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Constitutional Law—Punitive Damages—Arkansas' Common Law Method of Awarding Punitive Damages May Violate Due Process. Viking Insurance Co. v. Jester, 310 Ark. 317, 836 S.W.2d 371 (1992).

Penny Brown Wilbourn

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CONSTITUTIONAL LAW—PUNITIVE DAMAGES—ARKANSAS' COMMON LAW METHOD OF AWARDING PUNITIVE DAMAGES MAY VIOLATE DUE PROCESS. *Viking Insurance Co. v. Jester*, 310 Ark. 317, 836 S.W.2d 371 (1992).

I. INTRODUCTION

The United States Supreme Court recently held in *Pacific Mutual Life Insurance Co. v. Haslip*,¹ that an \$800,000 judgment awarded under Alabama's common-law system of assessing punitive damages did not violate the Due Process Clause of the Fourteenth Amendment to the United States Constitution.² In reviewing Alabama's method of assessing punitive damages, however, the Court explicitly stated that constitutional principles may arise in the context of assessing punitive damages awards.³ Significantly, since the *Haslip* decision, the Supreme Court of Arkansas has upheld several large punitive damages awards, including assessments of \$1,000,000,⁴ \$500,000,⁵ \$350,000,⁶ and \$250,000.⁷ Likewise, in cases arising under Arkansas law, the Eighth Circuit Court of Appeals has upheld punitive damages awards of \$4,000,000,⁸ \$1,700,000,⁹ and \$850,000.¹⁰ In light of the Supreme Court's decision in *Haslip* and the more recent cases of the Supreme Court of Arkansas and the Eighth Circuit Court of Appeals, this note discusses the method used by Arkansas courts in awarding punitive damages and reviewing such awards. Specifically, an analysis of *Viking Insurance Co. v. Jester*¹¹ raises the issue of whether the Arkansas method of awarding punitive damages violates due process.

1. 111 S. Ct. 1032 (1991).

2. *Id.* at 1044.

3. *Id.* at 1043.

4. *B. & F. Eng'g, Inc. v. Cotroneo*, 309 Ark. 175, 183, 830 S.W.2d 835, 840 (1992).

5. *Warhurst v. White*, 310 Ark. 546, 552, 838 S.W.2d 350, 352 (1992).

6. *Cater v. Cater*, 311 Ark. 627, 846 S.W.2d 173 (1993).

7. *Viking Ins. Co. v. Jester*, 310 Ark. 317, 836 S.W.2d 371 (1992).

8. *Robertson Oil Co. v. Phillips Petroleum Co.*, 979 F.2d 1301, 1312 (8th Cir. 1992).

9. *Benny M. Estes & Assoc. v. Time Ins. Co.*, 980 F.2d 1228, 1235 (8th Cir. 1992).

10. *Peoples Bank & Trust Co. v. Globe Int'l Publishing, Inc.*, 978 F.2d 1065, 1071 (8th Cir. 1992).

11. 310 Ark. 317, 836 S.W.2d 371 (1992). The due process issue did not arise in *Cotroneo*, *Warhurst*, or *Cater*, the other cases in which the Supreme Court of Arkansas recently affirmed large punitive damages awards.

II. FACTS

On August 2, 1989, Ramona Jester was involved in a one-vehicle collision which damaged her Chevrolet Camaro automobile beyond repair.¹² Ms. Jester reported the accident to her insurer, Viking Insurance Company of Wisconsin ("Viking"). Both parties agreed that Viking would keep the salvage¹³ as long as Ms. Jester was paid a just amount for the car. However, when Ms. Jester and Viking were unable to come to a mutually satisfactory settlement, Ms. Jester decided to keep the salvage. Shortly thereafter, she learned that the salvage had already been sold and partially dismantled.¹⁴

Ms. Jester hired counsel and filed suit.¹⁵ Her complaint alleged that Viking Insurance Company was guilty of the first party tort of bad faith in refusing to settle her claim and of converting her car to its own use.¹⁶

Viking answered the complaint, but the trial court later struck the answer.¹⁷ The reasons given by the trial court were that Viking had violated a court order requiring it to produce its entire claim file and that Viking's actions had established a pattern of conduct designed to obstruct the discovery process.¹⁸ The trial court also entered a default judgment as to liability against Viking.¹⁹ The case was tried on the damages issue, and the jury returned a verdict of \$1,000 compensatory damages and \$250,000 punitive damages.²⁰

On appeal to the Supreme Court of Arkansas,²¹ Viking argued that its due process rights were violated because: (1) the trial court erred in instructing the jury regarding punitive damages and (2) the state procedure for awarding punitive damages was deficient.²² The court stated that the only issue properly raised regarding the jury in-

12. 310 Ark. at 321, 836 S.W.2d at 373. Ms. Jester is a single parent of five children who commutes 34 miles a day to her job at the International Paper Company outside Gurdon, Arkansas.

13. Salvage is defined as any material or goods (in this case an automobile) saved from destruction and sold or put to use, as involved in insurance claim settlements. WEBSTER'S NEW WORLD DICTIONARY 1258 (2d ed. 1972).

14. 310 Ark. at 321-22, 836 S.W.2d at 373-74.

15. *Id.* at 322, 836 S.W.2d at 374.

16. *Id.* at 322-23, 836 S.W.2d at 374.

17. *Id.* at 320, 836 S.W.2d at 372.

18. *Id.*

19. *Id.* at 325, 836 S.W.2d at 371.

20. *Id.* at 320, 836 S.W.2d at 371-72.

21. *Id.*

22. *Id.* at 329, 836 S.W.2d at 377.

struction was whether the trial court erred in refusing to give Viking's proffered instruction. The court stated that Viking sought to improperly modify its argument and, for the first time on appeal, to argue that the state procedure for awarding punitive damages violates due process.²³ The court then affirmed the trial court's judgment.²⁴

III. HISTORY OF PUNITIVE DAMAGES

Although punitive damages have long been a part of the American legal system, they have always been controversial.²⁵ One view is that punitive damages fill the gap between criminal and civil law because they compensate the victim while serving the purposes of punishment and deterrence.²⁶ An opposing view, however, is that punitive damages are unsound, illegal, arbitrary, economically unnecessary for the plaintiff, and economically disastrous, at times, for the defendant.²⁷

In recent history, as the dollar amounts of punitive damages awards have been highly publicized, the controversy has intensified.²⁸ For example, as a result of the current alleged litigation explosion, academics are searching for a neutral way to measure litigation regarding issues such as punitive damages.²⁹

Recently, the constitutionality of punitive damages has been ques-

23. *Id.* at 329, 836 S.W.2d at 378.

24. *Id.* at 332, 836 S.W.2d at 379. Justice Hays dissented, noting that when the trial court struck Viking's answer, it left Viking defenseless and vulnerable to claims for compensatory and punitive damages. Additionally, he stated that the sanction was seriously disproportionate to the offense of failure to deliver the entire claim file. *Id.* at 332-33, 836 S.W.2d at 379.

25. *Pacific Mut. Life Ins. Co. v. Haslip*, 111 S. Ct. 1032, 1047 (1991) (Scalia, J., concurring). Justice Scalia noted that as recently as the 19th century, commentators disagreed over whether punitive damages even existed.

26. See generally James B. Sales & Kenneth B. Cole, Jr., *Punitive Damages: A Relic that Has Outlived Its Origins*, 37 VAND. L. REV. 1117 (1984); Melody S. Peacock, Note, *Alabama's Common Law Scheme of Awarding Punitive Damages Does Not Violate Due Process*, 14 U. ARK. LITTLE ROCK L.J. 143, 146 (1991).

27. Sales & Cole, *supra* note 26, at 1165; Peacock, *supra* note 26, at 146.

28. Peacock, *supra* note 26, at 149-50. See Robert E. Goodfriend, *Preserving Error in Punitive Damage Cases*, 53 TEX. B.J. 1282, 1282 (Dec. 1990). A Cook County, Illinois, study showed a 600% increase in the average punitive damages award between 1980 and 1984. See Bruce Fein & William B. Reynolds, *Punitive Damages Don't Mesh With Due Process*, TEX. LAW., May 14, 1990, at 32. *Contra* Stephen Daniels & Joanne Martin, *Myth and Reality in Punitive Damages*, 75 MINN. L. REV. 1 (1990) (statistical analysis concluding that there has been no increase in punitive damages awards with regard to incidence or amount). See also David H. Williams, *What Dan Quayle Doesn't Know About Punitive Damages*, 14 U. ARK. LITTLE ROCK L.J. 717, 717-18 (1992) (an article arguing that there is no hard evidence to support the conclusion that punitive damages awards are escalating and suggesting that this was merely a story "[c]omprised mainly of pure unsubstantiated gossip").

29. Andrew Blum, *Debate Still Rages On Torts*, 15 NAT'L L.J. 1, 32-35 (1992).

tioned in light of insufficient standards governing such awards.³⁰ In *Aetna Life Insurance Co. v. Lavoie*³¹ the United States Supreme Court heard the argument that insufficient standards governing Alabama's punitive damages awards violated due process under the Fourteenth Amendment.³² The case was remanded for a new trial on other grounds, and the Court did not resolve the due process issue.³³ In *Bankers Life & Casualty Co. v. Crenshaw*,³⁴ the constitutionality of punitive damages was challenged again, but the Court declined to reach the due process issue because it was not raised and passed upon in the lower court.³⁵ Additionally, in *Browning-Ferris Industries v. Kelco Disposal, Inc.*,³⁶ the Court once again deferred the Fourteenth Amendment question because the issue had not been raised in the district court or the court of appeals.³⁷

Subsequently, however, in *Pacific Mutual Life Insurance Co. v. Haslip*, the Court held that, while the Alabama system for awarding punitive damages is not violative of due process, the Due Process Clause may be the basis for a review of punitive damages awards.³⁸ The Court's analysis included an examination of the procedural safeguards employed by the Alabama courts in awarding punitive damages.³⁹ First, the Court found that the jury instructions provided significant jury discretion in awarding punitive damages and in determining the size of such awards. However, that discretion was confined to the state's policy concerns of deterrence and retribution.⁴⁰ Second, the Court stated that there were sufficiently established post-trial procedures and standards at the trial court level for scrutinizing punitive damages awards.⁴¹ Third, the Court held that there were sufficiently established standards for appellate review of punitive damages

30. *Aetna Life Ins. Co. v. Lavoie*, 475 U.S. 813 (1986).

31. *Id.*

32. *Id.* at 828.

33. *Id.* at 828-29.

34. 486 U.S. 71 (1988).

35. *Id.* at 76.

36. 492 U.S. 257 (1989).

37. *Id.* at 277. Nevertheless, four Justices noted concern over the constitutionality of jury discretion without definite standards. *Id.* at 280 (Brennan & Marshall, JJ., concurring); *Id.* at 281 (O'Connor & Stevens, JJ., concurring in part and dissenting in part).

38. 111 S. Ct. at 1043-44. See also Richard A. Dean, *Punitive Damages: The Immediate Aftermath of Haslip*, 34 DEF. 5, 9 (May 1992).

39. 111 S. Ct. at 1044.

40. *Id.*

41. *Id.*

awards.⁴² In sum, the Court concluded that these three procedures provided adequate safeguards for the due process rights of the defendant.⁴³

Although the Court in *Haslip* did not mandate specific criteria, it did state that “general concerns of reasonableness and adequate guidance from the court . . . properly enter into the constitutional calculus.”⁴⁴ The Court noted its concern about punitive damages awards that “run wild.”⁴⁵ Additionally, the Court in *Haslip* applauded the adoption in certain jurisdictions of a standard of “clear and convincing evidence”⁴⁶ or “beyond a reasonable doubt” as a predicate to awarding punitive damages.⁴⁷

Furthermore, Justice O'Connor noted in a dissenting opinion that such a modest safeguard would make the process significantly more rational. Specifically, a “clear and convincing” evidentiary requirement would limit the jury's discretion to the more egregious cases, allow closer scrutiny of the evidence by reviewing courts, and indicate to the jury that it must be sure of its factual findings before imposing punitive damages.⁴⁸

IV. EXAMINATION OF ARKANSAS' METHOD OF AWARDING PUNITIVE DAMAGES

Arkansas, like Alabama, assesses punitive damages under a common-law method⁴⁹ that leaves the measurement of the amount of damages to the discretion of the jury.⁵⁰ In light of *Haslip*, the Arkansas common-law method may be violative of due process of law under the Fourteenth Amendment because of the lack of adequate guidance from the court.⁵¹ Indeed, after the *Haslip* decision, it was speculated in Ar-

42. *Id.* at 1045.

43. *Id.* The Court concluded that this review distinguished Alabama's method from those systems in Mississippi and Vermont about which the Court had expressed concern. *Id.* at 1045 n.10.

44. 111 S. Ct. at 1043. *See also* Peacock, *supra* note 26, at 158.

45. 111 S. Ct. at 1043. *See also* Peacock, *supra* note 26, at 158.

46. Clear and convincing evidence means evidence in which there is no serious or substantial doubt about the correctness of the conclusions drawn from the evidence. *Hodges v. S.C. Toof & Co.*, 833 S.W.2d 896, 901 n.3 (Tenn. 1992).

47. 111 S. Ct. at 1046 n.11. The Court noted, however, that the Due Process Clause did not require that much. Rather, it held that the lesser standard used in Alabama—“reasonably satisfied from the evidence”—along with certain procedural and substantive protections, was constitutionally sufficient. *Id.*

48. 111 S. Ct. at 1064 (O'Connor, J., dissenting).

49. *Id.* at 1043. *See also* Peacock, *supra* note 26, at 158.

50. Peacock, *supra* note 26, at 158.

51. 111 S. Ct. at 1043. *See also* Peacock, *supra* note 26, at 158.

kansas that the decision "may compel the Courts, if not the legislature, to mandate clear standards for the imposition and review of punitive damages."⁵²

In *Union National Bank v. Mosbacher*,⁵³ the Eighth Circuit Court of Appeals expressed uncertainty about the constitutionality of the Arkansas method of awarding punitive damages in regard to due process.⁵⁴ The court noted that "[c]onsiderable discretion is given to the jury in fixing punitive damages in an amount it deems appropriate to the circumstances."⁵⁵ Additionally, the court noted that Arkansas juries are told little more than the defendant's net worth and that the purpose of punitive damages is to punish and deter.⁵⁶ The court expressed uncertainty as to whether Arkansas law applies standards which impose an adequately definite and meaningful constraint on the discretion of the jury.⁵⁷ Finally, the court noted that the Supreme Court of Arkansas reviews the punitive damages award only to determine whether the award is so excessive that prejudice by the jury is suspected or whether the award shocks the conscience of the court.⁵⁸

The Eighth Circuit Court of Appeals discussed the constitutionality of punitive damages in light of *Haslip* both in *Robertson Oil Co. v. Phillips Petroleum Co. (Robertson II)*⁵⁹ and *Robertson Oil Co. v. Phillips Petroleum Co. (Robertson III)*.⁶⁰ First, in *Robertson II*, it remanded the Arkansas case⁶¹ to the district court for review of the amount of the punitive damages award under the criteria approved in *Haslip* by the United States Supreme Court.

In *Robertson II*, the Eighth Circuit Court of Appeals interpreted the holding in *Haslip* broadly and stated, "[U]nder *Haslip* we must evaluate both the jury instructions as to the punitive damages award and the adequacy of judicial review of the jury's award."⁶² The court then noted that the jury instructions in this Arkansas case only in-

52. Peacock, *supra* note 26, at 158.

53. 933 F.2d 1440 (8th Cir. 1991).

54. *Id.* at 1447-48.

55. *Id.* at 1448 (citing *Walt Bennett Ford v. Keck*, 298 Ark. 424, 768 S.W.2d 28 (1989)).

56. *Id.* (citing *Matthews v. Rodgers*, 279 Ark. 328, 651 S.W.2d 453 (1983)).

57. *Id.* (citing *Haslip*, 111 S. Ct. at 1045).

58. *Id.* The case was remanded to the district court for consideration of the due process argument. However, a petition for writ of certiorari to the United States Supreme Court was denied on January 13, 1992. 112 S. Ct. 870 (1992) (memorandum opinion).

59. *Robertson Oil Co. v. Phillips Petroleum Co.*, 930 F.2d 1342, 1342 (8th Cir. 1991).

60. *Robertson Oil Co. v. Phillips Petroleum Co.*, 979 F.2d 1301 (8th Cir. 1993).

61. 930 F.2d at 1342.

62. *Id.* at 1346.

formed the jury that it could consider the defendant's financial condition, without instructing it to consider the character and degree of the wrong as required by *Haslip*.⁶³

On remand, the district court held that the Arkansas method for awarding punitive damages does not violate due process.⁶⁴ Although it did not discuss the sufficiency of the jury instructions in light of *Haslip*, the district court held that the Arkansas "shock the conscience" standard of review does not violate due process. The court noted that the Supreme Court of Arkansas has enumerated a number of specific inquiries which give the standard a definite "shape and texture."⁶⁵ The court then "turn[ed] to an application of the criteria developed by the Arkansas Supreme Court"⁶⁶ under its general standard and found that the amount of the *Robertson II* award did not shock the conscience of the court.⁶⁷ However, the district court did not address the fact that these inquiries⁶⁸ have not been used together as a consistent standard to be applied by the trial court in determining whether an award shocks the conscience. The district court defended the Arkansas method when the court remarked that "[t]he long and distinguished history of the Arkansas standard bears testimony to its utility and constitutionality."⁶⁹ The district court did not heed the Court's comment in *Haslip* that any practice might be unconstitutional notwithstanding its "'antiquity'" or "'the fact of steadfast legislative and judicial adherence.'" ⁷⁰

Phillips Petroleum appealed the district court order refusing to vacate the two punitive damages awards. In *Robertson III*, Phillips argued that the Arkansas "shock the conscience" standard does not con-

63. *Id.* at 1347. Some would prefer a more narrow interpretation of *Haslip*, specifically, that the decision does not mandate any particular criteria but merely holds that the method employed in Alabama does not violate due process. See Peacock, *supra* note 26, at 159 n.160.

64. 779 F. Supp. 994, 997 (W.D. Ark. 1991).

65. *Id.* at 996.

66. *Id.* at 997.

67. *Id.* at 997-98. Additionally, the court noted its reluctance to disturb the relevant findings because two juries had awarded punitive damages in relatively similar amounts. *Id.* at 997.

68. The district court noted the following inquiries: the relationship between the relevant parties, the ratio of the punitive award to the compensatory award, the extent and duration of a defendant's acts, the deliberateness of the motives, the defendant's motives, the defendant's remorse, if any, and the defendant's net worth, along with a long string citation to eleven cases in which the reviewing court made one or more of the inquiries to judge the propriety of a punitive damages award. *Id.* at 996-97.

69. *Id.* at 996.

70. 111 S. Ct. at 1043 (quoting *Williams v. Illinois*, 399 U.S. 235, 239 (1970)).

strain the jury's discretion when awarding punitive damages and, thus, is violative of the right to due process.⁷¹

In *Robertson III*,⁷² the Eighth Circuit Court of Appeals considered for the second time the constitutionality of the Arkansas method of awarding punitive damages in light of *Haslip*. The court stated that although Arkansas' "shock the conscience" and passion and prejudice inquiries are broad, the Arkansas cases recognize more specific issues in their analyses.⁷³ The court stated that even though the factors considered by the district court in this case were not identical to those in *Haslip*, they coincided for the most part. Furthermore, the court stated that the *Haslip* factors not considered by the district court were inapplicable. Consequently, the court held that the district court's review satisfied the principles laid down in *Haslip*.⁷⁴ Although the court found that the district court dealt with a number of the more specific issues,⁷⁵ the court did not directly address the appellant's argument that the inquiries under the Arkansas method have been "inconsistent and unpredictable, and that there is no fixed standard" for the measurement of punitive damages.⁷⁶

V. EXAMINATION OF OTHER JURISDICTIONS AND PUNITIVE DAMAGES

Other jurisdictions have examined their state procedures in light of the principles outlined in *Haslip*. Courts in twenty states have examined standards for assessing punitive damages and the systems in South Carolina, Virginia, and West Virginia have, in fact, been struck down.⁷⁷ Additionally, Tennessee has changed the standard of evidence for proof of punitive damages from "a preponderance of the evidence" to the "clear and convincing" standard.⁷⁸

71. *Robertson Oil Co. v. Phillips Petroleum Co.*, 979 F.2d 1301 (8th Cir. 1993).

72. *Id.*

73. The court did not list the specific issues but cited to the most recent district court decision and approved the district court's conclusion that such specific inquiries give the standard a definite "shape and texture." See 779 F. Supp. at 996. See also *supra* note 68 and accompanying text.

74. 979 F.2d at 1305-06.

75. *Id.* at 1304.

76. *Id.* More recently, in *Benny M. Estes & Assoc.*, the Eighth Circuit Court of Appeals cited *Robertson III* while rejecting an argument that the Arkansas procedures for review of punitive damages awards, both in the trial court and on appeal, are insufficient to satisfy the procedural requirements of the Due Process Clause. 980 F.2d at 1235.

77. Julie G. Shoop, *Courts Approve Most Methods for Assessing Punitive Damages*, 28 TRIAL 6, June 1992, at 13.

78. *Hodges v. S.C. Toof & Co.*, 833 S.W.2d 896 (Tenn. 1992). Additionally, punitive damages have been subjected to substantial statutory reform in recent years. See, e.g., Peacock, *supra*

In October 1991, the Fourth Circuit Court of Appeals vacated a \$100,000 punitive damages award, finding that South Carolina law lacked meaningful standards and gave juries unfettered discretion in awarding punitive damages.⁷⁹ In a later case, however, the Fourth Circuit Court of Appeals approved a more detailed post-verdict review process which the Supreme Court of South Carolina had adopted to comply with *Haslip*.⁸⁰

The Fourth Circuit Court of Appeals also vacated a punitive damages award because Virginia's judicial review procedures were inadequate.⁸¹ Although the jury instructions satisfied the basic requirements of Virginia law, the court concluded that the standard of review did not measure up to the Alabama criteria set out in *Haslip*.⁸² It was more analogous to the Mississippi and Vermont review methods, which asked merely whether the award is "manifestly and grossly excessive," and which the Court rejected in *Haslip* for that very reason.⁸³

The West Virginia Supreme Court of Appeals vacated a punitive damages award because of inadequate standards to guide the trial court in its review process.⁸⁴ In *Fleming Landfill, Inc. v. Garnes*, the West Virginia Supreme Court of Appeals concluded that the state's courts' only real inquiry was into the possible excessiveness of the awards and, thus, found it insufficient under *Haslip*.⁸⁵ The court also stated that punitive damages should bear a reasonable relationship to the potential of harm caused by the defendant's actions. The court remarked that "punitive damages must bear a reasonable relationship to actual damages because compensatory damages provide a reasonable measure of likely harm."⁸⁶ Finally, the court concluded that the state's

note 26, at 157. One reform includes raising the standard of proof to that of "clear and convincing evidence." E.g., KAN. STAT. ANN. § 60.3701 (Supp. 1990); OHIO REV. CODE ANN. § 2307.80 (Anderson 1991).

79. *Mattison v. Dallas Carrier Corp.*, 947 F.2d 95 (4th Cir. 1991).

80. See *Gamble v. Stevenson*, 406 S.E.2d 350 (S.C. 1991). In the new South Carolina post-verdict review scheme, the trial court may consider: (1) the defendant's degree of culpability; (2) the duration of the conduct; (3) the defendant's awareness or concealment; (4) the existence of similar past conduct; (5) the likelihood the award will deter the defendant or others from like conduct; (6) the reasonable relationship between the award and the harm likely to result from such conduct; (7) the defendant's ability to pay; and (8) any other factors deemed appropriate. 947 F.2d at 106.

81. *Johnson v. Hugo's Skateway*, 949 F.2d 1338 (4th Cir. 1991).

82. *Id.* at 1339.

83. *Id.* at 1350.

84. *Garnes v. Fleming Landfill, Inc.*, 413 S.E.2d 897 (W. Va. 1991).

85. *Id.* at 908.

86. *Id.*

appellate courts had been operating under inadequate standards in reviewing punitive damages awards.⁸⁷

The court in *Fleming* promised that upon petition, it would review all punitive damages awards. The court also stated that when reviewing petitions, it would consider the same factors that the jury and judge are required to consider, and it directed that all petitions must address each one of those factors with particularity, summarizing evidence presented to the jury or to the trial court at the post-judgment review stage.⁸⁸

In *Hodges v. S. C. Toof & Co.*,⁸⁹ Tennessee abandoned its former method and adopted one requiring, upon motion of the defendant, a bifurcation of the punitive damages trial into two phases. In the first phase, the fact finder determines liability for and the amount of compensatory damages, along with liability for punitive damages. If the defendant is found liable for punitive damages, the amount of such damages is determined in the second phase. The new Tennessee method also requires multi-element jury instructions, a "clear and convincing" standard of evidence, and a formal review of the award by the trial judge.⁹⁰

In *Hodges* the Supreme Court of Tennessee found that the higher standard of proof is appropriate given the dual purpose of punishment and deterrence.⁹¹ The court then stated that "[f]airness requires that a defendant's wrong be clearly established before punishment is imposed; awarding punitive damages only in clearly appropriate cases better effects deterrence."⁹²

In *Glasscock v. Armstrong Cork Co.*, the Fifth Circuit Court of Appeals found that post-trial review procedures in Texas met the procedural due process requirements established in *Haslip*.⁹³ Although

87. *Id.* at 897.

88. *Id.* at 899-900. The court noted that: (1) punitive damages should bear a reasonable relationship to the harm that is likely to result from the defendant's conduct; (2) the jury may consider the reprehensibility of the defendant's conduct; (3) the punitive damages should remove any profit that resulted from the defendant's wrongful conduct; and (4) punitive damages should bear a reasonable relationship to compensatory damages. *Id.* at 899.

The court also noted that any issue not specifically addressed in a petition for review of a punitive damages award would be deemed waived as a matter of law. *Id.* at 900.

89. 833 S.W.2d 896, 901 (Tenn. 1992).

90. *Id.* at 902.

91. *Id.*

92. *Id.*

93. 946 F.2d 1085 (5th Cir. 1991). One difference, however, is that Alabama requires trial courts to state their reasons for either sustaining or interfering with a punitive damages award,

Texas' procedure is not as extensive as the Alabama criteria, the court concluded that the differences between the Texas and Alabama procedures did not result in a deprivation of due process. Specifically, the court noted that in Texas, trial and appellate courts review punitive awards to determine if they are reasonably proportionate to actual damages.⁹⁴ Even more importantly, the court noted that the Texas Supreme Court provides standards for courts to use when making this inquiry.⁹⁵

Finally, some interesting post-*Haslip* cases are ones in which courts have vacated punitive damages awards because they were too large. The jury instructions were appropriate, and the procedures were sufficient for reviewing the award. However, the courts were troubled by the amount of the awards themselves in relation to the purpose of punitive damages.⁹⁶

For example, in *Alexander & Alexander, Inc. v. B. Dixon Evander & Associates*, the Maryland Court of Special Appeals vacated a \$12.5 million punitive damages award which was fifty times the amount of the compensatory damages awards because it was excessive.⁹⁷ The court noted that it would not uphold a punitive award that is entered upon proper procedure but, nonetheless, violates due process because it is disproportionate to both the harm caused and the perniciousness of the conduct.⁹⁸

One decision that affirmed a punitive damages award under the *Haslip* standards on a substantive due process basis is *Eichenseer v. Reserve Life Insurance Co.*, from the fifth circuit.⁹⁹ The Fifth Circuit Court of Appeals stated that the *Haslip* requirements are "not a vehi-

while Texas trial courts are not required to justify their review on the record.

94. *Id.* at 1096.

95. *Id.* at 1099. The consistent standards used in Texas require consideration of the nature of the wrong, the character of the conduct involved, the degree of culpability, and the extent to which the conduct offends the public's sense of propriety and justice. *Id.* at 1098.

96. Dean, *supra* note 38, at 11. See *Mason v. Texaco, Inc.*, 948 F.2d 1546 (10th Cir. 1991) (reducing a \$25 million dollar punitive damages award by one-half, calling it a "staggering sum" that shocked the judicial conscience); *Republic Ins. Co. v. Hires*, 810 P.2d 790 (Nev. 1991) (reducing a \$22.5 million punitive damages award to \$5 million because the award was disproportionate to the harmfulness of the defendant's conduct and was a larger sum than necessary to serve as a deterrent); *Jacobs Mfg. Co. v. Sam Brown Co.*, 792 F. Supp. 1520 (W.D. Mo. 1992) (vacating a \$2.7 million punitive award because it was so unrealistic as to demonstrate irrational rather than reasonable behavior by the jury, and it bore no rational relationship to the harm likely to result or the harm that actually occurred).

97. 596 A.2d 687 (Md. Ct. Spec. App. 1991).

98. *Id.* at 710.

99. 934 F.2d 1377 (5th Cir. 1991).

cle for expansive appellate review of punitive awards" but a "narrow channel for appellate review."¹⁰⁰ The court further stated that the purpose of the *Haslip* requirements was to ensure that under the circumstances of the particular case, the punitive damages award is not grossly excessive or unreasonable.¹⁰¹

A summary of where the law stands after *Haslip* was given by Judge Johnson in *Eichenseer* as follows:

Thus, after *Haslip*, an award of punitive damages is constitutional if the circumstances of the case indicate that the award is reasonable and the procedure used in assessing and reviewing the award imposes a definite and meaningful constraint on the discretion of the factfinder. This is a fact intensive analysis. On appellate review, a court must consider the nature of the wrong and the status of the parties. The touchstone of constitutionality under *Haslip* is not the amount of the award in the abstract. The size of an award and the relationship between the award and the amount of compensatory damages are relevant facts in determining whether the award is constitutional, but these facts are not dispositive.¹⁰²

Indeed, punitive damages awards have received even more scrutiny since *Haslip*.¹⁰³ As a result, many decisions developing procedural due process issues have come down in various states, and Arkansas is no exception. *Viking Insurance Co. v. Jester* is just one Arkansas case that raises due process questions.

VI. REASONING OF THE COURT IN *VIKING*

On appeal to the Supreme Court of Arkansas, Viking complained that its right of due process was violated.¹⁰⁴ The court¹⁰⁵ rejected Viking's challenge and affirmed the decision of the trial court.

Specifically, Viking complained that the jury instruction regarding punitive damages provided inadequate guidance to the jury and violated Viking's constitutional right to due process.¹⁰⁶ At trial, Viking

100. *Id.* at 1382.

101. *Id.*

102. *Id.* at 1381-82.

103. Dean, *supra* note 38, at 13.

104. 310 Ark. at 329, 836 S.W.2d at 377.

105. Justice Dudley delivered the opinion of the court. Justice Hays filed a dissenting opinion. 310 Ark. at 317, 332-33, 836 S.W.2d at 371, 380.

106. 310 Ark. at 329, 836 S.W.2d at 377. The appeal by Viking to the Supreme Court of Arkansas presented the following points:

1. The trial court erred in entering sanctions of striking the answer, declaring a default as to liability, and awarding fees and costs.

had asked the court to give its proposed instruction in light of the Supreme Court's ruling in *Haslip*, but the trial court refused.¹⁰⁷ On appeal, the court held that whether the trial court erred in refusing to give Viking's proffered instruction was the only issue raised. The court also stated that Viking sought to modify its argument and argue for the first time on appeal that the Arkansas procedure for awarding punitive damages violates due process.¹⁰⁸

After addressing the procedural law, the court then turned to the substantive law. The court discussed the three criteria by which to judge whether a particular award is violative of the Due Process Clause as established in *Haslip*:

- (1) Whether the jurors were given sufficient guidance and instruction on punitive damages so that they could reach a rational decision. . . .
- (2) Whether there were sufficiently established post-trial procedures and standards in the trial court for scrutinizing punitive damage awards. . . .
- (3) Whether there are sufficiently established standards for appellate review.¹⁰⁹

The court only considered that part of the first criterion relating to the trial court's failure to give defendant's proffered instruction.¹¹⁰ The

2. The second point of appeal contained two subparts: First, the trial court erred in giving an instruction to the jury on the issue of punitive damages because there was not sufficient evidence to warrant such an instruction. Second, the jury instruction violated Viking's right of due process. 3. The punitive damages were excessive and demonstrated that the jury was motivated by passion and prejudice.

Id. at 325-28, 836 S.W.2d at 375-79.

107. *Id.* at 331, 836 S.W.2d at 379. The instruction given to the jury was based upon Ark. Model Jury Instr. Civil 3d 2217.

108. 310 Ark. at 329, 836 S.W.2d at 378.

109. *Id.* at 330, 836 S.W.2d at 378 (citing *Pacific Mut. Life Ins. Co. v. Haslip*, 111 S. Ct. 1032 (1991)).

110. *Id.* at 330-31, 836 S.W.2d at 378. The defendant's proffered instruction was then recited by the court as follows:

In addition to compensatory damages for any actual loss that Ramona Jester may have sustained, she asks for punitive damages from Viking Insurance Company of Wisconsin. Punitive damages may be imposed to punish a wrongdoer and to deter others from similar conduct. In order to recover punitive damages from Viking Insurance Company of Wisconsin, Ramona Jester has the burden of proving:

That Viking Insurance Company of Wisconsin engaged in affirmative misconduct which was dishonest, malicious, or oppressive in an attempt to avoid its liability under the insurance policy issued to Ramona Jester. Actual malice is that state of mind in which a person's conduct is characterized by hatred, ill will, or a spirit of revenge. Malice may be inferred from conduct and surrounding circumstances.

You are not required to assess punitive damages against Viking Insur-

court found that the instruction given and the proposed instruction used the same language in explaining the nature and purpose of punitive damages: punishment and deterrence. Further, the court concluded that the only difference was that the actual instruction told the jurors they "may" impose punitive damages while the proposed instruction told them that they were not required to assess punitive damages but "may" do so.¹¹¹

Finally, the court held that under *Haslip*, there was no material difference between the instruction given and the proposed instruction, and thus, the trial court did not err in refusing Viking's proffered instruction.¹¹² Consequently, the court affirmed the decision of the trial court, rejecting all of Viking's arguments.¹¹³

VII. SIGNIFICANCE

There must be a rational procedure for determining and awarding punitive damages.¹¹⁴ Since the United States Supreme Court, in *Haslip*, held that the Due Process Clause may be the basis for a review of punitive damages awards,¹¹⁵ the procedures used in many states have been challenged.

It is possible that the Arkansas method for awarding punitive damages violates due process. An examination of *Viking* and the Arkansas method, when they are compared to the challenged procedures used by other states raises this debatable issue. Additionally, *Viking* raises the question of what an attorney must do to preserve the due process question for appeal to the Supreme Court of Arkansas.

First, the Arkansas method may provide inadequate guidance to the jury in assessing punitive damages, thus resulting in unbridled jury

ance Company of Wisconsin but you may do so if justified by the evidence. If you find that punitive damages are justified by the [The proffered instruction ends in mid-sentence.].

Id.

111. *Id.* at 331, 836 S.W.2d at 379.

112. *Id.* at 332, 836 S.W.2d at 379.

113. The court rejected Viking's first point on appeal and held that the trial court did not abuse its discretion in imposing the sanctions, in entering a default judgment against Viking, or in awarding fees and costs. Viking's third point was also rejected. The court held that the punitive damages were not excessive and that it had always scrutinized punitive awards. Further, the court stated that the financial condition of the defendant is a proper matter to consider. The court then concluded that the damages awarded were not excessive in view of the state's interest in punishing the conduct of Viking and deterring others from engaging in such conduct. *Id.* at 332, 836 S.W.2d at 379.

114. Peacock, *supra* note 26, at 160.

115. 111 S. Ct. at 1043-44.

discretion. In *Mosbacher*, the Eighth Circuit Court of Appeals questioned the constitutional adequacy of the Arkansas method because of the considerable discretion given to the jury.¹¹⁶ *Viking* raised the question again.

The instruction given in *Viking* provided the jury with minimal guidance in awarding punitive damages. It advised: (1) that punitive damages are imposed for purposes of punishment and deterrence; (2) that the plaintiff must prove that Viking engaged in misconduct that was dishonest, malicious, or oppressive; and (3) that the jurors may consider the financial condition of Viking.¹¹⁷ This instruction gave the jury considerable discretion in its determination of punitive damages.

Conversely, the Court in *Haslip*, while approving the instruction given in the Alabama case, noted that the jury was not given unlimited discretion. The Court also noted that evidence of wealth was excluded and that the jurors were directed to "take into consideration the character and the degree of the wrong as shown by the evidence and necessity of preventing similar wrong."¹¹⁸ The Arkansas scheme, by contrast, imposes no such evidentiary restrictions.

The instruction given in *Viking* did require the jury to consider the character of the wrong but did not do so sufficiently. Specifically, it did not stress consideration of "the degree of the wrong as shown by the evidence."¹¹⁹

The instruction proffered by Viking was more complete and would have come closer to the instruction that was approved in *Haslip*.¹²⁰

116. 933 F.2d at 1448.

117. 310 Ark. at 331, 836 S.W.2d at 379.

118. 111 S. Ct. at 1044.

119. *See id.*

120. The complete instruction proffered by the defendant stated:

In addition to compensatory damages for an actual loss that Ramona Jester may have sustained, she asks for punitive damages from Viking Insurance Company of Wisconsin. Punitive damages may be imposed to punish a wrongdoer and to deter others from similar conduct. In order to recover punitive damages from Viking Insurance Company of Wisconsin, Ramona Jester has the burden of proving:

That Viking Insurance Company of Wisconsin engaged in affirmative misconduct which was dishonest, malicious or oppressive in an attempt to avoid its liability under the insurance policy issued to Ramona Jester. Actual malice is that state of mind in which a person's conduct is characterized by hatred, ill will or a spirit of revenge.

Ramona Jester's claim for punitive damages against Viking Insurance Company of Wisconsin cannot be based upon a good faith denial, offers to compromise a disputed claim or for other honest errors of judgment by Viking Insurance Company. Neither can Ramona Jester's claim be based upon negligence or bad judgment so long as Viking Insurance Company of Wisconsin acted in good faith.

First, it instructed that if punitive damages were justified by the evidence, in fixing the amount the jury must consider whether there is a reasonable relationship between the punitive damages award and the harm likely to result, as well as the harm that actually occurred.¹²¹ This came closer to the criteria approved in *Haslip* that recognized the "necessity of preventing similar wrong."¹²² Second, Viking's proposed instruction advised the jury to consider the degree of reprehensibility of Viking's conduct, the duration of that conduct, any concealment, and the existence and frequency of similar past wrongful conduct.¹²³ The "duration" and "frequency" elements of the proposed instruction related to the "degree of the wrong" consideration in *Haslip*. The "reprehensibility" element exemplified the *Haslip* requirement that the jury consider the "character" of the wrong as shown by the evidence.¹²⁴

By comparison, in the fourth circuit case *Mattison v. Dallas Carrier Corp.* in which the court found South Carolina's procedure inadequate, the jury instruction was strikingly similar to the one approved in *Viking*.¹²⁵ In *Mattison*, the court found that the combination of undirected jury instructions resulting in unfettered jury discretion and the state's lack of meaningful standards in awarding punitive damages denied the defendant due process.¹²⁶

You are not required to assess punitive damages against Viking Insurance Company of Wisconsin but you may do so if justified by the evidence.

If you find that punitive damages are justified by the evidence, consider the following in fixing the amount:

- (1) Whether there is a reasonable relationship between the punitive damages award and the harm likely to result from Viking's conduct as well as the harm that has actually occurred to Ramona Jester;
- (2) The degree of reprehensibility of Viking's conduct, the duration of that conduct, Viking's awareness, any concealment and the existence and frequency of similar past conduct;
- (3) The profitability to Viking of the wrongful conduct;
- (4) The financial condition of Viking;
- (5) All the costs of litigation; and
- (6) The motive of Viking in undertaking the conduct.

Abstract and Brief for Appellant at 234-35, *Viking Ins. Co. v. Jester*, 310 Ark. 317, 836 S.W.2d 371 (1992) (No. 91-253).

121. *Id.*

122. 111 S. Ct. at 1044.

123. Abstract and Brief for Appellant at 234-35.

124. *See id.*

125. *See* 947 F.2d at 105. The court emphasized the circumstances under which punitive damages are available, the purpose of punitive damages, and the standard of proof required to award punitive damages. Then, the court's only instruction in regard to quantification was "[t]he amount of punitive damages assessed against any defendant may be such sum as you believe will serve to punish that defendant and deter it and others from like conduct." *Id.*

126. *Id.* at 95. Additionally, the Fourth Circuit Court of Appeals held that because no guidance is required by South Carolina law, a reviewing court could not rationally decide that the

The second basis for review of the Arkansas method is that the Arkansas procedure for post-trial review of punitive damages awards may be constitutionally defective. The Court in *Haslip* indicated that the constitutionality of a punitive damages award will turn on the existence of some procedure that ensures "meaningful and adequate review by the trial court whenever a jury has fixed the punitive damages."¹²⁷ The Court discussed a series of specific factors "appropriate for the trial court's consideration"¹²⁸ that the Alabama Supreme Court had established in a previous decision. Under the Alabama system, both the trial and appellate courts are directed to apply a clear list of standards.¹²⁹

In sharp contrast to the detailed standards for review used in Alabama, Arkansas trial courts are only guided by the general question of whether the award "shocks the conscience of the court or demonstrates that the jurors were motivated by passion or prejudice."¹³⁰ Significantly, the Arkansas standard is strikingly similar to the Vermont and Mississippi methods that were criticized in *Haslip*. The Supreme Court noted in *Haslip* that under those systems, an award would only be set aside if it were grossly excessive or when "it evince[d] passion, bias and prejudice on the part of the jury so as to shock the conscience."¹³¹ The Court criticized such systems as insufficient. Consequently, the Arkansas method may lack the detailed standards for review required by *Haslip*.

Third, the Arkansas method for appellate review may be unconstitutional because of its lack of consistent application of "detailed substantive standards."¹³² Rather, the Arkansas appellate review method employs a variety of standards, but no defined, consistent standard or

amount was excessive without merely substituting its own notion of excessiveness for that of the jury. *Id.* at 105.

Notably, after *Mattison* was argued, the South Carolina Supreme Court, in *Gamble v. Stevenson*, adopted a clear and convincing standard of evidence. It also announced new procedures for post-trial review, in order to meet those approved in *Haslip*. *Id.* at 106-107. See *Gamble v. Stevenson*, 406 S.E.2d 350 (S.C. 1991).

127. *Haslip*, 111 S. Ct. at 1044.

128. *Id.*

129. *Id.* at 1045.

130. *Robertson Oil Co. v. Phillips Petroleum Co.*, 930 F.2d 1342, 1346 (8th Cir. 1991). See also *O'Neal Ford v. Davie*, 299 Ark. 45, 49, 770 S.W.2d 656, 659 (1989) (quoting *W.M. Bashlin Co. v. Smith*, 277 Ark. 406, 423, 643 S.W.2d 526, 534 (1982)).

131. *Haslip*, 111 S. Ct. at 1045 n.10 (quoting *Banker's Life & Casualty Co. v. Crenshaw*, 483 So.2d 254, 278 (Miss. 1985)).

132. *Id.* at 1045.

set of standards.¹³³

The Arkansas method is indistinguishable from those that were struck down in Virginia and West Virginia after *Haslip*. The Fourth Circuit Court of Appeals found the Virginia standard to be more analogous to the Mississippi and Vermont review methods.¹³⁴ The West Virginia state court's only real inquiry was into the excessiveness of the award, which the Supreme Court held to be insufficient in *Haslip*.¹³⁵ The Supreme Court of Appeals of West Virginia struck down the state's method of appellate review because of inadequate standards.¹³⁶ These systems strongly resemble the Arkansas appellate review system, which employs no defined, consistent standard or set of standards.¹³⁷

Although the United States District Court for the Western District of Arkansas¹³⁸ and the Eighth Circuit Court of Appeals have defended the history of the Arkansas method,¹³⁹ neither court addressed Arkansas' lack of a fixed, consistent standard for assessing punitive damages. Even though Arkansas courts examine a "number of specific inquiries,"¹⁴⁰ the lack of a fixed, predictable, and consistent standard may render the Arkansas method constitutionally defective.

Alternatively, the adoption of a "clear and convincing" evidentiary standard in punitive damages cases would do much to ensure the constitutionality of such awards. In his concurrence in *National Bank of Commerce v. McNeill Trucking Co.*,¹⁴¹ Justice Dudley suggested that Arkansas adopt the clear and convincing evidentiary standard for punitive damages. Additionally, he suggested a procedural change to the bifurcation of punitive damages trials. Although Justice Dudley's suggestions were made in a concurring opinion, he stated that he hoped his

133. *Robertson*, 779 F. Supp. at 997.

134. *Johnson v. Hugo's Skateway*, 949 F.2d 1338, 1351 (4th Cir. 1991) (citing *Haslip*, 111 S. Ct. at 1045 n.10). See also *Dean*, *supra* note 38, at 10.

135. *Garnes v. Fleming Landfill, Inc.*, 413 S.E.2d 897, 908 (W. Va. 1992). See *Haslip*, 111 S. Ct. at 1044. See also *Dean*, *supra* note 38, at 11.

136. 413 S.E.2d at 908. The trial court and appellate review methods were found to be neither meaningful nor adequate because jury verdicts would not be set aside as excessive unless they were monstrous, enormous, beyond all measure, unreasonable, outrageous, and manifestly showed jury passion, prejudice or corruption, and had "no foundation in the evidence so as to evince passion, prejudice or corruption in the jury." *Id.*

137. *Robertson*, 779 F. Supp. at 997 (discussing various standards of review that have been used, but noting that the courts have not developed a defined, consistent standard.) See also *supra* note 68 and accompanying text.

138. 779 F. Supp. at 996.

139. *Robertson Oil Co.*, 979 F.2d 1301 (8th Cir. 1992).

140. *Id.* at 1303; 779 F. Supp. at 996.

141. 309 Ark. 80, 828 S.W.2d 584 (1992).

suggestions for change would be brought before the court for consideration.¹⁴²

Notably, in *Peoples Bank & Trust Co. v. Globe*, while affirming a punitive damages award, the Eighth Circuit Court of Appeals noted that the District Court for the Western District of Arkansas had required the jury to determine, by clear and convincing evidence, if *Globe* had acted with actual malice in publishing certain statements that were at issue in the case. Additionally, the court emphasized that only after the jury had found actual malice did the court then instruct the jury as to the factors to be considered in awarding punitive damages.¹⁴³ The cautious approach taken by the district court in this case and the attention it received in the eighth circuit's opinion suggest that adoption of these two procedural safeguards would alleviate due process concerns when punitive damages are awarded.

Arkansas' neighbor state of Tennessee has actually avoided the strict scrutiny of punitive damages by adopting a clear and convincing standard of evidence.¹⁴⁴ In *Hodges v. S.C. Toof & Co.*, Tennessee adopted the same ideas Justice Dudley proposed for an enhanced evidentiary standard and bifurcation of the punitive damages issue.¹⁴⁵ *Hodges* is representative of the increasing number of cases abandoning the common-law schemes in favor of a standard unquestionably consistent with the due process rights discussed in *Haslip*. Arkansas could do much to ensure the constitutionality of its punitive damages awards by adopting a standard of clear and convincing evidence.

Even though the Eighth Circuit Court of Appeals, in *Robertson III*, summarily approved the Arkansas method of awarding punitive damages, Justice Dudley's concurrence in *McNeill* hints that the Supreme Court of Arkansas would consider following Tennessee in avoiding the strict scrutiny of punitive damages by adopting a "clear and convincing" evidentiary standard and a procedural change to the bifurcation of punitive damages trials. At the very least, Justice Dudley's expression of hope that his suggestions for change will be brought before the court presents a challenge to Arkansas lawyers.¹⁴⁶

142. 309 Ark. at 89, 828 S.W.2d at 590 (Dudley, J., concurring).

143. 978 F.2d at 1071.

144. See *Hodges v. S.C. Toof & Co.*, 833 S.W.2d 896 (Tenn. 1992).

145. *Id.* See *National Bank of Commerce v. McNeill Trucking Co.*, 309 Ark. 80, 89-93, 828 S.W.2d 584, 588-91 (1992) (Dudley, J., concurring).

146. Ironically, it should be noted that Justice Dudley wrote the majority opinion in *Viking*. However, because the court found that the defendant did not properly object to the Arkansas procedure for awarding punitive damages, Justice Dudley did not address the issue in the *Viking*

Finally, in light of Viking's objection to the jury instruction that was given, the question arises of what an attorney must do to preserve the issue for appeal to the Supreme Court of Arkansas. After the court refused Viking's proffered jury instruction, Viking made the following objection:

Defendants proffer Defendant's Proposed Instruction No. 1 on the basis that to submit the issue of punitive damages without some defined, established, recognized guidelines is violative of the defendant's right to due process as set forth in *Pacific Mutual Life Insurance Company v. Haslip*, a recent Supreme Court case, as well as other authorities cited in support of this instruction.¹⁴⁷

The objection was overruled by the trial court. On appeal, the Supreme Court of Arkansas refused to address the issue of whether the state procedure for awarding punitive damages violates due process because the issue was not properly preserved for appeal.¹⁴⁸

At first blush, it seems that the objection could not have been more thorough in preserving the issue for appeal. However, a closer examination of the objection reveals a possible reason for the court's refusal to recognize the issue on appeal. The objection merely argued that submitting the issue of punitive damages without some defined guidelines was violative of the defendant's right to due process. No specific mention was made of the Arkansas common-law method of awarding punitive damages as a whole; the objection only mentioned the jury instruction aspect.

In conclusion, *Viking* suggests that, to preserve this issue, the entire method used by Arkansas must be set out in the objection as violating due process rights. Accordingly, it seems that even if the specific objection is to one aspect of the method, such as jury instructions, the objection must also set out trial court and appellate review procedures as violative of due process, in order to preserve the issue for appeal.

Penny Brown Wilbourn

opinion. Therefore, it seems that he is still waiting for the right case in which his suggestions for change will be properly brought before the court.

147. Abstract and Brief for Appellant at 287-B.

148. 310 Ark. at 329, 836 S.W.2d at 378.