2002 WL 32625916 (Ark.) (Appellate Brief)
Supreme Court of Arkansas.

ADVOCAT, INC.; Diversicare Leasing Corporation d/b/a Rich Mountain Nursing and Rehabilitation Center; and Diversicare Management Services Co., Appellants,

v.

Lon C. SAUER, Individually and as Administrator of the Estate of Margaretha Sauer, Deceased, and on Behalf of the Wrongful Death Beneficiaries of Margaretha Sauer, Appellee.

No. 02-189.
September 5, 2002.

On Appeal from the Polk County Circuit Court
The Honorable Gayle Ford, Circuit Judge

Arkansas Advocates for Nursing Home Residents; Illinois Citizens for Better Care; Advocates Committed to Improving Our Nursing Homes; TLC 4 Long-Term Care; Citizens for Better Care; United Senior Action of Indiana; Nursing Home Monitors; Advocates for Nursing Home Reform; Association for Protection of the Elderly - National Chapter; Association for Protection of the Elderly - Pennsylvania Chapter; New Mexicans for Quality Long Term Care; Nursing Home Victims Coalition, Inc.; Foundation Aiding the Elderly; Kansas Advocates for Better Care; Nursing Home Community Coalition of New York State; Fighting Elder Abuse Together; Friends and Relatives of Institutionalized Aged, Inc.; Center for Advocacy and Rights of the Elderly; Texas Advocates for Nursing Home Reform; Oklahomans for Improvement of Nursing Care Homes; Friends of Residents in Long Term Care; and Arkansas Trial Lawyers Association's Amicus Curiae Brief

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1 I. *STATEMENT OF INTEREST

Amici are various state groups advocating the rights of and dedicated to obtaining quality care for nursing home residents and promoting access to the courts for all citizens of this State. Arkansas Advocates for Nursing Home Residents, a non-profit organization, dedicates itself to protecting and improving the quality of care and life for Arkansas long term care facility residents. Illinois Citizens for Better Care, an advocacy and service organization for nursing home residents and their families, was responsible for drafting and getting passed the original Illinois Nursing Home Care Reform Act. Advocates Committed to Improving Our Nursing Homes is a Florida group whose mission is to effect a safer, more consistent and higher quality of care and life for nursing home residents. TLC 4 Long Term Care is dedicated to obtaining quality care for Virginia's nursing home residents.

Citizens for Better Care is a non-profit advocacy agency for residents of nursing homes, adults' foster care homes, assisted living programs and homes for the aged in Michigan. United Senior Action of Indiana's purpose is to unite Indiana seniors into a powerful voice to impact policies affecting their lives. Nursing Home Monitors, an Illinois group, works to protect those who must live in nursing homes by making them safer places. Advocates for Nursing Home Reform, a Texas group, advocates against tort reform and for improving quality of care in nursing homes. The Association for Protection of the Elderly, a national network for elder-crime awareness and accountability, creates awareness of elder-crime in society and is dedicated to promoting quality care for nursing home residents.

Nursing Home Victims Coalition, Inc., a Texas non-profit organization, is dedicated to the support of all who have been abused, neglected or exploited in a nursing home setting and provides education, counseling and community resources to strengthen and unite those in ***2** need. The Foundation Aiding the Elderly, a California non-profit citizen's advocacy group, is dedicated

to protecting the rights of nursing home residents. Kansas Advocates for Better Care, a non-profit group, advocates for quality long term care. The Nursing Home Community Coalition of New York State, a non-profit watchdog and advocacy coalition, works to improve the lives of long-term care consumers by strengthening regulation, surveillance and enforcement. Fighting Elder Abuse Together, a citizen advocacy group, creates public awareness of abuse of the elderly in nursing homes and assisted living facilities.

Friends and Relatives of Institutionalized Aged, an independent non-profit advocacy group, assists nursing home residents, organizes their families and friends, educates consumers and seeks more effective laws and public policies. The Center for Advocacy and Rights of the Elderly, an Alaska advocacy group, seeks to improve care for residents and raise family awareness to potential for problems in nursing and assisted living homes. Texas Advocates for Nursing Home Reform is a non-profit volunteer organization advocating improvement in the quality of life and care of Texas nursing home residents. Oklahomans for Improvement of Nursing Care Homes is an organization working to improve the quality of life for nursing home residents in Oklahoma. Friends for Residents in Long Term Care is a North Carolina organization devoted to promoting the highest possible quality of life for those who cannot live independently. The Arkansas Trial Lawyers Association is organization whose mission is to promote the right to trial by jury and access to the courts for all Arkansans.

Amici have an interest in this appeal because this Court's decision will be used as guidance for the courts of this state as well as the states in which these advocacy groups operate. These groups seek to appear as *amici* in order to argue for protection of the elderly ***3** in this country and to ensure that limits are not placed on the civil justice system's ability to compensate victims of abuse and neglect.

II. *ARGUMENT*

Admitting a loved one to a nursing home is, perhaps, one of the hardest and emotionally charged decisions a family member can make. It is a decision often reached only after a pivotal event clearly reveals the inability of family members to provide for a loved one's physical well-being. At that point, a nursing home, designed to provide nursing, rehabilitative, and medical support services 24-hours a day, becomes the only available option many have for ensuring the dignity and physical comfort of these cherished role models. Unfortunately, not all nursing homes fulfill their obligations to their frail and vulnerable residents, who are often too mentally impaired and physically dependent to exercise meaningful choices or protest poor care. When such abuses occur, the elderly must oftentimes rely on others to champion their cause and see that justice is done. Jury verdicts are one of the few avenues the citizens of this State have for holding nursing home companies responsible for the pain and suffering stemming from such negligence and, as a result, must be protected as a means of effecting change for the better in the industry. Every step must be taken to protect every nursing home resident in this State. Appellants failed in that respect by causing the death of Margaretha Sauer and were appropriately punished. *Amici* file this brief in order to ensure that the justice meted out by the jury is upheld by this Court.

It is a longstanding tenet of this and other courts that the purpose of an *amicus* brief is to assist the Court in understanding the issues present in an appeal. *See Ferguson v. Brick,* 279 Ark. 168, 649 S.W.2d 397 (1983). In *Ferguson,* this Court acknowledged that *amicus* briefs had become a mere form of judicial lobbying, adding "nothing to the arguments except ***4** the supposed political prestige of the group making the endorsement." The brief submitted by the Associated Industries of Arkansas, Inc. and the Arkansas State Chamber of Commerce (AIA) is nothing more than a request for this Court to engage in legislative reform.

A. AFFIRMANCE OF THIS VERDICT WILL NOT HAVE A NEGATIVE IMPACT ON BUSINESSES.

Contrary to the position espoused by AIA, it is not the role of this Court to consider whether or not a verdict will have a negative impact on the overall business climate of this or any other state. Further, AIA has offered no evidence showing that, by upholding this verdict, this Court will frighten away future business prospects. Even if this argument were shown to be meritorious, there is no holding by this or any other court that "impact on business prospects" is a factor in determining whether a verdict should

be upheld. Such an argument has no place in the law and no place in this case. The relevant issue in this appeal is whether the evidence submitted at trial supported the award of compensatory and punitive damages to the Estate of Margaretha Sauer. A verdict should be affirmed or reversed on its merits, not on unsubstantiated concerns about its impact on commerce.

AIA would have this Court limit the ability of the civil justice system to adequately compensate victims of wrongful acts and to adequately punish wrongdoers for their actions. The civil justice system has long insured that injured citizens receive compensation and are treated as respected and dignified human beings. Any limits on the system harm not only our citizens, but our society, by undermining the corresponding deterrents of corporate misconduct. As has been made clear by the recent corporate scandals, when corporations are left alone to police themselves, they rarely do. It is up to the civil justice system to provide accountability. When victim's rights are vindicated in court our society benefits in countless ways: injured people and shattered families are compensated for unspeakable losses, ***5** corporations are sent a message that they must change their conduct, and most importantly, community values concerning the rights of all citizens not to be harmed by corporate misconduct are reinforced.

These corporations, far from needing the protection of this Court, need to be exposed for the criminal practices that are at their core. In fact, the Arkansas Attorney General recently filed suit against Appellants under the Arkansas Abuse of Adults Act, for repeatedly failing to meet demands to improve the care of their residents. Appellants have a history of substandard practices that threaten their residents' health and well-being. The number of deficiency citations received by Appellants' facilities from the Office of Long Term Care is above the average for Arkansas nursing facilities. Further, Appellants' average number of deficiency citations is notably above the national average. Surely, this is not how the citizens of this state wish to see business conducted, especially businesses entrusted with the care of our elderly and impaired citizens. The jury's verdict in this case made it clear that corporations who come to this state and harm its citizens are not welcome unless they are willing to accept responsibility for their conduct and to change their way of doing business.

B. EVIDENCE OF APPELLANTS' FINANCIAL CONDITION SHOULD NOT BE CONSIDERED BY THIS COURT.

The final page of AIA's brief purports to present the financial condition of Advocat, Inc., Diversicare Management Services and Diversicare Leasing Corporation, in an attempt to convince this Court that the verdicts against Appellants cannot stand. However, Appellants refused to produce any information related to their financial status prior to and during trial, thereby waiving any right to have this Court consider their financial condition for purposes of determining an appropriate amount of punitive damages. Any attempt to inject this information now is improper. To review an award of punitive damages on the grounds of ***6** excessiveness, it is incumbent upon a party to introduce evidence of net worth. *See Papcun v. Piggy Bag Discount Souvenirs, Food and Gas,* 472 So.2d 880 (Fla. 5th Dist. Ct. App. 1985). Appellants not only failed to introduce this evidence, but refused to even produce it in discovery. It is clear from the record that Appellee made many attempts to determine the financial status of Appellants, but Appellants continuously took the position that financial information was not discoverable or admissible. Thus, Appellee was never able to test the validity of the information that is now submitted.

Further, Appellants could have, but did not, proffer an instruction to the jury allowing them to consider financial information. Arkansas Model Jury Instruction 2218 contains a bracketed paragraph which states: “in arriving at the amount of punitive damages, you may consider the financial condition of [[defendant], as shown by the evidence.” Appellants did not ask that the jury be instructed on this issue and therefore, waived their ability to have their financial condition considered.

The doctrine of invited error clearly prevents AIA from taking the position that the financial information has suddenly become relevant. *See, e.g., Security Pac. Hous. Serv., Inc. v. Friddle,* 315 Ark. 178, 866 S.W.2d 375 (1993). Additionally, it is well-settled that *amicus curiae* attorneys must take a case as they find it and cannot introduce new issues not raised at the trial level. *Arkansas Transit Homes, Inc. v. Aetna Life & Cas.,* 341 Ark. 317, 16 S.W.3d 545 (2000); *Priest v. Polk,* 322 Ark. 673, 912 S.W.2d 902 (1995). Further, *amicus curiae* briefs are limited to the facts proven at trial. *Ferguson v. Brick,* 279 Ark. 168, 649 S.W.2d 397 (1983).

AIA wants this Court to consider the very information Appellants refused to provide as a mechanism to complain that the jury's award of damages is excessive. However, this ***7** evidence has never been subject to the scrutiny of a courtroom and AIA's attempt to put this information before this Court amounts to nothing less than trial by ambush, something the discovery rules specifically seek to avoid.

C. THE INSURANCE CRISIS IS NOT A RESULT OF PUNITIVE DAMAGES VERDICTS; RATHER IT IS A RESULT OF POOR BUSINESS PRACTICES BY INSURANCE COMPANIES.

The state of the insurance industry has no relevance to this case. The jury based its award on the injuries endured by Mrs. Sauer, including her death from severe dehydration, as well as the deplorable corporate behavior and irresponsibility that caused her suffering. That issue alone is controlling.

AIA blames the alleged crisis on the legal system and ask this Court to restrict the rights of victims who seek to obtain compensation from wrong-doers. They claim that this Court's decision will have a direct impact on the premiums paid by businesses for insurance. Two years ago, groups such as AIA, asked the General Assembly of the State of Arkansas to enact laws that would severely restrict the rights of a nursing home resident or their family to sue a nursing home corporation who caused injury or death to a resident. The proposed bill never made it out of committee, but now AIA is asking this Court to do what the General Assembly would not. This is an inappropriate request and ignores the role of this Court.

Further, there is simply no evidence that restrictions on punitive damages verdicts will lower insurance premiums for businesses, nor is there proof that the converse is true, that punitive damages verdicts have caused an increase in insurance premiums. What is true is that corporations whose actions injure elderly, helpless victims should suffer the consequences.

AIA seeks to achieve greater immunity for reckless corporations. However, the solution to the supposed “insurance crisis” lies not with the courts, but with the insurance ***8** industry itself. *Amici* submit that high-risk behavior results in the consequences at issue here. Premiums in any industry would increase if it engaged in the type of behavior practiced by some nursing homes. A simple way to solve the “crisis” is for facilities to avoid claims by following the law, providing adequate and appropriate care, and not neglecting and abusing residents.

It is important to note that there is nothing unique about the insurance market in this state. In fact, because of the deplorable care provided in nursing homes, most of the major carriers have withdrawn from the nursing home insurance market across the country. The supposed insurance crisis has less to do with the amount of verdicts awarded by juries in the past several years, and more to do with the nursing home industry's failure to provide good care. The jury awards have simply reflected the growing concern with the care provided to elderly and impaired residents of nursing homes.

Further, studies show that rising insurance costs are not the result of lawsuits, but are rather the results of years of accumulation of inadequate pricing and loss reserving that has caught up with the insurance companies in the current economic downturn. *See A.M. Best Special Report,* June 18, 2002. (A.M. Best Company, established in 1899, is the world's oldest and most authoritative source of insurance company ratings.) This special report notes that inadequate reserves, improper pricing and unsustainable growth levels were by far the proximate causes of the insolvencies of several insurance companies. Additionally, the *Wall Street Journal* recently noted that lawsuits alone were not the cause of the rise in malpractice premiums. *See* Rachel Zimmerman & Christopher Oster, *Insurers' Price Wars Contributed to Doctors Facing Soaring Costs,* Wall St. J., June 24, 2002. The article noted that “Some of these carriers had rushed into malpractice coverage because an accounting practice widely ***9** used in the industry made the area seem more profitable in the early 1990s than it really was.” Importantly, the article contained a quote from the chief executive of Scpie Holdings, Inc., a leading malpractice insurer in California, who stated that “I don't like to hear insurance company executives say it's the tort [injury-law] system - it's self-inflicted.”

Another article noted that the higher premiums many small and mid-size businesses now face are the legacy of a decade of imprudence among insurers - a period that combined a relentless price war with aggressive risk-taking. *See* Christopher Oster, *At Premium: Insurance Costs Loom as a Cloud Over the Economy*, Wall St. J., April 11, 2002. From 1993 to 2000, underwriters slashed rates, sometimes as much as forty-percent, and fought for customers by loosening terms on all types of business policies. During the 1990s, insurers could sustain losses on underwriting because the short-falls were more than offset by investment income the insurers earned on premiums. Now that the economy has weakened, insurer's investment yields have dropped. As a result of that drop, insurance companies have been forced to raise premiums.

Contrary to the position taken by AIA "that all industries and businesses in Arkansas will be adversely affected by the affirmance of this judgment whether in the form of higher insurance premiums or otherwise. In this context it is imperative that this Court will reverse these unconstitutional punitive damage verdicts;" Appellee submits that it is imperative that this Court place the value of human life over the cost of insurance premiums and corporate profits.

D. THE PUNITIVE DAMAGES VERDICTS AWARDED IN THIS CASE ARE CONSTITUTIONAL.

In *Cooper Indus., Inc. v. Leatherman Tool Group, Inc.*, 532 U.S. 424 (2001), the United States Supreme Court was called upon to determine the proper standard of review ***10** when a federal appellate court reviewed the constitutionality of a particular punitive damages award. Prior to *Cooper*, the amount of a punitive damages award was subject only to reversal if the trial court had abused its discretion in entering the judgment. *See, e.g., Gasperini v. Center for Humanities, Inc.*, 518 U.S. 415 (1996). In *Cooper*, the Court held that district court determinations on the constitutionality of punitive damages awards were subject to *de novo*, rather than abuse of discretion, review by the federal appellate courts.

Importantly, even though the Court found a jury's punitive verdict to be an expression of moral condemnation and not a factual finding, the Court did recognize that factual findings supporting the punitive award, or the trial court's holding that the award was not excessive, still receive substantial respect and review under the abuse of discretion standard. Specifically, the Court held "Nothing in our decision today suggests that the Seventh Amendment would permit a court, in reviewing a punitive damages award, to disregard such jury findings." *Cooper*, 532 U.S. at 440. In other words, while *Cooper* does provide for a *de novo* review of the trial court's review of a punitive damages award, *Cooper* does not allow an appellate court to conduct a *de novo* review of a jury's findings. Such a review would fly in the face of the Arkansas Constitution and the precedent of this Court.

It is questionable whether *Cooper* is even binding on this Court because there, the Court specifically noted that it was being called upon to determine the proper standard of review for the *federal* appellate courts. *Cooper*, 532 U.S. at 431. In addition, the Court stated that its holding did not implicate the Seventh Amendment to the United States Constitution because under that amendment, there is no *absolute* right to a jury trial in civil cases. *Id.* at 437. *See also*, 37 Tort & Ins. L.J. 281 (2002). However, the Arkansas Constitution provides an inviolate right to a jury trial in *all* cases. *See* Ark. Const. of 1874, Art. II, § 7. This right ***11** includes the right to have a jury award damages. In *Womack v. Brickell*, 232 Ark. 385, 337 S.W.2d 655 (1960), this Court cited Art. II, § 7 and Art. VII, § 23 of the Arkansas Constitution in holding that the trial court had invaded the province of the jury when it ordered the jury to return for further deliberations after it had already reached a verdict:

> The trial court may tell the jury in a proper case that there is no question of fact for it to determine, and may also set aside a verdict for errors committed by the jury and grant a new trial; but it can never substitute its judgment for that of the jury upon a disputed question of fact. It is obvious that, if the trial court could do this, the verdict of the jury would have no binding force, but would be persuasive merely as is the case of the verdict of a jury in a chancery court. The amount to be recovered by the plaintiff was a disputed question of fact, and it was the exclusive province of the jury to determine it.

Id. at 388, 337 S.W.2d at 657 (citing *Beckley v. Miller*, 96 Ark. 379, 131 S.W. 876 (1910)).

Thus, in Arkansas, a jury's findings of fact are afforded constitutional protection, and *Cooper* cannot override the Constitution of the State of Arkansas. The states that have adopted the Court's reasoning in *Cooper* have not engaged in an analysis of whether they were indeed bound by the Court's holding. *See Williams v. Philip Morris, Inc.*, 2002 WL 1189763 (Or. App.); *Romo v. Ford Motor Co.*, 2002 WL 1398041 (Cal. 5th Dist. Ct. App.). [1]

The Arkansas Constitution would also prohibit the General Assembly from enacting any law that would limit the amount to be recovered for injuries resulting in death or injuries to persons or property. Article V, § 32 states "no law shall be enacted limiting the amount to be recovered for injuries resulting in death or for injuries to persons or property...." Citing this section of the constitution, this Court has held that the amount of damages to be recovered cannot be limited by statute. *See Baldwin Co. v. Maner*, 224 Ark. 348, 273 S.W.2d 28 (1954).

An appellate court may review an award of damages for excessiveness. Punitive ***12** damages awards are grossly excessive when they are out of proportion to the reprehensibility of the defendant's conduct, the disparity between the harm suffered by the plaintiff, and the amount of the award is completely out-of-step with other awards made in comparable cases. In *BMW of North America, Inc. v. Gore*, 517 U.S. 559 (1996), the Court articulated guideposts to assist courts in determining whether a punitive damages award is grossly excessive:
1. The degree of reprehensibility of the defendant's conduct;

2. The disparity between the harm suffered by the plaintiff and the punitive damages award; and

3. The difference between the penalty imposed in the case under review as compared to penalties imposed in other similar cases.

Id. at 575.

Notably, a verdict's impact on commerce is not set forth as a guideline to be used by courts when reviewing a punitive damage award.

1. *The Degree of Reprehensibility of Appellants' Actions*

At trial, the jury found that Appellants' ongoing misconduct, intentional and reckless disregard of the rights, health, welfare and safety of Margaretha Sauer were the direct cause of her death. It is clear that Appellants acted with a total indifference to the consequences which were known, or should have been known to them. They were told time and again by their own nursing staff, by the State, and then by the federal government, that the care they were providing to the residents of Rich Mountain, including Mrs. Sauer, was substandard. Their own Vice-President was aware of the serious staffing and care problem at the facility and was still under corporate pressure to meet staffing budget goals, but the Appellants did nothing to change their ways. It is not unreasonable to think that the jury, after hearing this evidence, ***13** awarded such damages. Appellants were on notice of the problems at Rich Mountain yet repeatedly ignored these warnings causing devastating injuries, humiliation and death. The purpose of punitive damages was clearly met in this case.

Appellants ignored the harm that was likely to befall Mrs. Sauer due to their intentional understaffing of the nursing home. They expressed a wanton, reckless disregard for the rights, health and welfare of the public generally. These corporations operate twelve facilities with approximately 1,300 beds in this State, with a total of 11,000 beds in the United States and Canada. Such disregard for the well-being of others has great potential for harm. Appellants' conduct in this case was driven by business and profit motives, with no care or consideration whatsoever given to the nursing care needs of Mrs. Sauer and the other residents of Rich Mountain. Their outrageous conduct in promoting an atmosphere of corporate greed and increased profitability at the expense of the health and welfare of Mrs. Sauer was shown by clear and convincing evidence to be flagrant, intentional, and knowingly wrong, for improper motives, and accompanied by misrepresentation and deceit. There is no question that the degree of the reprehensibility of Appellants' actions was more than adequate to justify this award.

2. *The Disparity Between Harm Suffered and the Punitive Damages Award (The Ratio Between the Compensatory Damages Award and the Punitive Damages Award)*

The second criterion established by the Supreme Court, the ratio of the amount of punitive damages to the amount of actual harm inflicted, shows that the ratio in this case is both reasonable and constitutional.[2] In *Pacific Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1 (1991), *TXO Production Corp. v. Alliances Corp.*, 509 U.S. 443 (1993) and *Gore*, the ***14** Supreme Court rejected the adoption of a bright line test, although *Gore* stated that a comparison with compensatory damages is "significant," and *TXO* referred to an outside limit of a ten to one ratio. Here, the $21,000,000.00 in punitive damages awarded against each Appellant is less than half of the total compensatory damages awarded against them.

Moreover, this ratio is far less than the seventy-five-to-one ratio that has been approved by this Court. In *Routh Wrecker Service, Inc. v. Washington*, 335 Ark. 232, 980 S.W.2d 240 (1998), the Arkansas Supreme Court granted review of the case to consider the trial court's ruling on punitive damages in light of *Gore*. In affirming the trial court's didecision to uphold the $75,000 punitive award, the Arkansas Supreme Court discussed the facts of the case:

> The circumstances in this case are egregious and nightmarish. Washington, a young African-American male, was arrested at work at the bank in front of his peers and supervisor. The testimony was that he was humiliated, suffered emotional distress, and was frightened about what might happen to him. After the arrest, he suffered migraine headaches and could not sleep or eat. He lost 30 pounds. Several witnesses testified to the dramatic and negative changes to him, including a loss of interest in social activities and depression.

Id. at 244.

Based on this Court's holding, it is clear that the punitive damages award in this case should be upheld. *Routh Wrecker* was a case about malicious prosecution and involved nothing even close to the "egregious and nightmarish" circumstances that befell Mrs. Sauer. Appellants' conduct in this case is further amplified by the fact that they had full knowledge through constant complaints by caregivers and repeated warnings by the State. Yet, rather than making any attempt to correct the problems, Appellants engaged in deliberate falsity and affirmative misconduct by corporate supervisors who instructed staff to falsify residents' charts to deceive OLTC surveyors, deliberately increasing staff and supplies during state ***15** surveys, instructing staff to conceal staffing problems from residents' families, and to hide from state surveyors.

This Court further discussed the *Gore* case in *Edwards v. Stills*, 335 Ark. 470, 984 S.W.2d 366 (1998). In *Edwards*, this Court upheld the punitive damages award which was over six times the amount awarded for compensatory damages, explaining that the calculation of punitive damages lies within the discretion of the jury after due consideration of all the attendant circumstances:

> The penalty must be sufficient to deter similar conduct on the part of the same tortfeasor, and it should be sufficient to deter others who engage in similar conduct. The jury is free to consider the extent and enormity of the wrong, the intent of the parties, as well as the financial and social standing of the parties.

Id. at 376 (quoting *Smith v. Hanson*, 323 Ark. 188, 914 S.W.2d 284 (1996)).

In *Edwards*, there was no evidence of prior notice and a continuation of harmful conduct despite that notice. Here, the evidence of notice of a dangerous condition in the nursing home is overwhelming. Here, there is overwhelming evidence that these Appellants continued on a course of conduct that directly endangered the health and safety, not only of Mrs. Sauer, but also the multitude of other residents entrusted to the care of the Appellants. Here, the suffering of Mrs. Sauer could have been prevented

had Appellants cared more about the people for whom they promised to care than the bottom line. Appellants' egregious conduct in this case fits squarely within this Court's standards.

3. *The Difference Between the Penalty Imposed in this Case as Compared to Penalties Imposed in Other Similar Cases*

The third *Gore* criterion is consideration of penalties imposed for comparable misconduct. AIA claims that none of the Appellants were on notice that their "conduct could result in a $21,000,000 verdict...." However, Appellants were certainly aware that their ***16** actions might result in the imposition of severe penalties. Arkansas law provides clear notice that "knowingly causing the death of another person under circumstances manifesting an extreme indifference to the value of human life" could result in a penalty as severe as second-degree murder. *See* Ark. Code Ann. § 5-10-103. *See also, Romo v. Ford Motor Co., supra.* Additionally, Ark. Code Ann. § 5-28-103(b)(1) provides that it is a Class B felony to commit adult abuse, which is defined as purposely abusing and endangered or impaired adult causing serious physical injury or substantial risk of death. Those who neglect an endangered or impaired adult are guilty of a Class D felony as well. Ark. Code Ann. § 5-28-103(c)(1). In addition to criminal penalties, civil penalties of up to $10,000.00 for each violation can be assessed under Ark. Code Ann. § 5-28-106(a)(2). Under this chapter, "caregiver" is defined as "an owner, agent, high managerial agent of a public or private organization, or a public or private organization that has a responsibility for the protection, care or custody of an endangered or impaired adult as a result of assuming the responsibility voluntarily, by contract, through employment, or by order of the court." Ark. Code Ann. § 5-28-101(5). Each time that Mrs. Sauer was abused or neglected Appellants were subject to up to a $10,000 penalty. The evidence presented at trial proved numerous and repeated occurrences of such violations. Because a corporation cannot be sent to jail, monetary sanctions are all that is available as punishment for this egregious and deadly conduct.

The evidence presented at trial would have supported the imposition of other criminal penalties based on Appellants' violation of various criminal statutes that impose penalties and fines including: § 5-27-201, endangering the welfare of an incompetent person (Class D felony - $10,000); § 5-28-202, failure to report abuse (Class B misdemeanor - $500); § 5-13-207 third degree assault (Class C misdemeanor - $500); § 5-13-206 second degree assault ***17** (Class B misdemeanor - $500); § 5-13-201 first degree assault (Class A misdemeanor - $1,000); § 5-10-105 negligent homicide (Class A misdemeanor - $1,000); § 5-10-104 manslaughter (Class C felony - $10,000); and § 5-10-103 second degree murder (Class B felony - $15,000). In addition, when a defendant has derived pecuniary gain as in this case, the fine can be doubled. Ark. Code Ann. § 5-4-201(d). Of course, because of the continuous and repeated nature of the conduct here, these fines could be imposed for each time the violation occurred.

In addition to the above criminal statutes, a provider who receives payment or submits claims for services not provided commits Medicaid fraud pursuant to Ark. Code Ann. § 5-55-111. Federal law also prohibits such conduct. 42 U.S.C. § 408. Clearly, as the jury found, Appellants were not providing the care they were required to under the regulations applicable to nursing home facilities receiving federal funding. Yet, Appellants were submitting and receiving reimbursement from Medicaid for the full value of these services. There was evidence at trial from expert witnesses on both sides as well as caregivers that Mrs. Sauer's chart was falsified. Portions of Mrs. Sauer's chart were fraudulently created, as evidenced by the fact that people's initials appeared in the chart on days that they were not even at work. If Appellants are investigated by the government regarding the fraudulent activities in which they have engaged, they may be subject to fines and penalties far exceeding the punitive damages awarded by the jury in this case.

Further, there are numerous damage awards from nursing home cases that are illustrative of the justification of the award in this case: *Fuqua v. Horizon/CMS Healthcare Corp.*, No. 98-CV-1087 (N.D. Tex., Feb. 14, 2001) (jury award of $2,710,000 in compensatory damages; $310,000,000 in punitive damages); *Rhodes v. Sensitive Care, Inc.,* ***18** No. 141-166352-96 (Tex. Dist. Ct., Tarrant Cty., Oct. 15, 1998 ($30,000 in actual damages and $250,000,000 in punitive damages); *Ernst v. Horizon/CMS Healthcare Corp. d/b/a Blanco Vista Nursing and Rehabilitation Center*, No. 99-CI-08116 (285th Jud. Dist. Ct., San Antonio, Tex., Feb. 23, 2001) (jury awarded $7,000,000 in compensatory damages; $75,000,000 in punitive damages); *Holder v. Beverly Enterprises-Texas, Inc.*, (Tex. Dist. Ct., Rusk Cty., Nov. 1997) ($13,000,000 in compensatory damages; $70,000,000 in punitive damages); *West v. Vari-Care, Inc.*, No. CV91-617, (Baldwin Cty. Cir. Ct., Ala., Nov. 19, 1993) (verdict totaling $65,000,000); *Rigby v. Rapp*, No. 296,896-401 (Tex. P. Ct., Harris Cty., Jan. 31, 2000) ($5,000,000 in compensatory damages; $60,000,000

in punitive damages); *Copeland v. Dallas Home for Jewish Aged, Inc.*, No. 98-04690 (Dallas Cty. Jud. Cir. Ct., Tex., May 21, 2001) (jury awarded $16,000,000 in compensatory damages; $34,000,000 in punitive damages); *McCorkle v. Extendi-care Health Facilities*, No. 99-00815-CIV-011 (Fla. Cir. Ct., Pinellas Cty., Sept. 2000) (jury awarded $2,994,527.32 in compensatory damages; $17,000,000 in punitive damages); *Collins v. Beverly Enterprises-Florida, Inc.*, No. 98-433-CA (Taylor Ct. Jud. Cir. Ct., Fla., Mar. 31, 2000) (jury awarded $2,021,630.83 in compensatory damages; $10,000,000 in punitive damages).

These cases are a clear indication that juries in this country are willing to impose severe penalties upon corporations who abuse and neglect nursing home residents. AIA cites other punitive damages verdicts from Arkansas. These verdicts, however, have no bearing on this Court's evaluation of the third *Gore* factor because they are not comparable cases.

Further, the current regulatory scheme in place to punish nursing homes for failing to provide care is not sufficient to compensate victims of such abuse and neglect. Under normal circumstances and with a typical industry, the fact that such a system is in place may be an ***19** important determination, however the nursing home industry is neither normal nor typical in this regard.

Since 1998, at least five separate government reports have spoken directly to the gross inadequacy of the regulatory and oversight of nursing homes. The accumulation of these reports suggests that the current system of protecting residents from abuse is a complete failure and that virtually every aspect of the regulatory process is flawed. The United States General Accounting office itself has noted the breadth of these inadequacies, “noting weakness in state's compliant investigations, annual surveys, and enforcement actions.” (GAO-02-312)

From the “surprise inspections” to the collection of fines there seems to be no area of oversight that is without serious concern. Further, the entirety of these independent government reports suggest that by and large the system is systematically biased in favor of the homes against the interests of the residents these regulations were designed to protect. *See California Nursing Homes: Care Problems Persist Despite Federal and State Oversight:* U.S. General Accounting Office, July 1998 (“Even when the state identifies serious deficiencies, HCFA's enforcement policies have not been effective.”); *Complaint Investigation Process Often Inadequate to Protect Residents:* U.S. General Accounting Office, March 1999 (“Federal and state's practices for investigating complaints about care in nursing homes are often not as effective as they should be.”); *Additional Steps needed to Strengthen Enforcement of Federal Quality Standards:* U.S. General Accounting Office, March 1999 (“The threat of sanctions appeared to have little effect ... because homes could continue to avoid the sanctions' effect as long as they kept correcting deficiencies.”).

Since federal and state regulatory agencies are not actively enforcing nursing home ***20** regulations that were put in place to protect residents, civil suits are the only means by which to hold the nursing home industry accountable for its crimes.

III. *CONCLUSION*

The jury in this case clearly disagreed with AIA's statement that “the extent and enormity of the wrong in this case is relatively small....” This Court should not abandon our country's history of individualized justice, and replace it with a system that values commerce over the quality of individual human life. First and foremost, the State of Arkansas should be concerned with the well-being of its residents. This case is not about economic injury. This is a case in which the corporate behavior of these Appellants caused the pain, suffering, and death of another human being. A state's objectives for punitive damages should be paramount and should reflect the state's interest in protecting the well-being and lives of its citizens over protecting the economic condition of corporations. For this Court to upset or reduce the punitive damage award in this case would have the effect of demeaning the suffering caused to Margaretha Sauer and nursing home residents like her.

President Bush recently stated, “At this moment, America's greatest economic need is higher ethical standards, enforced by strict laws and upheld by responsible business leaders ... In the end, there is no capitalism without conscience, no wealth without character.” It seems that President Bush could have been addressing Appellants, whose concerns over corporate well-being overrode any concerns for the well-being of Margaretha Sauer. More than 18,000 Arkansans live in nursing facilities and will

be directly affected by this decision. Residents in facilities around the country will also be affected because this decision will help guide other courts addressing similar issues. It is imperative that this Court set the proper standard for how our elderly citizens will be treated.

Footnotes

1 In both cases, the appellate courts upheld jury verdicts against an excessiveness challenge. In *Romo,* the court affirmed an award of $290 million in punitive damages and in *Williams* the court affirmed an award of $79.5 million in punitive damages.

2 In their brief, AIA states that, "In this case, punitive damages awards of $63,000,000 are more than four times the compensatory damages awards of $15,425,000." *Brief of Amici at 10.* The actual ratio is 4.08.

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