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## **Did Cooper v. Leatherman Require State Appellate Courts to Apply a De Novo Standard of Review for Determining the Constitutional Excessiveness of Punitive Damages Claims - Aken v. Plains Electric Generation & (and) Transmission Cooperative, Inc.**

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DID *COOPER V. LEATHERMAN* REQUIRE STATE APPELLATE  
COURTS TO APPLY A DE NOVO STANDARD OF REVIEW  
FOR DETERMINING THE CONSTITUTIONAL  
EXCESSIVENESS OF PUNITIVE DAMAGES CLAIMS?  
*AKEN V. PLAINS ELECTRIC GENERATION &  
TRANSMISSION COOPERATIVE, INC.*

CYNTHIA L. BLACKWELL\*

I. INTRODUCTION

In *Aken v. Plains Electric Generation & Transmission Cooperative, Inc.*,<sup>1</sup> the New Mexico Supreme Court changed the standard of review that New Mexico appellate courts must utilize when reviewing lower court determinations of the constitutional excessiveness of a punitive damages award. The appellate standard of review changed from substantial evidence to a de novo analysis of the award. The court's reason for changing the standard was that the Supreme Court of the United States, in *Cooper Industries, Inc. v. Leatherman Tool Group, Inc.*,<sup>2</sup> ruled that "courts of appeals should apply a de novo standard of review when passing on district court determinations of the constitutionality of punitive damages awards."<sup>3</sup> While the Supreme Court of the United States did not explicitly hold that such a review was constitutionally required, and therefore applicable to state as well as federal courts, the New Mexico Supreme Court concluded that *Cooper* imposed de novo review as a matter of federal constitutional imperative.<sup>4</sup>

This Note examines the rationale, in both the *Cooper* and *Aken* decisions, for changing the substantive due process standard of review for punitive damages and assesses the potential implications that arise in the wake of the *Aken* decision with respect to the role of the jury and the impact on appellate and trial courts in New Mexico.

II. STATEMENT OF THE CASE

Jim Aken was an employee of Plains Electric for over nine years.<sup>5</sup> He was a respected and trusted employee who brought issues of plant safety and sexual harassment to the attention of management.<sup>6</sup> When he confronted management with safety issues, company managers told him that such complaints were "not conducive to long-term employment."<sup>7</sup> Similarly, the human resource manager dismissed his sexual harassment complaints.<sup>8</sup> Aken alleged that as a result of these activities the company gave him poor attendance marks, denied his promotions, and ultimately

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1. 2002-NMSC-021, 49 P.3d 662.

2. 532 U.S. 424 (2001).

3. *Id.* at 436.

4. *Aken*, 2002-NMSC-021, ¶ 19, 49 P.3d at 668.

5. *Id.* ¶ 2, 49 P.3d at 664.

6. *Id.*

7. *Id.*

8. *Id.*

terminated his employment.<sup>9</sup> Plains Electric fired Aken after falsely accusing him of stealing a welding machine,<sup>10</sup> and members of the company management team disseminated false information that Aken was fired for theft.<sup>11</sup> During these events, Aken suffered a stroke and experienced depression. He subsequently sued Plains Electric for retaliatory discharge and defamation.<sup>12</sup>

The jury awarded Aken \$500,000 compensatory and \$1,750,000 in punitive damages for the wrongful termination claim and \$100,000 compensatory and \$1,000,000 in punitive damages for the defamation claim.<sup>13</sup> The trial court denied the motion for a new trial or remittitur and Plains Electric appealed the final judgment.<sup>14</sup> The New Mexico Court of Appeals affirmed all awards and the New Mexico Supreme Court granted certiorari to review whether the punitive damages were unconstitutional under the three-guidepost test established in *BMW of North America, Inc. v. Gore*.<sup>15</sup>

The *Aken* court conducted a de novo review of the punitive damages award because it concluded that the decision by the Supreme Court of the United States, in *Cooper Industries, Inc. v. Leatherman Tool Group, Inc.*, mandated that state courts apply a de novo review when considering the constitutional excessiveness of a punitive damages award.<sup>16</sup> After performing a de novo review of the awards, the *Aken* court affirmed the lower court determination of damages for the wrongful termination claim, holding that the punitive damages award was not constitutionally excessive given the strong state interest in discouraging wrongful discharge related to the reporting of safety problems.<sup>17</sup> With regard to the awards for the defamation claim, the court upheld the compensatory award but found that the punitive damages award was constitutionally excessive and required a reduction from \$1,000,000 to \$300,000.<sup>18</sup> In reducing that award, the court sought a punishment that was "less suggestive of jury passion and prejudice."<sup>19</sup> Using the factors defined in *BMW*<sup>20</sup> and as expressed in New Mexico case law,<sup>21</sup> the court found that a ten-to-one ratio between the punitive damages award for defamation and the associated compensatory award was not justified by the reprehensibility of the defendant's acts.<sup>22</sup> In choosing to reduce the defamation award to a three-to-one ratio, the court noted that the ratio between the punitive and compensatory awards for the wrongful discharge

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9. *Id.* ¶¶ 3–4, 49 P.3d at 664.

10. *Id.* ¶ 4, 49 P.3d at 664.

11. *Id.* ¶ 6, 49 P.3d at 665.

12. *Id.* ¶¶ 5, 8, 49 P.3d at 664–65.

13. *Id.* ¶ 8, 49 P.3d at 665.

14. *Aken v. Plains Elec. Generation & Transmission Coop., Inc.*, No. 20,271 (N.M. Ct. App. 2000) (mem.).

15. *Aken*, 2002-NMSC-021, ¶ 8, 49 P.3d at 665. The *BMW* guideposts look to the reprehensibility of the defendant's actions, the ratio between the compensatory and punitive damages and the difference between the punitive award and what comparable civil or criminal sanctions might impose. *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 574 (1996).

16. *Aken*, 2002-NMSC-021, ¶ 17, 49 P.3d at 668.

17. *Id.* ¶ 22, 49 P.3d at 670.

18. *Id.*

19. *Id.*

20. See *supra* note 15.

21. See, e.g., *Allsup's Convenience Stores, Inc. v. N. River Ins. Co.*, 1999-NMSC-006, 976 P.2d 1.

22. *Aken*, 2002-NMSC-021, ¶ 24, 49 P.3d at 671.

claim was only 3.5 times the actual damages.<sup>23</sup> The court applied a suggested guideline from a secondary source that a proper ratio between compensatory and punitive damages in defamation cases was three-to-one.<sup>24</sup> Lastly, the court determined that the reduced punitive damages award in combination with the compensatory award provided sufficient deterrence to discourage employers from similar conduct in the future.<sup>25</sup>

### III. BACKGROUND

#### A. Punitive Damages in New Mexico

In New Mexico, appellate courts have historically used a substantial evidence standard of review for punitive damages awards<sup>26</sup> to ensure that a jury verdict was not unduly influenced by passion or prejudice.<sup>27</sup> Prior to *Aken, Allsup's Convenience Stores, Inc. v. North River Insurance Co.* was the controlling case for appellate review of the excessiveness of punitive damages.<sup>28</sup> There, a jury awarded \$4,500,000 in punitive damages against an insurance company for the inappropriate handling of insurance claims and the wrongful drawdown of a letter of credit.<sup>29</sup> The trial court granted a motion for remittitur and, on appeal, the New Mexico Supreme Court, using a substantial evidence standard of review, reversed the order of remittitur and reinstated the jury verdict.<sup>30</sup>

When discussing the appropriate standard of review, the *Allsup's* court stated that the "proper amount of damages is...bound up in the assessments made by a jury during the actual trial itself, for its verdict is presumed to be correct. It is a fundamental function of a jury to determine damages."<sup>31</sup> Drawing from past cases, the court reiterated that the

findings of the jury should not be disturbed as excessive except in extreme cases, as where it results from passion, prejudice, partiality, sympathy, undue influence, or some corrupt cause or motive or where palpable error is committed by the jury, or where the jury has mistaken the measure of damages.<sup>32</sup>

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23. *Id.*

24. *Id.* (citing 2 RODNEY A. SMOLLA, LAW OF DEFAMATION, § 9.50 at 9-35 (2d ed. 2001)).

25. *Id.* ¶ 25, 49 P.3d at 672.

26. *Id.* ¶ 17, 49 P.3d at 668; *see, e.g., Green Tree Acceptance, Inc. v. Layton*, 108 N.M. 171, 174, 769 P.2d 84, 87 (1989) (A substantial evidence standard of review looks for relevant evidence in the record to support the jury's award "as a reasonable mind might accept as adequate.").

27. *Green Tree*, 108 N.M. at 174, 769 P.2d at 87.

28. *Allsup's*, 1999-NMSC-006, 976 P.2d 1.

29. *Id.* ¶ 6, 976 P.2d at 6. The jury also awarded the appellant insureds \$540,000 in compensatory damages for the inadequate handling of the claims and \$4,792 in compensatory damages for the wrongful drawdown of a letter of credit. *Id.*

30. *Id.* ¶ 52, 976 P.2d at 19.

31. *Id.* ¶ 16, 976 P.2d at 8 (quoting *Richardson v. Carnegie Library Rest., Inc.*, 107 N.M. 688, 690, 763 P.2d 1153, 1155 (1988), *overruled on other grounds by* *Trujillo v. City of Albuquerque*, 1998-NMSC-031, 965 P.2d 305).

32. *Id.*

Thus, the court concluded that on appeal the record should be reviewed using a substantial evidence standard.<sup>33</sup>

The *Allsup*'s opinion exemplified the importance that New Mexico courts have historically placed on preserving the role of the jury and giving deference to a jury's determination. *Allsup*'s held that a plaintiff could accept a remittitur "under protest" and file an appeal, thus ensuring that the "voices of the jury" would be heard "in accordance with [article] II, § 12" of the New Mexico Constitution.<sup>34</sup> The court reasoned that the change would "improve the consistency of verdict results...and alleviate claims of alleged arbitrary conduct by trial courts."<sup>35</sup> In support of the substantial evidence standard, the court required that when ordering a remittitur a trial judge must clearly articulate the reasons for finding that the damages are excessive.<sup>36</sup> Furthermore, the fact that a jury award may be greater than what the court would have given is not enough to disturb the jury's verdict.<sup>37</sup>

*Allsup*'s also created a "distinction between the appeal process for orders proposing remittitur and the appeal process for orders granting a new trial without providing the remittitur alternative."<sup>38</sup> The court held that, when reviewing a remittitur order, the burden of proof on appeal "shifts to the appellee to show that the trial court was correct" in ordering the remittitur.<sup>39</sup> In other words, the defendant must specifically show that passion or prejudice "tainted" the jury's award of damages.<sup>40</sup> In effect, this shifting burden rendered it more difficult to change a jury verdict through the remittitur process. The court, however, did not require this shift in burden for an appeal of a new trial order.<sup>41</sup> The standard for appellate review in that case would continue to be abuse of discretion, which is a difficult burden of proof.<sup>42</sup> The apparent justification for shifting the burden for remittitur but not for a new trial order was judicial concern for protecting the right to trial by jury.<sup>43</sup> The remittitur process overturns a jury's award; whereas, a new trial order still allows a jury to decide the matter.<sup>44</sup> Thus, the primary concern expressed in *Allsup*'s was protection of the jury's role.

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33. *Id.* ¶ 18, 976 P.2d at 9.

34. *Id.* ¶ 14, 976 P.2d at 8. At the time of the *Allsup*'s case, *Nally v. Texas-Arizona Motor Freight Inc.* was the controlling case on the new trial or remittitur process. *Id.* ¶ 9, 976 P.2d at 8 (citing *Nally v. Texas-Arizona Motor Freight Inc.*, 67 NM 153, 156, 353 P.2d 678, 680 (1960)). That case held that an order granting a remittitur, or in the alternative a new trial, was not immediately appealable. *Id.* Under *Nally*, a plaintiff could not accept a remittitur order "under protest" and then immediately appeal the order. The *Allsup*'s court found that this process for remittitur violated both the constitutional right to trial by jury and the constitutional right to one appeal from a final judgment. *Id.* ¶ 14, 976 P.2d at 8. *Allsup*'s therefore held that a plaintiff could accept the remittitur under protest and file an immediate appeal. *Id.*

35. *Allsup*'s, 1999-NMSC-006, ¶ 14, 976 P.2d at 8.

36. *Id.* ¶ 18, 976 P.2d at 9.

37. *Id.* ¶ 16, 976 P.2d at 9.

38. Sean J. Sullivan, *Civil Procedure and Constitutional Law: Changing New Mexico Remittitur Procedure to Protect the Appropriate Balance of Power Between Judge and Jury—Allsup's Convenience Store, Inc. v. North River Insurance Company*, 32 N.M. L. REV. 277, 285 (2002).

39. *Allsup*'s, 1999-NMSC-006, ¶ 19, 976 P.2d at 10.

40. Sullivan, *supra* note 38 (citing *Allsup*'s, 1999-NMSC-006, ¶ 19, 976 P.2d at 10).

41. *Id.* (citing *State v. Chavez*, 98 N.M. 682, 684, 652 P.2d 232, 234 (1982)).

42. *Id.*

43. *Id.* at 286.

44. *Id.*

This portion of the *Allsup*'s opinion did not specify whether the court was articulating a standard for performing a common law excessiveness inquiry or one based on constitutional grounds; however, the court's meaning became clearer when the opinion specifically addressed the defendant's due process argument that the damages were excessive under *BMW*. In addressing the constitutional excessiveness claim, the *Allsup*'s court again used a substantial evidence standard of review when analyzing whether the evidence for each *BMW* factor supported the "jury's award of punitive damages."<sup>45</sup> The *Allsup*'s court however, went beyond the *BMW* factors as a "constitutional minimum" in reviewing the award and also applied the common law criteria that the damages "must not be so unrelated to the injury as to plainly manifest passion and prejudice rather than reason and justice."<sup>46</sup> Upon review, the court found no evidence that the jury was inappropriately influenced<sup>47</sup> and concluded that the punitive damages award was not unconstitutional or excessive under common law.<sup>48</sup> Thus, *Allsup*'s used the same standard of review for common law and constitutional excessiveness.

#### *B. Punitive Damages in the Federal Courts: Constitutional Concerns*

In a series of cases, the Supreme Court of the United States addressed the question of whether certain punitive damages could be characterized as constitutionally excessive.<sup>49</sup> Through these cases, the Supreme Court defined criteria and established standards to be used by courts when making a determination of constitutional excessiveness. In *Browning-Ferris Industries of Vermont, Inc. v. Kelco Disposal, Inc.*,<sup>50</sup> the Court reviewed the applicability of the Eighth Amendment Excessive Fines Clause to private, civil suits<sup>51</sup> and determined that this constitutional provision was inapplicable in the context of civil punitive damages that were unrelated to governmental abuse.<sup>52</sup> Turning its attention to the Fourteenth Amendment Due Process Clause, the Court, in *Pacific Mutual Life Insurance Co. v. Haslip*, identified specific procedural requirements that were necessary to ensure that punitive damages awards were consistent with the demands of procedural due process.<sup>53</sup> In *BMW of North America, Inc. v. Gore*, the Court established substantive due process criteria that began to define the line between constitutional and

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45. *Allsup*'s, 1999-NMSC-006, ¶¶ 48–50, 976 P.2d at 18–19. The court held that "the punitive damages awarded by the jury...were not violative of the 14th Amendment" because, unlike the situation in *BMW*, there was a finding of bad faith that was supported by the evidence. *Id.* ¶ 48, 976 P.2d at 18.

46. *Id.* ¶ 51, 976 P.2d at 19.

47. *Id.* ¶ 52, 976 P.2d at 19 (holding that "the amount of such [punitive] damages is left to the sound discretion of the jury based on the nature of the wrong, the circumstances of each case, and any aggravating or mitigating circumstances as may be shown").

48. *Id.* ¶ 55, 976 P.2d at 19–20.

49. While a number of Supreme Court cases have addressed the issue of excessive punitive damages, this Note focuses on the following cases: *Browning-Ferris Industries of Vermont, Inc. v. Kelco Disposal, Inc.*, 492 U.S. 257 (1989); *Pacific Mutual Life Insurance Co. v. Haslip*, 499 U.S. 1, 19–20 (1991); *BMW of North America, Inc. v. Gore*, 517 U.S. 559 (1996); *Cooper Industries, Inc. v. Leatherman Tool Group, Inc.*, 532 U.S. 424 (2001); *State Farm Mutual Automobile Insurance Co. v. Campbell*, 538 U.S. 408 (2003).

50. 492 U.S. 257 (1989).

51. The Eighth Amendment states, "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." U.S. CONST. amend. VIII.

52. *Browning-Ferris*, 492 U.S. at 264.

53. *Haslip*, 499 U.S. at 19–20.

unconstitutional awards.<sup>54</sup> The Court then shifted its focus in *Cooper Industries, Inc. v. Leatherman Tool Group, Inc.* to the appropriate standard of review for an appellate court to use when evaluating a lower court decision on the constitutionality of a punitive damages award.<sup>55</sup> Finally, the latest Supreme Court opinion on the subject, *State Farm Mutual Automobile Insurance Co. v. Campbell*, became more explicit in defining constitutionally excessive awards by suggesting that a punitive damages award that was less than ten times the compensatory award would be more likely to meet due process requirements than an award that was a hundred times greater.<sup>56</sup>

### 1. Eighth Amendment Considerations

The Supreme Court addressed the question of whether punitive damages were subject to the constraints of the Eighth Amendment of the Constitution in *Browning-Ferris*.<sup>57</sup> The Supreme Court had not previously considered the application of the Eighth Amendment Excessive Fines Clause to punitive damages but found that it had interpreted the Amendment in a way that suggested that the clause did not apply to a "civil-jury award of punitive damages."<sup>58</sup> The previous application of the clause had been primarily in the context of criminal prosecutions. While not ruling on whether the amendment was to be exclusively applied to criminal situations, the Court held that the Excessive Fines Clause "does not constrain an award of money damages in a civil suit when the government neither has prosecuted the action nor has any right to receive a share of the damages awarded."<sup>59</sup>

The Court did not address the contention of Browning-Ferris Industries (BFI) that the size of the punitive damages award was also excessive under the Due Process Clause of the Fourteenth Amendment because the argument was not raised in the district court or court of appeals.<sup>60</sup> Foreshadowing the line of cases to come, the

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54. *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559 (1996).

55. *Cooper*, 532 U.S. 424 (2001).

56. *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 425 (2003). *Campbell* will not be discussed in any detail in this Note. The Court in that case also held that for purposes of assessing punitive damages unrelated evidence of corporate reprehensibility involving out-of-state conduct by the company was not admissible. *Id.* at 1522.

57. *Browning-Ferris*, 492 U.S. 257. In that case, Browning-Ferris (BFI) operated a nationwide commercial waste-collection and disposal business. One of the company's former managers opened Kelco, a competing company in Vermont. *Id.* at 260. As Kelco's share of the Vermont market increased, BFI engaged in tactics to drive Kelco out of business. *Id.* Kelco brought suit alleging violations of the Sherman Act for attempts to monopolize the Vermont market and violation of Vermont's tort law with regard to interference with Kelco's contractual relationships. *Id.* at 260-61. A Vermont jury found BFI liable on both counts and returned a verdict for \$51,146 in compensatory damages and \$6 million in punitive damages. *Id.* at 262. The district court denied BFI's motion for a new trial or remittitur and the Second Circuit Court of Appeals affirmed, finding "no indication of jury prejudice or bias." *Id.* In addressing BFI's argument that the punitive damages were unconstitutional under the Eighth Amendment, the appellate court noted that even if the Eighth Amendment were applicable to the case, the punitive damages awarded were not "so disproportionate as to be cruel, unusual, or constitutionally excessive." *Id.*

58. *Browning-Ferris*, 492 U.S. at 262.

59. *Id.* at 264. The Court supported that holding with historical evidence that the purpose of the Eighth Amendment was to address the "potential for governmental abuse of its 'prosecutorial' power." *Id.* at 266. The fact that punitive damages are imposed through the court process and serve to "advance governmental interests" was not sufficient government involvement to support the application of the Excessive Fines Clause in that context. *Id.* at 275.

60. *Id.* at 276-77.

Court stated that the question of "whether due process acts as a check on undue jury discretion to award punitive damages" would have been a question of first impression for the Court, but that such an analysis would have to wait.<sup>61</sup>

## 2. Procedural Due Process Considerations

The Supreme Court had an opportunity in *Haslip* to answer the question of whether the Fourteenth Amendment due process protections could act as a "check"<sup>62</sup> on a jury's award of punitive damages.<sup>63</sup> The Supreme Court granted certiorari to "review the punitive damages procedures and award in light of the long-enduring debate" over the "propriety" of such awards.<sup>64</sup> Courts and scholars had previously debated the efficacy of punitive damages in civil cases, the constitutionality of the amounts awarded, and whether the Due Process Clause afforded any protection from such awards.<sup>65</sup>

After reviewing the historic and accepted methods of assessing punitive damages,<sup>66</sup> the Court determined that there were three key areas where proper procedures were needed to assure due process: jury instructions, post-trial procedure, and appellate procedure.<sup>67</sup> The Court found that the processes and

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61. *Id.* Justices Brennan and Marshall concurred with the opinion based on an understanding that the opinion still "leaves the door open for a holding that the Due Process Clause constrains the imposition of punitive damages in civil cases brought by private parties." *Id.* at 280. Accordingly, the clause prohibits awards that are "grossly excessive, or so severe and oppressive as to be wholly disproportioned to the offense and obviously unreasonable." *Id.* at 281. The Justices were concerned that a jury has little to guide them in determining damages and the "touchstone of due process is protection of the individual against arbitrary action of government." *Id.* Justices O'Connor and Stevens concurred in part and dissented in part, finding that the Eighth Amendment does place limits on punitive damages awarded in civil suits. *Id.* at 283.

62. *Haslip*, 499 U.S. at 10.

63. In *Haslip*, an agent for two different insurance companies wrote health and life insurance policies for city employees. *Id.* at 4-5. The agent misappropriated premiums resulting in the lapse of health care coverage and ruined credit for one of the Respondents. *Id.* at 5. The Respondents filed suit for fraud against the agent and a claim of respondeat superior against Pacific Mutual. *Id.* at 5-6. The jury returned verdicts against the agent and Pacific Mutual for more than \$1,000,000, including a punitive damages award that was approximately four times the amount of compensatory damages awarded. *Id.* at 7.

On appeal, the Alabama Supreme Court, in a divided vote, affirmed the award primarily because the agent made the misrepresentation in a willfully fraudulent manner. *Id.* at 7 (citing *Haslip*, 553 So. 2d at 540, *aff'd* 499 U.S. 1). Two Justices dissented in part on the grounds that such an award for punitive damages "violated Pacific Mutual's Due Process rights under the Fourteenth Amendment." *Id.* Pacific Mutual challenged the punitive damages as a "product of unbridled jury discretion" and, as such, was "violative of its due process rights." *Id.*

64. *Id.* at 7-8.

65. *Id.* at 8 n.4.

66. *Id.* at 15-18. The Court observed, "under the traditional common-law approach, the amount of the punitive award is initially determined by a jury instructed to consider the gravity of the wrong and the need to deter similar wrongful conduct." *Id.* at 15. "The jury's determination is then reviewed by trial and appellate courts to ensure that it is reasonable." *Id.* According to the Court's analysis, "every state and federal court that has considered the question has ruled that the common-law method for assessing punitive damages does not in itself violate due process." *Id.* at 17. In view of that history and lacking any contrary indication in the Fourteenth Amendment itself, the Court found that this method was not "so inherently unfair as to deny Due Process and be *per se* unconstitutional." *Id.*

67. *Id.* at 19-20. The Court concluded that jury instructions for punitive damages should (1) "enlighten the jury" as to the "nature and purpose" of punitive damages, (2) "identify the damages as punishment for civil wrongdoing of the kind involved," and (3) explain that "their imposition was not compulsory." *Id.* at 18. The instructions given in the *Haslip* case met all three criteria. *Id.* at 20. The second area of procedural checks was post-trial procedure necessary to ensure that a court conducted a meaningful and adequate review of the jury verdict. *Id.* at 20. The Court found that the factors considered by Alabama courts when reviewing verdicts were adequate and



standards followed by the Alabama courts in *Haslip* were adequate in these areas and "impose[d] a sufficiently definite and meaningful constraint on the discretion of Alabama factfinders in awarding punitive damages."<sup>68</sup> Even though the punitive damages award was more than four times the amount of the compensatory award, the state standards for assessing the amount of the award had objective criteria and, thus, the award "did not cross the line into the area of constitutional impropriety."<sup>69</sup>

In the dissenting opinion, Justice O'Connor concluded that the procedural standards adopted by the majority were not sufficient to guide a jury or meet the procedural due process test as set out in *Mathews v. Eldridge*.<sup>70</sup> Due process required states to provide "meaningful standards to guide the application of its law,"<sup>71</sup> and in Justice O'Connor's opinion, the jury instructions in *Haslip* needed to offer more guidance.<sup>72</sup> The Alabama Supreme Court had formulated a list of seven factors that it found to be "relevant to the size of a punitive damages award,"<sup>73</sup> three of which were the "degree of reprehensibility of the defendant's conduct," the relationship that the punitive damages bear to the harms, and the profit made by the defendant on the wrongdoing.<sup>74</sup> Justice O'Connor reasoned that, by providing those factors to a jury, the state would be giving specific guidance that would enhance the "fairness and rationality" of the system.<sup>75</sup> While Justice O'Connor found that the Alabama factors should be incorporated into jury instructions to meet procedural due process requirements, the same factors reemerge in the next case as criteria associated with deciding whether a punitive damages award meets substantive due process requirements.

### 3. Substantive Due Process Considerations

In *BMW of North America, Inc. v. Gore*, the Supreme Court had an opportunity to build on the procedural due process standards established in *Haslip* by adding criteria that it saw as necessary to ensure that substantive due process was achieved.<sup>76</sup> The Court shifted away from a *procedural* approach for constraining damages to one that focused on defining *substantive* criteria for establishing the line

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included reviewing the "culpability of the defendant's conduct," the "desirability of discouraging others from similar conduct," and looking at the "impact [on] the parties" or "innocent third parties." *Id.* Finally, the third area of procedural concern was appellate review. The Court held that the procedures followed by the Alabama Supreme Court provided "an additional check on the jury or trial court's decision" and made certain that the "damages are reasonable in their amount and rational in light of their purpose to punish what has occurred and to deter its repetition." *Id.* at 21.

68. *Id.* at 22.

69. *Id.* at 23-24.

70. *Id.* at 43 (referring to *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976)).

71. *Id.* at 44.

72. *Id.*

73. *Id.* at 51.

74. *Id.*

75. *Id.* at 57.

76. *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559 (1996). In *BMW*, the Court conducted an independent review of punitive damages awarded by a jury against a car manufacturer who failed to disclose previous damage to a vehicle that it was selling as new. *Id.* at 559. At trial, the jury awarded the plaintiff actual damages of \$4,000 and punitive damages of \$4,000,000. *Id.* at 565. The defendant moved to set aside the punitive award but the trial court denied the motion. *Id.* On appeal, the motion was also denied but the state supreme court granted a remittitur and reduced the punitive damages to \$2,000,000 because the jury inaccurately calculated the award. *Id.* at 567.

between constitutional and unconstitutional damages. The Supreme Court granted certiorari to "illuminate the character of the standard that...[would] identify unconstitutionally excessive awards of punitive damages."<sup>77</sup>

The Court, in performing an independent review, established the threshold criterion that an identifiable state interest must exist that was served by assessing punitive damages.<sup>78</sup> Assuming the existence of such an interest, the Court then identified three elements, referred to as "guideposts," that would assist in detecting unconstitutionally excessive awards.<sup>79</sup>

1) The degree of reprehensibility of the defendant's conduct, 2) the ratio between the plaintiff's compensatory damages and the amount of punitive damages, and 3) the difference between the punitive damages and the civil or criminal sanctions that could be imposed for comparable misconduct.<sup>80</sup>

The Court concluded that BMW's conduct was not sufficiently egregious to justify a \$2,000,000 award.<sup>81</sup> Additionally, in evaluating the second guidepost, the Court looked to "whether there...[was] a reasonable relationship between the punitive damages award and the harm likely to result from the defendant's conduct as well as the harm that actually occurred."<sup>82</sup> While the Court rejected the idea of drawing a "bright line" with regard to constitutional versus unconstitutional ratios, it found that a ratio of 500 to 1 was grossly excessive.<sup>83</sup> Under the third guidepost, the Court determined that the relevant civil and criminal penalties were approximately \$2,000, which did not provide sufficient notice to a company that it could be subjected to multi-million dollar penalties.<sup>84</sup> The Court viewed the \$2,000 maximum as an indication of the type of sanction that the legislature thought appropriate for the conduct.<sup>85</sup> Based on its independent analysis of the guideposts, the Court reversed and remanded the case.<sup>86</sup>

*C. Change in Standard of Review on Appeal: Cooper Industries, Inc. v. Leatherman Tool Group, Inc.*

Subsequent to *BMW*, the Supreme Court again focused on procedural due process by changing the standard of review to be used at the appellate level when determining the constitutional excessiveness of punitive damages. In *Cooper Industries, Inc. v. Leatherman Tool Group, Inc.*,<sup>87</sup> the sole issue addressed by the Court was whether the U.S. Court of Appeals for the Ninth Circuit applied the wrong standard of review in considering the constitutionality of the punitive

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77. *Id.* at 568; see also *Honda Motor Co. v. Oberg*, 512 U.S. 415, 420 (1994).

78. *BMW*, 517 U.S. at 568.

79. *Id.* at 574.

80. *Id.*

81. *Id.* at 585.

82. *Id.* at 581 (quoting *TXO Prod. Corp. v. Alliance Res. Corp.*, 509 U.S. 443, 460 (1993)).

83. *Id.* at 585.

84. *Id.* at 584.

85. *Id.* at 583.

86. *Id.* at 585.

87. 532 U.S. 424.

damages award in an unfair competition action.<sup>88</sup> The Court granted certiorari to “resolve confusion among the Courts of Appeals” on the issue of the proper standard of review for assessing the constitutionality of punitive damages.<sup>89</sup> After considering whether the abuse of discretion standard of review used by the lower court was correct, the Court concluded that “the constitutional issue merits de novo review.”<sup>90</sup> The case was subsequently remanded to determine the constitutionality of the award using a de novo standard of review and the *BMW* criteria.<sup>91</sup>

In reaching this conclusion, the Court began its analysis with the premise that punitive damages are “quasi criminal” and operate as “private fines” to punish and show the jury’s “moral condemnation” of the conduct.<sup>92</sup> The Court noted that state “[l]egislatures have extremely broad discretion in defining criminal offenses and in setting the range of permissible punishments for each offense.”<sup>93</sup> Furthermore, “judicial decisions that operate within these legislatively-enacted guidelines are typically reviewed for abuse of discretion.”<sup>94</sup> Similarly, “legislatures enjoy broad discretion in authorizing and limiting permissible punitive damages awards” and have “considerable flexibility in determining the level of punitive damages that they will allow in different classes of cases.”<sup>95</sup> As a result of this flexibility, many states have placed statutory limits on punitive damages (such as caps or multipliers).<sup>96</sup> When reviewing jury decisions that involve those limits, the Court found that the role of the trial judge was to determine whether a jury verdict was “within the confines set by state law, and to determine...whether a new trial or remittitur should be ordered.”<sup>97</sup> If a constitutional issue was not raised on appeal, “the role of the appellate court, *at least in the federal system*,...[was] merely to review the trial court’s ‘determination under an abuse-of-discretion standard.’”<sup>98</sup>

Even though states enjoy considerable discretion in deciding punitive damages, the Court cautioned that the Fourteenth Amendment Due Process Clause limits that

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88. *Id.* at 426. In that case, Cooper Industries, Inc. designed and marketed a multifunctional tool that competed with an already existing Leatherman product. *Id.* at 427. Leatherman filed an action asserting violations of the Trademark Act of 1946 and a jury awarded Leatherman \$50,000 in compensatory damages and \$4.5 million in punitive damages. *Id.* at 428–29. The district court entered judgment after finding that under *BMW* guidelines the punitive damages award was not grossly excessive and therefore did not violate the Federal Constitution. *Id.* at 429. The Ninth Circuit affirmed the award and concluded that the district court “did not abuse its discretion in declining to reduce” the award and that the award did not violate Cooper’s due process rights. *Id.* at 430.

89. *Id.* at 431.

90. *Id.*

91. *Id.*

92. *Id.* at 432.

93. *Id.*

94. *Id.*

95. *Id.* at 433.

96. *Id.*

97. *Id.* (quoting *Browning-Ferris*, 492 U.S. at 279).

98. *Id.* (citing *Browning-Ferris*, 492 U.S. at 279) (emphasis added). The Court did not express an opinion on whether an abuse of discretion standard would be more appropriate than de novo review for determining constitutional excessiveness if a state adopted a scheme that tied the award of punitive damages “more tightly to the jury’s finding of compensatory damages.” *Id.* at 439. Examples of such a scheme included a state constraining a jury award to only “the exact amount of punitive damages it determined necessary to obtain economically optimal deterrence or if it defined punitive damages as a multiple of compensatory damages (for example, treble damages).” *Id.*

discretion by prohibiting the imposition of "grossly excessive" punishments.<sup>99</sup> The Court has enforced this limit on states in both criminal and civil contexts for cases involving alleged deprivation of life, liberty, or property.<sup>100</sup> While the Supreme Court has applied the same general criteria for constitutional excessiveness in all of those cases, the most relevant similarity was that the Court "engaged in an independent examination" of that criteria.<sup>101</sup> The Court warned that states would continue to be judged independently unless they have a "scheme" to constrain punitive damages.<sup>102</sup> This caveat left an open door such that an abuse of discretion standard of review might be more appropriate than a de novo review "if a State were to adopt a scheme that tied the award of punitive damages more tightly to the jury's finding of compensatory damages."<sup>103</sup> Thus, under *Cooper*, a more deferential appellate standard was appropriate when states assert statutory control over punitive damages or when the appeal does not raise constitutional issues.

The *Cooper* Court then turned to an Eighth Amendment analysis that, although inapplicable, provided useful analogies to the issue of the appropriate appellate standard to use for reviewing the excessiveness of punitive damages. The Court analogized the inherent ambiguity and "fluid" nature of criminal concepts such as "reasonable suspicion" and "probable cause" to that of "gross excessiveness" involved in punitive damages claims.<sup>104</sup> With regard to "reasonable suspicion" and "probable cause," the Court found that the concepts acquired "content only through application" and that an independent review was necessary if "appellate courts are to maintain control of, and...clarify[,] the legal principles."<sup>105</sup> Additionally, de novo review tended to "unify precedent and stabilize the law."<sup>106</sup> The Court was convinced that de novo review of the constitutional excessiveness of punitive damages awards could achieve the same results of control, clarity, and unity.<sup>107</sup>

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99. *Id.* at 434 (citing *BMW*, 517 U.S. at 562; *TXO*, 509 U.S. at 453–55).

100. *Id.*; see, e.g., *Enmund v. Florida*, 458 U.S. 782, 788 (1982) ("death is not 'a valid penalty under the Eighth and Fourteenth Amendments for one who neither took life, attempted to take life, nor intended to take life'"); *Coker v. Georgia*, 433 U.S. 584, 592 (1977) ("sentence of death is 'grossly disproportionate' and excessive punishment for the crime of rape"); *United States v. Bajakajian*, 524 U.S. 321, 324 (1998) ("punitive forfeiture of \$357,144 for violating reporting requirement was 'grossly disproportional' to the gravity of the offense"); *BMW*, 517 U.S. at 585–86 ("\$2 million punitive damages award for failing to advise customers of minor predelivery repairs to new automobiles was 'grossly excessive' and therefore unconstitutional.").

101. *Cooper*, 532 U.S. at 434–35; see, e.g., *Bajakajian*, 524 U.S. at 336–37 (mandating that "courts of appeals must" use a "de novo" review when assessing whether a penalty was proportional to the gravity of the offense); *Ornelas v. United States*, 517 U.S. 690, 697 (1996) ("the question whether a [criminal] fine is constitutionally excessive calls for the application of a constitutional standard to the facts of a particular case, and in this context de novo review of that question is appropriate"); *BMW*, 517 U.S. at 575–86; *Solem v. Helm*, 436 U.S. 277, 295–300 (1983); *Enmund*, 458 U.S. at 788–801.

102. *Cooper*, 532 U.S. at 439.

103. *Id.*

104. *Id.* at 436 (citing *Ornelas*, 517 U.S. at 697).

105. *Id.*

106. *Id.*

107. *Cooper*, 532 U.S. at 436. The Court further supported the need for unified precedent and stable law with a quote from a concurring opinion by Justice Breyer in *BMW*: "Requiring the application of law, rather than a decisionmaker's caprice, does more than simply provide citizen's notice of what actions may subject them to punishment; it also helps to assure the uniform treatment of similarly situated persons that is the essence of law itself." *Id.* (quoting *BMW*, 517 U.S. at 587). In an interesting counterpoint, others have argued that this result will not be realized by the *Cooper* change of standard. See, e.g., Lisa M. White, *A Wrong Turn on the Road to Tort Reform: The Supreme Courts Adoption of De Novo Review in Cooper Industries v. Leatherman Tool Group, Inc.*,

The Court next responded to arguments that the Seventh Amendment Reexamination Clause precluded de novo review of a jury's award.<sup>108</sup> In response to this argument, the Court stated that the "jury's award of punitive damages does not constitute a finding of fact"; therefore, "appellate review of the District Court's determination that an award is consistent with due process does not implicate Seventh Amendment concerns."<sup>109</sup> The Court further supported its contention that the amount of the award was not a fact by arguing that punitive damages have evolved and that the "theory behind punitive damages" had become more punitive and less factual.<sup>110</sup> The Court's distinction between fact and non-fact was crucial. If the Court had conversely determined that the amount of a punitive damages award was a fact, then the Seventh Amendment would apply and may have precluded the shift to a de novo standard. Previous Supreme Court rulings established that the Seventh Amendment only allowed an appellate court to review a lower court decision using an abuse of discretion standard.<sup>111</sup>

The Court also distinguished between the Right to Trial by Jury Clause of the Seventh Amendment and its Reexamination Clause. In previous opinions, the Court found that determining the amount of punitive damages was a "fact-sensitive undertaking" better "left to the discretion of the jury" under the Right to Trial by Jury Clause.<sup>112</sup> However, the Court flatly stated that it had not indicated "that the amount of punitive damages imposed by the jury is itself a 'fact' within the meaning of the Seventh Amendment,"<sup>113</sup> and, thus, the Reexamination Clause was not implicated.

The Court in *Cooper* also evaluated the appropriateness of appellate de novo review by considering the "institutional competence" of both trial and appellate judges to evaluate an award's "consistency with due process" according to the *BMW* criteria.<sup>114</sup> With regard to the first *BMW* factor, the degree of reprehensibility, the Court found that district courts have a "somewhat superior advantage over courts of

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68 BROOK. L. REV. 885, 905 (2003) (noting, "the assessment of punitive damages is based upon the specific facts of each particular case. Therefore, de novo review...will not help to clarify the larger doctrine of punitive damages." In addition, because of this case-specific nature, "one case will rarely serve as useful precedent for subsequent cases.").

108. U.S. CONST. amend. VII. The Seventh Amendment Reexamination Clause states, "no fact tried by a jury shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law."

109. *Cooper*, 532 U.S. at 437. In a recent law review article, the author found this characterization of the amount of punitive damages as a "legal issue" to be a "dangerous development" because it removed "the locus of decision-making away from juries and trial judges and toward appellate courts." William V. Dorsaneo, III, *Reexamining the Right to Trial by Jury*, 54 SMU L. REV. 1695, 1733 (2001). It further found this approach to be "an unsatisfactory one because it provide[d] no principled restraints on the judicial review of jury findings...." *Id.* at 1734. Similarly, the author anticipated that other "evaluative [jury] determinations will be challenged on the basis that they do not constitute matters of historical or predictive fact," and eventually the "right to trial by jury in federal courts will lose most of its current value." *Id.*

110. *Cooper*, 532 U.S. at 437.

111. *Browning-Ferris*, 492 U.S. at 279. *But see* N.Y. Times v. Sullivan, 376 U.S. 254 (1964). In *Sullivan*, as in *Aken*, the Court addressed a defamation case where it found that the Seventh Amendment did not preclude an independent examination of the facts to ensure that a judgment did not violate constitutional provisions. *Id.* at 285. The Court stated that in cases where the line must be drawn between "speech [that is] unconditionally guaranteed and speech which may legitimately be regulated[.]" the Court must examine the statements and circumstances itself to determine whether First Amendment protections apply. *Id.*

112. *Cooper*, 532 U.S. at 437.

113. *Id.* (emphasis added).

114. *Id.* at 440-43.

appeals” because of “witness credibility and demeanor” issues.<sup>115</sup> Trial and appellate courts were “equally capable” of analyzing the second factor that addressed the ratio between the punitive damages award and the actual or potential harm suffered by the plaintiff.<sup>116</sup> Lastly, the Court determined that the third *BMW* factor, comparing punitive damages awarded versus comparable civil penalties, seemed “more suited to the expertise of appellate courts.”<sup>117</sup> The Court used this analysis to support a de novo standard by concluding that institutional competency considerations “fail to tip the balance in favor of deferential appellate review.”<sup>118</sup>

While the Court noted that the new de novo standard of review would only affect the result of the *BMW* analysis in “a relatively small number of cases,”<sup>119</sup> it did change the outcome of the *Cooper* case. The Court performed an independent review using the *BMW* criteria and found “a series of questionable conclusions by the District Court that may not survive de novo” appellate review.<sup>120</sup> The Supreme Court therefore vacated the decision of the court of appeals because it had used a less demanding standard, and the case was remanded for further proceedings consistent with the opinion.<sup>121</sup>

The dissent by Justice Ginsburg provided an interesting counterpoint to the majority decision. The primary focus of the dissent was the argument that the majority improperly characterized jury determination of punitive damages as a non-fact to get around the Seventh Amendment Reexamination Clause.<sup>122</sup> Justice Ginsburg was not swayed by the majority’s arguments and claimed that the de novo decision was at odds with the Seventh Amendment of the Constitution and with longstanding common law decisions that “the task of determining the amount of punitive damages ‘has [always been] left to the discretion of the jury.’”<sup>123</sup> Contrary to the majority, Justice Ginsburg asserted, “there can be no question that a jury’s verdict on punitive damages is fundamentally dependent on determinations we characterize as factfindings.”<sup>124</sup> A jury’s verdict to levy punitive damages is based on factfinding such as issues of good faith, whether the act was a single instance or

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115. *Id.* at 440.

116. *Id.*

117. *Id.*

118. *Id.* While the *Cooper* Court determined that the competency balance was not tipped in favor of deferential appellate review, numerous articles have been written that disagree with this conclusion. See White, *supra* note 107, at 905–07. The author found the Court decision to be “untenable” given that the first and second factors are best suited to district court determination because reprehensibility lends itself to “first-hand assessment” and district courts are “better equipped to measure the harm...[of intangible injuries].” In addition, the fact that appellate courts have greater expertise in applying the third factor was insufficient to skew the balance in favor of de novo review. The author also noted that district courts have a “general institutional advantage” because they “see more cases involving punitive damages.”

119. *Cooper*, 532 U.S. at 441.

120. *Id.* The Court’s de novo application of the *BMW* criteria to this case resulted in a different conclusion than when the lower court applied the criteria deferentially; illustrating why a decision by a court of appeals might depend on the standard of review. *Id.* at 443.

121. *Id.*

122. *Id.* at 444–45. While Justice Scalia did not join the dissent, his concurrence with judgment strongly suggested that he believed the “excessiveness” of punitive damages resembled other “fact-bound constitutional issues” such as “reasonable suspicion” and “probable cause” and that abuse of discretion was the proper standard. *Id.* at 443–44.

123. *Id.* at 445 (citing *Day v. Woodworth*, 54 U.S. 363 (1852)).

124. *Id.* at 446.

suggested a pattern of behavior, and whether the defendant acted "negligently, recklessly, or maliciously."<sup>125</sup> The Justice thus compared punitive damages to "the measure of actual damages suffered...in cases of intangible, noneconomic injury" and found that "[o]ne million dollars worth of pain and suffering does not exist as a 'fact' in the world any more or less than one million dollars' worth of moral outrage."<sup>126</sup>

In Justice Ginsberg's judgment, the Court went as far as it could under the Seventh Amendment in *Browning-Ferris*, where it allowed appellate review of a new trial/remittitur ruling under an abuse of discretion standard.<sup>127</sup> The rationale of the *Cooper* majority for dismissing *Browning-Ferris* was that the case dealt with common law excessiveness and not constitutional excessiveness. To Justice Ginsberg this was a distinction without a difference given that two of the *BMW* factors for constitutionality were "derived from common-law standards."<sup>128</sup> The Justice also argued that the analogies relied upon by the majority such as "reasonable suspicion" and "probable cause" were "determinations typically made without jury involvement" and therefore did "not implicate the Seventh Amendment."<sup>129</sup>

Contrary to the majority opinion, the Justice also found that the institutional competence argument did not support the standard change.<sup>130</sup> In addition, a de novo standard would strain the judicial system by requiring lower courts to differentiate between common-law and constitutional excessiveness and separate findings of fact, to which an abuse of discretion standard would be applied, from non-facts that would receive de novo review.<sup>131</sup>

#### IV. RATIONALE AND ANALYSIS

Through the series of cases discussed above, the Supreme Court of the United States developed requirements and guidance for appellate review of the constitutionality of punitive damages awards. The Court outlined certain elements necessary to guide evaluation of whether a punitive damages award violates the Due Process Clause: procedural integrity; substantive evaluation using the three *BMW* criteria; and, in *State Farm v. Campbell*, perhaps an insistence on a single digit ratio between punitive and compensatory damages.<sup>132</sup> Furthermore, appellate review in federal courts must now be conducted under a de novo standard with no deference given to the courts below. Thus, in *Aken*, the task for the New Mexico Supreme Court was to synthesize this series of cases, determine the impact of *Cooper*, and reconcile it with existing New Mexico case law.

In *Aken*, the New Mexico Supreme Court explored the question of the appropriate standard of review for state appellate courts to use when reviewing a trial court

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125. *Id.*

126. *Id.*

127. *Id.* at 447.

128. *Id.* Only the third *BMW* criteria calling for legal comparison did not evolve from common law. *Id.* at 448.

129. *Id.*; see, e.g., *Bajakajian*, 524 U.S. at 325-26; *Ornelas*, 517 U.S. at 694.

130. *Id.* at 449.

131. *Id.*; see also White, *supra* note 107, at 913-14 (agreeing with the dissent and adding that the complexity will not result in "significantly different results than are already found under an abuse of discretion standard").

132. *Campbell* was not addressed in this Note. See *supra* note 56 and accompanying text for a brief description of the case holdings.

determination of a new trial or remittitur motion based on constitutional excessiveness.<sup>133</sup> The holdings of *Aken* are, therefore, relevant in cases where the attack on punitive damages is constitutionally based and is subsequent to a request for new trial or remittitur.<sup>134</sup> In analyzing the language of *Cooper*, the *Aken* court focused on the statement that “courts of appeals should apply a de novo standard of review when passing on district courts’ determinations of the constitutionality of punitive damages awards.”<sup>135</sup> This statement presented an interpretory dilemma for the *Aken* court because *Cooper* left the question unanswered as to whether the use of a de novo standard was a constitutional requirement or was imposed by the Court “in the exercise of its supervisory authority over the federal courts.”<sup>136</sup> The *Cooper* Court reasoned in ways that suggest both. State appellate courts would be required to utilize the standard if it was a constitutional mandate, but if the Court was merely exercising its superintending control over federal courts, then state courts would “not necessarily [be] bound by the holding.”<sup>137</sup>

*A. Constitutional Mandate or Superintending Control: Does Cooper Compel the Aken Decision?*

Another Supreme Court case, *Dickerson v. United States*, is useful in analyzing whether a standard decided by the Supreme Court is or is not a constitutional mandate.<sup>138</sup> In *Dickerson*, the Supreme Court granted certiorari to determine whether its decision in *Miranda v. Arizona*<sup>139</sup> was a constitutional holding that applied in both state and federal courts.<sup>140</sup> The Court held that the decision was a constitutional mandate.<sup>141</sup> In reaching this conclusion, the Court analyzed specific elements of the *Miranda* opinion. Applying the Supreme Court’s own analysis to the *Cooper* decision suggests that the decision was not a constitutional mandate.

In contrast to *Miranda*, the *Cooper* decision contained numerous references to the constitutional underpinnings of its decision<sup>142</sup> but did not explicitly provide a constitutional basis for its ultimate decision. In addition, unlike *Miranda*, the *Cooper* decision was applied to proceedings in the U.S. District Court rather than to state court proceedings, which again fails to provide evidence of an intent to apply the standard at the state level.<sup>143</sup> The Court in *Dickerson* also supported its position by determining that *Miranda* laid down concrete constitutional guidelines

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133. *Aken*, 2002-NMSC-021, 49 P.3d 662.

134. For a discussion of the procedural due process requirements, see *id.* ¶¶ 11–16, 49 P.3d at 665–68.

135. *Id.* ¶ 17, 49 P.3d at 668 (quoting *Cooper*, 532 U.S. at 436).

136. *Id.*

137. *Id.*

138. *Dickerson v. United States*, 530 U.S. 428 (2000).

139. *Miranda v. Arizona*, 384 U.S. 436 (1966).

140. *Dickerson*, 530 U.S. at 432.

141. *Id.* at 444.

142. For example, the *Cooper* opinion concluded that “the constitutional issue merits de novo review.” 532 U.S. at 431. The Court also analogized heavily to constraints on criminal punishment that arise out of the Eighth Amendment. *Id.* at 433–36. Similarly, the Court found that the Due Process Clause alone “prohibits the States from imposing ‘grossly excessive’ punishments on tortfeasors.” *Id.* at 434.

143. *Id.* at 428 (“That *Miranda* announced a constitutional rule is demonstrated...by the fact that both *Miranda* and two of its companion cases applied the rule to proceedings in state courts.”).



for courts;<sup>144</sup> *Cooper* never asserted that the de novo standard was a concrete constitutional guideline. In fact, the Court in *Cooper* stated that an independent review was necessary to control and clarify principles and unify precedent, which sounds more like a superintending function than a constitutional mandate.<sup>145</sup> Similarly, according to *Dickerson*, the Court in *Miranda* explicitly stated that certiorari was granted to provide “concrete constitutional guidelines” to courts;<sup>146</sup> whereas, *Cooper* granted certiorari to “resolve confusion among the Courts of Appeals” as to whether the appellate court in that case had used the correct standard in reviewing the constitutionality of the punitive damages award.<sup>147</sup>

The only *Dickerson* element that points to the *Cooper* decision being a constitutional mandate is that, as in *Dickerson*, an argument could be made that when the Court in *Cooper* invited state legislators to enact legislation that would be as protective as a de novo review it was saying that the Constitution would not preclude legislative solutions that provided equal protection for a constitutional right.<sup>148</sup> On balance, however, the *Dickerson* elements of analysis seem to indicate that the *Cooper* decision was more of a superintending pronouncement than a constitutional mandate.

The *Aken* court did not use the *Dickerson* elements and approached the analysis in a different fashion. In answering the question of whether *Cooper* created a constitutional standard or was exercising superintending control, the court in *Aken* focused on the *Cooper* majority’s reasoning that a de novo standard would allow the concept of gross excessiveness of punitive awards to be more clearly defined through appellate decisions.<sup>149</sup> As in *Cooper*, the court in *Aken* agreed that gross excessiveness, like “reasonable suspicion” or “probable cause,” was a “fluid concept” whose meaning varies with the context<sup>150</sup> and that a de novo standard would allow appellate courts to provide definition to that concept.<sup>151</sup> The court also agreed that an independent appellate review was necessary to control and clarify the legal principle<sup>152</sup> and unify precedent.<sup>153</sup> Based on this analysis, the New Mexico Supreme Court held that *Cooper* mandated that state courts of appeals apply a de novo standard when reviewing the constitutionality of a punitive damages award.<sup>154</sup> Without such a change, the court noted that the alternative was to remain in the pre-*Cooper* dilemma where there was “no real rhyme or reason” for determining what constituted a reasonable award.<sup>155</sup>

The *Aken* court was not the first state appellate court to apply the *Cooper* standard of review. Other state courts have agreed with the New Mexico interpretation of

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144. *Id.* at 435.

145. *Id.* at 436.

146. *Dickerson*, 530 U.S. at 439 (citing *Miranda*, 384 U.S. at 441–42).

147. *Cooper*, 532 U.S. at 431.

148. *See Dickerson*, 530 U.S. at 440 (The Court concluded that there could be potential alternatives, such as legislative solutions, for protecting a constitutional privilege if they were “at least as effective.”).

149. *Aken*, 2002-NMSC-021, ¶ 18, 49 P.3d at 668.

150. *Id.*

151. *Id.*

152. *Id.* (citing *Ornelas*, 517 U.S. at 697).

153. *Id.*

154. *Id.* ¶ 19, 49 P.3d at 668.

155. *Id.*

*Cooper*, but none have provided any further insight into the decision to apply the standard in state appellate courts. In adopting the *Cooper* standard, the Kentucky Supreme Court stated, "the role of appellate courts was changed by the Supreme Court of the United States where federal constitutional questions are preserved and presented for review."<sup>156</sup> Similarly, the Louisiana Supreme Court concluded that in *Cooper* "the Supreme Court ruled that state and federal appellate courts must conduct a *de novo* review of claims that exemplary damage awards are grossly excessive in violation of the Due Process Clause of the Fourteenth Amendment."<sup>157</sup> The Oregon Court of Appeals added that *Cooper* required "an appellate court to review the trial court's decision on the amount of punitive damages as a matter of law—that is, by plenary review—rather than for an abuse of discretion."<sup>158</sup> A New Jersey appellate court applied the standard after noting that the amount was not a fact and that, as discussed in *Cooper*, "punitive damages are designed to exact punishment and therefore should be subject to the same analysis as criminal penalties."<sup>159</sup>

In many of those states, deferential review was maintained for claims of common law excessiveness. As discussed in a recent *Brooklyn Law Review* article, "appellate level courts in Georgia, Louisiana, South Dakota, Indiana, New Jersey, Alaska, [and] Minnesota...have all adopted *de novo* review" when reviewing a trial court's decision of "the constitutionality of an award of punitive damages, while retaining deferential review for common law claims of punitive excessiveness."<sup>160</sup> Additionally, the Utah Supreme Court adopted a *de novo* standard for "reviewing both awards of punitive damages by juries and also adjustments of those awards by trial courts."<sup>161</sup>

Thus, a review of other state cases sheds little light on the reasoning of state courts in accepting and applying the *Cooper* standard of review. It appears that the primary rationale is that, when a federal constitutional question is involved, the states feel compelled to apply the standards as articulated by the Supreme Court of the United States even if the mandate is vague and does not overtly invoke the Supremacy Clause of the Sixth Amendment. State courts view the *Cooper* decision as a constitutional mandate rather than the Supreme Court asserting its superintending control over federal courts.<sup>162</sup>

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156. *Sand Hill Energy, Inc. v. Ford Motor Co.*, 83 S.W.3d 483, 493 (Ky. 2002); see also *St. John v. Coisman*, 799 So. 2d 1110, 1114 (Fla. Dist. Ct. App. 2001) ("[W]hen punitive damages are challenged as excessive on federal constitutional grounds, the appellate court's review of the award must be pursuant to a *de novo* standard.").

157. *Mosing v. Domas*, 830 So. 2d 967, 973 (La. 2002); see also *Time Warner Entm't Co. v. Six Flags Over Ga.*, 563 S.E.2d 178, 180–81 (Ga. App. 2002).

158. *Williams v. Philip Morris Inc.*, 48 P.3d 824, 837 (Or. Ct. App. 2002). The Oregon courts did not adopt the *Cooper* standard but recognized its validity and held that they already met the standard by performing plenary review. While the court described it as "plenary review," the terms "plenary" and "independent" review are equivalent to *de novo* review.

159. *Baker v. Nat'l State Bank*, 801 A.2d 1158, 1162–63 (N.J. Super. Ct. App. Div. 2002).

160. *White*, *supra* note 107, n.289 (citing *Time Warner*, 563 S.E.2d at 183; *Mosing*, 830 So. 2d at 970; *Leisinger v. Jacobson*, 651 N.W.2d 693, 696 n.2 (S.D. 2002); *Stroud v. Lints*, 760 N.E.2d 1176, 1180 (Ind. Ct. App. 2002); *Baker*, 801 A.2d at 1162–63; *Cent. Bering Sea Fisherman's Assoc. v. Anderson*, 54 P.3d 271, 277 (Alaska 2002); *Brantner Farms, Inc. v. Garner*, No. C6-01-1572, 2002 Minn. App. LEXIS 625, at \*17 (Minn. Ct. App. June 4, 2002)).

161. *White*, *supra* note 107, n.289; see *Diversified Holdings, L.C. v. Turner*, 63 P.3d 686, 692 (Utah 2002).

162. In a recent New York University Annual Survey of American Law, the author simply noted, "almost

### B. Applying the De Novo Standard in New Mexico

The court in *Aken* recognized that the standard of review in New Mexico with regard to the substantive due process analysis of punitive damages was to uphold the award “if substantial evidence supports the jury’s findings.”<sup>163</sup> The substantial evidence standard required viewing the evidence “in the light most favorable to the prevailing party and all inferences arising from the factual findings of a trial are indulged,” while a de novo review required a court to make “an independent assessment of the record.”<sup>164</sup> The court noted, however, that, “after most jury trials, there are no findings of fact on which to rely in order to make a separate appellate judgment on punitive damages”<sup>165</sup> and that there was not a “mathematical bright line” between constitutionally acceptable and unacceptable damages.<sup>166</sup> The solution that the court found to be acceptable was based on the “concern for reasonableness” articulated in *BMW*, requiring that an appellate court “read the record before it bearing in mind, with respect to each relevant factor announced in *BMW*, whether the jury’s award of punitive damages is comparatively reasonable.”<sup>167</sup> If review of the record indicated that the jury should not have concluded as it did, “the appellate court may, exercising its de novo power, set aside the award.”<sup>168</sup> The court in *Aken* adopted the *BMW* conclusion that an appellate court must actually conduct an “analysis of the reasonableness of the jury verdict.”<sup>169</sup> According to *BMW* and to the court in *Aken*, any doubt “concerning the question of what appropriate damages may be in the abstract, or owing to the coldness of the record, should be resolved in favor of the jury verdict.”<sup>170</sup>

This line of reasoning and the language that was chosen to define New Mexico’s standard indicates that the court in *Aken* struggled with reconciling a de novo standard of review with previous New Mexico case law that placed great importance on preserving a jury’s verdict. A de novo review implies that no deference should be given to the jury determination or the lower court decision;<sup>171</sup> however, the standard articulated by the court in *Aken* maintained some level of deference. The court, finding the ability to exercise a de novo review to be a “grave responsibility,”<sup>172</sup> devised a standard that placed an emphasis on reading the record and

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every state supreme court that has considered the [*Cooper*] issue tacitly assumes the inescapable application of the Supremacy Clause.” Donald C. Wintersheimer, *Does Cooper Industries v. Leatherman Tool Group, Inc. Require de Novo Review by State Appellate Courts?*, 59 N.Y.U. ANN. SURV. AM. L. 357, 371 (2003). *But see* Seitzinger v. Trans-Lux Corp., 40 P.3d 1012, ¶ 48 (N.M. Ct. App. 2001), cert. granted and opinion withdrawn, 40 P.3d 1008 (2002) (“We do not interpret *Cooper Industries, Inc.* to impose a de novo review as a matter of federal constitutional imperative. Rather, it appears to be an appellate procedural option for the federal courts.”).

163. *Aken*, 2002-NMSC-021, ¶ 17, 49 P.3d at 668.

164. *Id.* ¶ 19, 49 P.3d at 668.

165. *Id.*

166. *Id.*

167. *Id.*

168. *Id.*

169. *Id.*

170. *Id.*

171. *See, e.g.,* Fort Sumner Irrigation Dist. v. Carlsbad Irrigation Dist., 87 N.M. 149, 150, 530 P.2d 943, 944 (1974) (holding that a trial de novo means “a trial anew” and, under that definition, the district court was not bound in any way by the findings of the lower court).

172. *Aken*, 2002-NMSC-021, ¶ 19, 49 P.3d at 668.

assessing whether the jury's award was reasonable.<sup>173</sup> Only then may an appellate court exercise its de novo power to set aside the award.<sup>174</sup> The court also preserved the concept that deference should be given to the jury's decision if the appellate court has any doubts.<sup>175</sup> Similarly, the holding recognized that the jury was in the best position to judge the conduct of the defendant.<sup>176</sup> A pure de novo standard would not incorporate or use language that was more indicative of a substantial evidence review than an independent analysis. The *Aken* standard therefore allows for some degree of deference to the record and to the jury's decision.<sup>177</sup> This creation of a quasi-de novo standard appears to be unique to New Mexico and is not as evident in opinions of other state courts that have considered the *Cooper* standard.<sup>178</sup>

Regardless of the uncertainty associated with the application of the new standard, the *Aken* decision nonetheless created a dramatic shift in New Mexico case law away from a substantial evidence standard of review to a de novo review of the constitutional excessiveness of punitive damages and the reasonableness of a jury's deliberations. Prior to *Aken*, *Allsup's* was the controlling case on the appellate standard to be used when reviewing a trial court's decision regarding a new trial or remittitur motion for a punitive damages award.<sup>179</sup> The holdings in *Allsup's* were ultra-protective of the jury's role in this process. Not only did that court specify the use of a substantial evidence standard, looking for jury passion or prejudice,<sup>180</sup> but it also shifted the burden of proof on appeal to the appellee to show why the jury's verdict should not be upheld and that the remittitur was appropriate.<sup>181</sup> In addition, the *Allsup's* court utilized the same substantial evidence standard when reviewing the award for constitutional excessiveness as it did when reviewing it for common law excessiveness. The *Aken* decision, in seeking to clarify the review process for determining the constitutionality of punitive damages awards, departed from the holdings in *Allsup's* where preservation of the role of the jury was paramount even for constitutional questions. It is yet to be seen whether *Aken* nullifies *Allsup's* view of a jury's role or simply evolves that role in response to a U.S. Supreme Court mandate.

Whatever effect *Aken* has on the rhetoric in *Allsup's*, the decision has created two possible standards of review for the excessiveness of punitive damages in New Mexico: one for a constitutional challenge and another for a challenge based on

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173. *Id.*

174. *Id.*

175. *Id.*

176. *Id.* ¶ 28, 49 P.3d at 672-73.

177. In New Mexico common law, the decision by a jury on a punitive damages award has historically been treated as a fact. *See, e.g., O'Neel v. USAA Ins. Co.*, 2002-NMCA-028, ¶ 19, 41 P.3d 365, 362 ("entitlement to attorneys fees was established by the factual determinations implicit in the jury's award of punitive damages"); *Allsup's*, 1999-NMSC-006, ¶ 16, 976 P.2d at 9 ("The proper amount of damages is...bound up in the assessments made by a jury during the actual trial itself."); *Weidler v. Big J Enterprises, Inc.*, 1998-NMCA-021, ¶ 45, 953 P.2d 1089, 1101 ("amount of punitive damages is left to the discretion of the trier of fact, based on the circumstances of each case..."). This may have contributed to the court's use of deferential language as it tried to balance a due process mandate with existing case law.

178. *See* discussion of the application of *Cooper* in other states, *supra* Part IV.A: Constitutional Mandate or Superintending Control.

179. *Allsup's*, 1999-NMSC-006, 976 P.2d 1.

180. *Id.* ¶ 18, 976 P.2d at 9.

181. *Id.* ¶ 19, 976 P.2d at 9.

common law excessiveness. The likelihood of this outcome is supported by case law in other states that have adopted the de novo standard for constitutional excessiveness.<sup>182</sup> In practice, once a trial court decides that an award is constitutionally excessive and orders a remittitur, the next question that will arise is whether that amount is still too high under New Mexico common law. Similarly, if a court concludes that an award is not constitutionally excessive using de novo review, it will still have to decide if the award is excessive under common law standards using the highly deferential paradigm established in *Allsup's. Aken* has therefore not only created a dual standard but also has created the need for a two-tiered analysis of every punitive damages award that is challenged under the Fourteenth Amendment Due Process Clause. This outcome seems inevitable unless the court chooses to conflate the two standards and create one over-arching standard for punitive damages.

## V. IMPLICATIONS

Several questions and possible implications arise as a result of the *Cooper* and *Aken* decisions. Some potentially affected areas include (A) the role of the jury; (B) the adequacy of existing New Mexico Uniform Jury Instructions; (C) changes that may occur in the way that juries record their verdicts; (D) an increased burden on appellate judges; (E) impact on the trial court's rulings on post-trial motions, including remittitur; and (F) judicial review of noneconomic damages.

### A. The Jury's Role

One remaining question is whether the role of a jury has changed in light of the *Cooper* decision that, for Seventh Amendment purposes, the determination of the proper amount of punitive damages is not a factual determination. Through this finding, the Court paved the way for de novo appellate review, free from the Reexamination Clause of the Seventh Amendment. The Reexamination Clause provides that "no fact tried by a jury shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law."<sup>183</sup> If determining the amount of punitive damages was factual in nature, then de novo review of that determination might be precluded under the Seventh Amendment. The jury's role is that of factfinder and, given *Cooper's* decision that the amount is not a fact, then it may be unnecessary and inappropriate for the jury to deliberate on that issue.<sup>184</sup> However, on closer examination, *Cooper* was careful to limit that distinction to the Reexamination Clause and never stated that the nonfactual nature of the determination had any effect on the Right to Trial by Jury Clause of the Seventh Amendment.<sup>185</sup> Indeed, courts have found that *Cooper* did not alter the right

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182. See cases cited *supra* note 160.

183. U.S. CONST. amend. VII.

184. See, e.g., Lisa Litwiller, *Has the Supreme Court Sounded the Death Knell for Jury Assessed Punitive Damages? A Critical Re-Examination of the American Jury*, 36 U.S.F. L. REV. 411, 411 (2002) ("To the extent that modern juries function solely as fact finders, the assessment of a punitive damage award, at least as to the amount, is outside the purview of the jury.") (internal citations omitted).

185. *Cooper*, 532 U.S. at 437 n.11. For example, the Court found no conflict with previous Supreme Court opinions that stood for "the proposition that, perhaps because it is a fact-sensitive undertaking, determining the

to have a jury determine the amount of punitive damages.<sup>186</sup> Three federal district courts have held that *Cooper's* declaration that the amount of punitive damages is not a fact tried by the jury pertains only to the review of jury awards under the Reexamination Clause and does not "end the jury's role in the determination of punitive damages."<sup>187</sup> Thus, at the federal level, case law is unfolding that supports the jury's continued role in deciding the amount of punitive damages.

With regard to the effect of *Aken* and *Cooper* on the role of juries at the state level, it is first important to note that the Seventh Amendment is not binding on states.<sup>188</sup> New Mexico integrated Seventh Amendment concepts into its constitution under article II, section 12, which states, "The right of trial by jury as it has heretofore existed shall be secured to all and remain inviolate."<sup>189</sup> The state constitution does not contain an equivalent to the Seventh Amendment Reexamination Clause and case law interpreting article II, section 12 primarily addresses the right to a jury trial.<sup>190</sup> As in the federal cases discussed above,<sup>191</sup> the issue is whether the right to have a jury decide punitive damages historically existed and not whether that determination is factual in nature. In New Mexico, the right to have a jury determination of exemplary damages was in existence as a legal rather than equitable remedy prior to the state constitution and should be guaranteed under the

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amount of punitive damages should be left to the discretion of the jury." *Id.* The Court focused on the fact that previous cases did not indicate that the "amount of punitive damages imposed by the jury is itself a 'fact' within the meaning of the Seventh Amendment's Reexamination Clause." *Id.* The Court further noted that there is a difference between "the 'Trial by Jury' Clause, which 'bears...on the allocation of trial functions between judge and jury,' and the 'Reexamination' Clause, which 'controls the allocation of authority to review verdicts.'" *Id.* (quoting *Gasperini v. Center for Humanities, Inc.*, 518 U.S. 415, 432 (1996)). Thus, the Court's holdings only appear to be related to the Reexamination Clause.

186. The Right to Trial by Jury Clause of the Seventh Amendment provides that "[i]n suits at common law...the right of trial by jury shall be preserved...." U.S. CONST. amend. VII.

187. *Todd v. Roadway Express, Inc.*, 178 F. Supp. 2d 1244, 1245-46 (M.D. Ala. 2001) (refusing to strike a request for a jury determination of punitive damages). Similarly, in *Hartford Fire Insurance Co. v. First National Bank of Atmore*, the court agreed with this limited interpretation of *Cooper* and refused to preclude trial by jury on punitive damages noting that "whether the right to trial by jury attaches under the Seventh Amendment depends not on whether a fact is involved, but on whether a suit at common law is involved." 198 F. Supp. 2d 1308, 1310 (S.D. Ala. 2002). In *Montgomery v. Karkut Industries Corp.*, when addressing a similar motion, the court likewise held that *Cooper* was only speaking to the Reexamination Clause. 259 F. Supp. 2d 952, 954-55 (E.D. Mo. 2003). In that case, the court supported its position with the recent Supreme Court decision in *State Farm v. Campbell* by arguing that, if *Cooper* stood for the proposition that a jury trial is inappropriate on the issue of punitive damages, the Supreme Court would have "overturned the punitive damages award [in *State Farm*] on the basis that it was improper for the jury to make the award at all," rather than simply overturning it as excessive. *Id.* at 953-54.

188. As early as 1893, the Supreme Court of the Territory of New Mexico stated, "the seventh amendment, so far as it relates to the courts was intended as a limitation, only, upon the power of the courts of the United States, and that it did not extend to territorial courts; that as to the latter they were, like the state courts, invested with general jurisdiction." *Lynch v. Grayson*, 7 N.M. 26, 31, 32 P. 149, 154 (1893). The court therefore held that "our courts are not restricted in their jurisdiction by the provisions of said amendment." *Id.* In *Vivian v. Archison, Topeka and Santa Fe Railway Co.*, the New Mexico Supreme Court reiterated the fact that the Seventh Amendment restricted federal courts in their review of excessive verdicts but "State courts...are not restricted by the Seventh Amendment." 69 N.M. 6, 9 (1961).

189. N.M. CONST. art. II, § 12.

190. The bulk of the cases deal with a convicted criminal requesting the right to have a jury decide his or her punishment. Courts consistently hold that this right was not in existence prior to the Constitution and therefore does not meet the "as it heretofore existed" element of the article. See, e.g., *Lisanti v. Alamo Title Ins. of Tex.*, 2002-NMSC-032, 55 P.3d 962; *State ex rel. Children, Youth & Families Dep't v. T.J.*, 1997-NMCA-021, 934 P.2d 293.

191. See *supra* note 187 and accompanying text.

constitution.<sup>192</sup> A jury decision on the amount of punitive damages is therefore required and is binding unless the court grants a new trial or remittitur under common law or constitutional standards of excessiveness, or unless the amount is not upheld on appeal.<sup>193</sup> Thus, New Mexico juries will continue to play a role in determining the amount of a punitive damages award.

### *B. Uniform Jury Instructions*

In *Aken*, the court performed a procedural due process check prior to engaging in a substantive due process analysis of the punitive damages award.<sup>194</sup> The court found that the procedures that had been followed by the courts below were adequate to meet the due process requirements.<sup>195</sup> Using the test as outlined in *Haslip*,<sup>196</sup> the court specifically found that the jury instructions used in *Aken* met the *Haslip* standard.<sup>197</sup> The instructions informed the jury that (1) it “may award punitive damages,” (2) the purpose of punitive damages was “to punish and deter wrongful conduct,” (3) the jury “should act toward the ends of reason and justice...[examining] the nature of the wrong and any aggravating or mitigating circumstances,” and (4) the “punitive damages must relate to actual damages and the injury sustained.”<sup>198</sup> New Mexico Uniform Jury Instructions are, therefore, sufficient to meet procedural due process requirements.

The question is whether New Mexico should add more to its jury instructions in light of *BMW*<sup>199</sup> and *Campbell*<sup>200</sup> to provide guidance on substantive due process. New Mexico jury instructions on punitive damages already incorporate two of the *BMW* factors for substantive due process. The current instructions provide that juries may assess punitive damages if the conduct of the defendant was “malicious, willful, reckless, wanton, fraudulent or in bad faith.”<sup>201</sup> This meets the requirements of the first *BMW* factor on reprehensibility. In addition, the instructions require that the damages “must be reasonably related to the injury and to any damages given as compensation and not disproportionate to the circumstances.”<sup>202</sup> This appears to be equivalent to the second *BMW* factor on evaluating the ratio between punitive and compensatory damages. *BMW* factor three, addressing comparable civil and criminal penalties, requires a “broad legal comparison”<sup>203</sup> that may be inappropriate for a jury. Thus, both of the jury-related *BMW* factors for substantive due process are incorporated into New Mexico’s current jury instructions.

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192. See, e.g., *Cunningham v. Sugar*, 9 N.M. 105, 49 P. 910 (Sup. Ct. Terr. of N.M. 1897); *Atchison Co. v. Citizen’s Traction & Power Co.*, 16 N.M. 163, 113 P. 813 (Sup. Ct. Terr. of N.M. 1911).

193. As discussed below, the jury’s determination may not be binding if the constitutionality of the award is questioned. The amount could be subject to de novo review by the trial court in the context of post-trial motions and, in accordance with *Cooper* and *Aken*, it would be subject to de novo review on appeal.

194. *Aken*, 2002-NMSC-021, ¶ 13, 49 P.3d at 666–67.

195. *Id.* ¶¶ 13, 15, 49 P.3d at 666–67.

196. 499 U.S. 1.

197. *Aken*, 2002-NMSC-021, ¶ 13, 49 P.3d at 666–67.

198. *Id.*

199. 517 U.S. 559.

200. 538 U.S. 408.

201. UJI 13-1827, NMRA 2002.

202. *Id.*

203. *Cooper*, 534 U.S. at 440.

The *Campbell* decision provided guidance on what a constitutionally acceptable ratio between punitive and compensatory damages might look like and in so doing raised the question of whether it is now appropriate to add this guidance to jury instructions.<sup>204</sup> *Campbell* cautioned that “few awards exceeding a single-digit ratio between punitive and compensatory damages will satisfy due process.”<sup>205</sup> New Mexico could add this guidance to the portion of the instruction that requires punitive damages to be reasonably related and not disproportionate to the amount given for injury compensation.<sup>206</sup> Plaintiffs may oppose adding the *Campbell* guidance because it explicitly suggests an outer limit for the award while providing no concomitant benefit; however, by adding the guidance, juries may find it easier to choose a reasonable and constitutional amount, thus improving the consistency of the damages awarded and preserving the jury’s verdict on appeal.

### C. How a Jury Reports Its Conclusions

In addressing the relative competency of trial and appellate judges to evaluate the *BMW* factors, the Supreme Court in *Cooper* found that district courts only have an advantage over appellate courts when assessing the first *BMW* factor of reprehensibility, especially when the assessment of witness credibility and demeanor is important to deciding the issue.<sup>207</sup> Thus, the Court seems to be saying that a decision on reprehensibility may be more factually based than the other *BMW* factors. If this is a correct reading of the Court’s view, then a court may give more deference to a jury determination on reprehensibility if the jury makes specific fact-based findings. Given that Rule 49(b) of the Federal Rule of Civil Procedure allows a court to submit special written interrogatories to a jury on issues of fact, the jury could be queried on findings that underpin their decision on reprehensibility.<sup>208</sup> Consequently, with special interrogatories, a federal court may still have a basis for giving some level of deference to the jury’s determination of the amount of punitive damages if it is strongly linked to reprehensibility.<sup>209</sup>

At the state level and given the quasi-de novo approach taken by the court in *Aken*, special interrogatories<sup>210</sup> may be of even more value. The de novo review conducted in *Aken* itself shows the likelihood that the court will defer to a jury’s determination on reprehensibility. *Aken* agreed with *Cooper* that reprehensibility is the most fact-like *BMW* element to evaluate.<sup>211</sup> When the court in *Aken* performed its de novo review of the record to evaluate the reprehensibility of the defendant’s conduct, it did so by interpreting the record as “some reasonable jury might.”<sup>212</sup> The

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204. *Campbell*, 538 U.S. at 410.

205. *Id.*

206. For example, the UJI could now state, “Unless there are extenuating circumstances, a punitive damages award that is more than nine times the compensatory award may be considered to be disproportionate to the circumstances and therefore unconstitutional.”

207. *Cooper*, 534 U.S. at 440.

208. FED. R. CIV. P. 49(b).

209. See generally David E. Hogg, *Alabama Adopts De Novo Review for Punitive Damage Appeals: Another Landmark Decision or Much Ado About Nothing?*, 54 ALA. L. REV. 223, 238–39 (2002).

210. Rule 1-049(B) NMRA 2003.

211. *Aken*, 2002-NMSC-021, ¶ 21, 49 P.3d at 670.

212. *Id.*



court, in fact, gave deference when it found evidence in the record of “trickery and deceit” and concluded that a substantial award was necessary to punish the defendant and deter others.<sup>213</sup> This approach exemplifies the *Aken* court’s reluctance to adopt a pure de novo standard of review and its continued willingness to show deference to a reasonable jury. New Mexico courts may therefore find value in the use of special interrogatories to delineate the factual underpinnings of a jury’s findings on reprehensibility and support the jury’s ultimate decision as to the amount of punitive damages.

#### *D. Appellate Level Review*

In the wake of the *Aken* decision, New Mexico now has two standards for appellate review of the excessiveness of punitive damages, one for constitutional claims and another for common law excessiveness. If the award on appeal, after remittitur, is attacked for common law excessiveness, the burden shifts, in accordance with *Allsup’s*,<sup>214</sup> to the appellee to show that the trial court was correct in reducing the award and the appellate court would utilize a substantial evidence standard. If the amount is also challenged constitutionally, the appellate review would be de novo in accordance with *Aken*; however, even if the amount after remittitur is found to be constitutional, it may still be too high under New Mexico common law. Thus, the appellate court would also need to review that amount under the substantial evidence common law standard, including the *Allsup’s* shift in burden. This two-tiered review process could become quite complicated and burdensome to a court.

If, as *Aken* contends, the reason for changing to a de novo review is to foster increased clarity and uniformity in defining appropriate punitive damages, then a multi-tiered system of standards and analysis may be counterproductive. Uniformity may actually decrease as courts struggle with constitutional versus non-constitutional factors and standards of review. In addition, if the *Aken* opinion is an example of the level of clarity that will emanate from the appellate level, then it may be less helpful than envisioned in achieving those goals. The opinion provides little clarity or guidance to assist courts in defining constitutionally acceptable awards. Without providing more insight into the reasoning behind the court’s choice to reduce the award to a three-to-one ratio, it will be difficult for courts to understand how to select an appropriate ratio for a given harm. If, as seen in *Aken*, it comes down to simply choosing a ratio based on the type of harm (*i.e.*, defamation), then the very purpose of a de novo review, where every case may be unique, is abrogated in favor of picking a known ratio that has not been overturned on appeal. At that point, a de novo review becomes an even more inefficient use of judicial time.

#### *E. Impact on Post-Trial Motions*

While the holding in *Aken* only applies to appellate courts, a question arises as to whether the same de novo standard of review should be applied at the trial court level. Applying the same standard at both the trial and appellate levels could

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213. *Id.*

214. *Allsup’s*, 1999-NMSC-006, 976 P.2d 1.

potentially foster the *Aken* goals of achieving consistency and unity in punitive damages verdicts. It could also improve judicial efficiency by decreasing the number of overturned trial court awards. An inference arising from *Aken*, if not an actual holding, is that for questions of constitutional excessiveness a trial court judge should apply a de novo standard when reviewing a jury determination in the context of post-trial motions for new trial or remittitur. As with appellate level review, this would require a trial court judge to apply both standards of review to a remittitur motion depending on whether the excessiveness claim was constitutional or based in common law. If, after de novo review, the trial judge finds that the amount of punitive damages assessed by the jury is not constitutionally excessive, the court would then review the award for excessiveness under the common law substantial evidence standard. On the other hand, if the judge finds that the amount of punitive damages is unconstitutional, she could reduce the amount to a constitutionally acceptable level. However, that constitutional amount may still be too high under the New Mexico common law notion of excessiveness,<sup>215</sup> and the judge would be required to perform a subsequent review using New Mexico's common law substantial evidence standard.<sup>216</sup>

The concept of changing the standard of review at the federal district court or state trial court levels has received very little attention thus far and a clear direction has not emerged. A few cases have suggested that at least federal district courts should conduct a de novo review. For example, the Ninth Circuit Court of Appeals in *Exxon Valdez v. Hazelwood* found that, because the *BMW* and *Cooper* cases had not been decided when *Exxon* was being considered at the district court level, there was "no constitutional analysis by a district court over which to exercise...de novo review."<sup>217</sup> The court stated that they "believe[d] the district court should, in the first instance, apply the appropriate standards."<sup>218</sup> After conducting their own analysis to serve as a guide, the appellate court remanded the case to the district court with instructions to "set a lower limit in light of the *BMW* and *Cooper* standards."<sup>219</sup> The Alaska District Court, in turn, understood the instructions to require them to perform a de novo review of the *BMW* factors.<sup>220</sup> After conducting this "independent evaluation," the court concluded that, contrary to the appellate analysis, the original \$5 billion punitive damages award "was not grossly excessive."<sup>221</sup> Even though the court did not find that a reduction in the award was justified, it interpreted the appellate court remand as an order to do so and ultimately reduced the award by one billion dollars.<sup>222</sup>

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215. See, e.g., *Richardson v. Rutherford*, 109 N.M. 495, 503, 787 P.2d 414, 422 (1990).

216. In a recent New York University Annual Survey of American Law, the author notes that the *Cooper* decision may have also, "unwittingly, made possible the use of additur...in future cases." Wintersheimer, *supra* note 162, at 371. Similarly, another author stated that, "if the award is considered merely an opinion of the jury, additur could again become a real possibility for plaintiffs on appeal, and perhaps even at a trial level review." Hogg, *supra* note 209, at 236.

217. *In re: The Exxon Valdez v. Hazelwood*, 270 F.3d 1215, 1241 (9th Cir. 2001).

218. *Id.*

219. *Id.* at 1246-47.

220. *In re The Exxon Valdez*, 236 F. Supp. 2d 1043, 1068 (D. Alaska 2002).

221. *Id.*

222. *Id.*

Likewise, the Federal Circuit of the U.S. Court of Appeals assumed that federal district courts would perform de novo review, noting that, "[i]f the district courts and we are to exercise our de novo review authority with confidence, the facts should be...clearly expressed."<sup>223</sup> The court further stated that, in "future cases, we suggest that district courts consider creating a record that will enable the district court, on post-trial motions, and courts on appeal to determine with greater certainty what the jury fact-findings regarding punitive damages actually were."<sup>224</sup>

At the state level, only one decision was found on the issue of trial court application of de novo review. A Florida court of appeals recognized that under *Cooper* it was required to perform a de novo review of the constitutionality of a punitive award and remanded a case back to the trial court level for further development of the record.<sup>225</sup> The court cited the *Exxon* case in support of this action and found that the trial court should be "afforded an opportunity to address the new federal law" in *Cooper* to develop a suitable record.<sup>226</sup> The dissent in that case noted, however, that the trial court already found that the award was not excessive under state common law and that "the appellate court, and not the trial court," should now perform the de novo analysis.<sup>227</sup> The dissent cited *Cooper* itself as supporting this interpretation because the Supreme Court in *Cooper* remanded to the Ninth Circuit Court of Appeals rather than to the trial court. The reason given in *Cooper* was that "the broad legal comparison" required in determining the validity of such an award was "more suited to the expertise of the appellate court."<sup>228</sup>

Perhaps another argument against performing a de novo review at the trial court level is that *Cooper* and *Aken* sought uniformity of law through the change in standard of review. Trial court decisions on remittitur are unreported decisions and, therefore, those decisions would not contribute directly to developing a uniform body of law.

Whatever the outcome on trial court application of the de novo standard of review, the *Aken* decision will affect attorney strategies in the new trial and remittitur processes. Defense attorneys will now have an incentive to request a new trial or remittitur under claims of both constitutional and common law excessiveness to maximize the possibilities of getting the award reduced.

#### *F. Judicial Review of Noneconomic Damages Awards*

*Cooper* and its progeny address the excessiveness of civil punitive damages. The Supreme Court has held that the constitutional law of excessiveness of punitive damages is not rooted in the Eighth Amendment but is instead subject to an analysis under the Fourteenth Amendment Due Process Clause.<sup>229</sup> The Eighth Amendment primarily limits damages that are associated with criminal fines.<sup>230</sup> Courts

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223. Rhone-Poulenc Agro, S.A. v. DeKalb Genetics Corp., 272 F.3d 1335, 1352-53 (Fed. Cir. 2001).

224. *Id.*

225. St. John v. Coisman, 799 So. 2d 1110, 1116 (Fla. Dist. Ct. App. 2001).

226. *Id.*

227. *Id.* at 1117.

228. *Id.* n.2.

229. *Browning-Ferris*, 492 U.S. at 262.

230. The Eighth Amendment provides that "[e]xcessive bail shall not be required, nor excessive fines

analogized punitive damages to criminal fines with the thought that if the damages, like fines, were too high then the Eighth Amendment was violated. The Court in *Browning-Ferris* rejected the application of the Eighth Amendment in this context.<sup>231</sup> If the constitutional basis for restraining excessive punitive damages were the Eighth Amendment, the civil application of "constitutional excessiveness" would most likely be limited to punitive damages. The Fourteenth Amendment is not so grounded. One long-range implication is that the Fourteenth Amendment may be used to attack awards of noneconomic damages other than punitives, such as pain and suffering or loss of consortium.<sup>232</sup> There may be a concerted attempt to constitutionalize all noneconomic damages. If so, the procedural due process criteria established for punitive damages are probably very similar to what would be required for other damage types; however, the substantive due process factors that have evolved for punitives would not be useful in analyzing other noneconomic damages. The *BMW* factors have no applicability to those types of damages and courts would need to develop new sets of factors. The threshold issue that may keep such attacks at bay for other noneconomic damage types is whether the damages, as decided by the jury, are "facts" or "non-facts" for purposes of de novo reexamination. The Supreme Court in *Cooper* likened a jury's decision on punitive damages to an "opinion." Given *Aken*'s acceptance of this distinction, federal and state courts may now be forced to differentiate between jury decisions that are based in "fact" from those that are "opinion." Facts will be accorded deference; whereas, opinions may be subject to constitutional attack through de novo review.

## VI. CONCLUSION

In conclusion, the New Mexico Supreme Court in *Aken v. Plains Electric* held that state appellate courts must apply a de novo standard of review when evaluating the constitutional excessiveness of punitive damages. It did so under a perceived mandate from the Supreme Court of the United States in *Cooper v. Leatherman*. While it is unclear as to whether *Cooper* actually mandated state compliance, *Aken* compels New Mexico appellate courts to follow that standard.

A number of questions and implications arise in the wake of the *Aken* decision. While New Mexico juries will continue to play a role in determining the amount of a punitive damages award, the preservation of that decision is in jeopardy. Procedural tools may be helpful in protecting the historical deference that New Mexico courts have given to such jury decisions. In addition, it may be necessary to revise the uniform jury instructions to ensure that they provide adequate guidance on substantive due process.

As a result of the *Aken* decision, attorneys will challenge a punitive damages award as being both constitutionally excessive and excessive under common law. State appellate courts will now be forced to grapple with a two-tiered review process that could prove to be more burdensome than helpful. This task is further

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imposed, nor cruel and unusual punishments inflicted." U.S. CONST. amend. VIII.

231. *Id.*

232. Recall that Justice Ginsberg in her dissent in *Cooper* noted that "[o]ne million dollars worth of pain and suffering does not exist as a 'fact' in the world any more or less than one million dollars' worth of moral outrage." *Cooper*, 532 U.S. at 446.

complicated by the quasi-de novo approach defined in *Aken*. The decision may also lead to application of a de novo standard of review for certain post-trial motions at the trial court level.

Lastly, with its differentiation between jury decisions that are rendered based on fact as opposed to opinion, *Aken* may have inadvertently opened the door in New Mexico for constitutionalizing other types of noneconomic damages. This could pave the way for evaluating the constitutional excessiveness of other damages such as pain and suffering, resulting in further erosion of the jury's function and changing the entire landscape of civil damages.