will make an award that is reasonable on the facts as the jury know them, but that will require downward adjustment by the trial court through remittitur because of factors that would be prejudicial to the defendant if admitted at trial, such as criminal sanctions imposed or similar lawsuits pending elsewhere against the defendant. However, at the option of the defendant, or in the sound discretion of the trial court, any of the above factors may also be presented to the jury.

186 W. Va. 659, 413 S.E.2d at 900, syl. pt. 4.

In BMW of North America, Inc. v. Gore, 517 U. S. 559 (1996), the United States Supreme Court explained that the trial courts, in scrutinizing the constitutionality of a punitive damage award, must review the ratio of the punitive damage award as compared to the actual harm to the plaintiff as reflected in the compensatory damage award. Id. at 582. A high ratio may be justifiable where a defendant's acts are particularly egregious, as determined in Parrott v. Carr Chevrolet, Inc., 965 P.2d 440 (1998), rev. allowed, 328 Or. 418 (1999), concluding that repeated trade practices supported a $300,000

punitives award with only $11,000 in compensatory damages. Where there is no evidence of particularly egregious or evil behavior, however, there is simply no justification for a high ratio. See Jenson v. Medley, 11 P.3d 678, 689 (2000) (reducing punitive award where "[t]he ratio of punitive damages to noneconomic damages in this case is about 35:1; no special circumstances are present in this case that justify an exceptionally high ratio of punitive damages in relation to compensatory damages").

The evaluation of the punitive damage award does not end at the trial court level. This Court is also obligated to conduct an evaluation, as explained in syllabus point five of Garnes:

> Upon petition, this Court will review all punitive damages awards. In our review of the petition, we will consider the same factors that we require the jury and trial judge to consider, and all petitions must address each and every factor set forth in Syllabus Points 3 and 4 of this case with particularity, summarizing the evidence presented to the jury on the subject or to the trial court at the post-judgment review stage. Assignments of error related to a factor not specifically addressed in the petition will be deemed waived as a matter of state law.

186 W. Va. at 659, 413 S.E.2d at 900, syl. pt. 5. Had the majority of this Court engaged in a thorough and exhaustive review of all aspects of this punitive damage award, as required by Garnes, I cannot fathom how it could have justified its decision to affirm. Where is any evidence which would justify any reasonable jury to find "actual evil intention" on the part of Marrowbone? 187 W. Va. at 461, 419 S.E.2d at 874, syl. pt. 15, in part. I cannot find any. I would reverse, based upon the absence of the Garnes instruction, and hold that an instruction on punitive damages which does not include the Garnes factors in per se reversible. It is the obligation of the court, regardless of the requests or objections of counsel, to ensure

that the constitutional mandate of due process inherent in any award of punitive damages be protected.

Thus, I dissent.