

**Dardinger, Exr., v. Anthem Blue Cross &  
Blue Shield et al., Appellees.**

Supreme Court Of Ohio  
2002 Ohio 7113 (2002)

[Ester Dardinger had a malignant brain cancer that was rapidly growing. Her doctor recommended that she receive a novel chemotherapy that was initially approved by her insurance carrier. The procedure seemed to work. Some tumors stopped growing, while others apparently declined in size. Accordingly, her doctor scheduled additional treatments. Payments for these future procedures were, however, denied because the insurer belatedly determined that they were experimental. Ester, and her husband Robert, appealed the decision. Based upon testimony in the court case it appeared that the insurer negligently, and perhaps even purposely, extended the appeals process. Given the uncertainty as to whether this expensive specialized treatment would be paid for by her insurer, Ester opted for a covered treatment while her appeal was pending. This delay in receiving the appropriate treatment proved fatal for Ester. She died a particularly painful and early death. The court awards punitive damages. Are the damages excessive? How should they be distributed?]

JUDGES: DOUGLAS, RESNICK, F.E. SWEENEY and PFEIFER, JJ., concur. DOUGLAS, J., concurs separately. MOYER, C.J., and LUNDBERG STRATTON, J., concur in part and dissent in part. COOK, J., concurs in part and dissents in part.

OPINIONBY: PFEIFER

Factual Background

There are two factual portions of this case relevant to our determination. The first set of facts is that which gives rise to the claims of the plaintiffs for breach of contract, bad faith, and punitive damages. The second set of facts is relevant in determining whether defendant Anthem Insurance Companies, Inc., waived a possible defense.

The Claim

The plaintiff-appellant in this case is Robert Dardinger, executor of the estate of his wife, Esther Dardinger. There are two defendants-appellees. The first is Community Insurance Company, an Ohio corporation that does business under the trade name Anthem Blue Cross and Blue Shield ("Anthem"). ...

The plaintiff and the defendants are before this court because of what happened to Esther Dardinger as she fought her battle against brain cancer in 1997. Esther died on November 6, 1997 at age 49. Her last days were spent in great pain as the cancerous tumors in her brain took their final, brutal toll. The plaintiff claims that the way

defendants handled Esther's chemotherapy needlessly shortened her life and caused her last days to be more painful than they should have been.

[What follows is an extensive discussion of Ester Dardinger's treatment by Anthem. This has been largely omitted. However, those interested in a case study for bureaucratic mismanagement should read the unabridged version.

Ester Dardinger had been diagnosed with breast cancer. By 1997 the cancer had spread to her brain. To shrink the brain tumors, she received intra-arterial chemotherapy ("IAC") at an Ohio State University medical center. The treatments appeared to have a beneficial impact on the tumors. After the first three treatments Anthem decided it would not pay for the remaining nine planned treatments. Her attending physicians appealed the decision by Anthem.

Anthem claimed that its only mistake was in certifying the first three treatments. Anthem provided several reasons for denying coverage, the primary reason being that the treatment was experimental. In the subsequent months after Ester's initial treatments Anthem through various communications appeared to vacillate between paying and not paying for additional treatments. This placed Ester on an emotional roller coaster. Waiting for a definitive decision from Anthem the family put off future IAC treatments that would have cost over \$100,000. Anthem's procedure for reviewing Ester's medical records appeared confused and created unnecessary delays. Ester proceeded with alternative treatments that Anthem was willing to pay for. Her condition worsened. Urgent appeals to Anthem on coverage for the IAC did not illicit a definitive response.]

...

Esther died on November 6 of "brain stem compression from continued growth of her multiple brain tumors in her surrounding brain." Newton testified, to a reasonable degree of medical probability, that Esther would have lived eight months to two years, "maybe longer," had she been able to continue with IAC. Dr. Newton also testified that, had IAC continued, a patient such as Esther would likely not have died from the brain tumors but from other systemic disease, such as lung or liver failure. Since brain tumors killed her, Esther's final days were marked by neurological compromise.

Esther's funeral was November 10. The letter refusing payment for the IAC treatment arrived at her house on November 11.

...

#### "Interrogatory J - Punitive Damages Claim

"Did the Defendants act with malice, aggravated or egregious fraud, oppression, or insult by acting in bad faith with regard to denying coverage of Plaintiff's [sic, decedent's] treatment and/or the processing or handling of Plaintiff's insurance claim or appeal[?]"

In addition, each of the general verdict forms as to breach of contract, bad faith, and punitive damages referred to the defendants as "defendants." Again, counsel did not object to their form.

In closing arguments, Dardinger's counsel cited "Anthem's" financial status, mentioning the \$172 million net income figure from AICI's 1998 annual report, to argue for a large punitive damages award. ...

The jury returned a verdict in favor of Dardinger and awarded him \$1,350 on the breach of contract claim, \$2.5 million on the bad-faith claim, and \$49 million in punitive damages. The trial court subsequently awarded attorneys fees in the amount of \$790,000. Defendants filed a posttrial motion seeking judgment notwithstanding the verdict, or a new trial, or a remittitur of the punitive damages.

...

The court upheld the jury's verdicts against Anthem for breach of contract and bad faith. However, the court remanded the matter to the trial court for a new trial as to the issue of damages against Anthem "since the jury interrogatories did not separately indicate the amount of the judgment rendered against each appellant." The court found that the jury's verdict, as to damages, was "based upon the combined financial information of both AICI and Anthem."

Since the court sent the case back for retrial as to damages, the court of appeals found all of the defendants' assignments of error regarding the excessiveness of punitive damages to be moot.

Finally, the court of appeals found that the trial court abused its discretion when it allowed Dardinger to introduce the personal salaries of Anthem executives in evidence.

The cause is before this court upon the allowance of a discretionary appeal.

#### Law and Analysis

The issues before us [is] .... whether the jury's punitive damages award was acceptable under Ohio law and the federal Constitution, and whether the trial court erred in allowing testimony regarding the salaries of executives employed by defendants. We address those issues separately.

...

#### Punitive Damages

Appellant requests that we review the issues mooted by the appellate court's judgment. The bulk of those remaining issues involve the appropriateness of the jury's punitive

damages award. We will address the issue of whether that award was "grossly excessive" and thus violated the federal Due Process Clause, whether it was excessive under Ohio law, and whether remittitur is appropriate.

### Constitutionality

The determination of whether a punitive damages award violates the federal Constitution is rooted in the Due Process Clause. In *BMW of N. Am., Inc. v. Gore* (1996), ... the court held that elementary notions of fairness "dictate that a person receive fair notice not only of the conduct that will subject him to punishment, but also of the severity of the penalty that a State may impose." ... In *Wightman v. Consol. Rail Corp.* (1999)..., this court applied the three guideposts established in *BMW* that indicate whether a defendant has received adequate notice of the possible sanction:

"The guideposts set forth in *BMW* include the degree of reprehensibility of the defendant's conduct, the disparity between the harm suffered by the plaintiff and the amount of the punitive damages award, and the difference between the punitive damages award and civil or criminal penalties authorized or imposed in similar cases." ...

A lack of fair notice may render a sanction "grossly excessive" and thus unconstitutional. ... We thus apply the *BMW* factors to this case. The first factor is the reprehensibility of the defendant's conduct, a factor that *BMW* calls "perhaps the most important indicium of the reasonableness of a punitive damages award."

.... It is here that the appellees fare most poorly. In *BMW*, the conduct under review was *BMW's* repainting of scratched new cars without notifying buyers. Here... we are dealing with human lives, rather than automobiles. ...[T]he tragedy evolved over months, while Anthem and AICI watched. They created hope, then snatched it away. They took a dignified death from Esther Dardinger, and filled her last days with frustration, doubt, and desperation. And every minute of additional pain suffered by Esther Dardinger was a natural outgrowth of the defendants' practiced powerlessness, their active inactivity. ...

The reasons for the denial changed. Originally, Anthem told OSU that the denial was because of the experimental nature of the procedure. In its follow-up letter after its telephone denial, Anthem cited the in-patient nature of the treatments as the reason for denying benefits, further muddying the situation. ...

...

We agree with the trial court that "the jury could easily find that a pervasive corporate attitude existed with the defendants to place profit over patients" and that "the defendants disregarded the rights of their insureds in an effort to obtain higher profits."

In *BMW*, the court stated that "*BMW's* conduct evinced no indifference to or reckless disregard for the health and safety of others." ... The exact opposite could be said of

Anthem and AICI in this case. Accordingly, we find that the conduct of the appellees reaches the level of reprehensibility sufficient to warrant the substantial punitive damages award the jury imposed in this case.

The Supreme Court's "second and perhaps most commonly cited indicium of an unreasonable or excessive punitive damages award is its ratio to the actual harm inflicted on the plaintiff." .... As we said of the Supreme Court and our own court in *Wightman*, "the court, like this court, has consistently rejected the notion of a bright-line mathematical formula for the computation of the reasonableness of punitive damages awards." ...

The punitive damages award here was nearly twenty times the amount of the compensatory damages awarded. In *BMW*, the court referred to the 500-to-1 ratio awarded by the jury in that case as "breathtaking." ... The court saw that case as an exception: "In most cases, the ratio will be within a constitutionally acceptable range, and remittitur will not be justified on this basis." ...

... The \$2.5 million awarded to Dardinger on the bad-faith claim was not unusual considering the five months that Esther Dardinger had to endure. The restraint the jury showed on the compensatory damages and the lack of a "breathtaking" ratio between those damages and punitive damages cause us to hold that the second of the *BMW* indicia does not favor the decision that this jury's award exceeded constitutional bounds.

The third indicium of excessiveness involves "comparing the punitive damages award and the civil or criminal penalties that could be imposed for comparable misconduct." .... While there is no statute directly on point as to the defendants' behavior in this case, an insurer that commits one of the unfair and deceptive practices outlined in R.C. 3901.21 is subject to fines of \$3,500 per occurrence and can lose its license to engage in the business of insurance in Ohio, ...The loss of Anthem's license to engage in the business of insurance in Ohio would certainly be a catastrophic punishment far outstripping the award in this case.

Moreover, the purpose of the *BMW* test is to give fair notice of the conduct that will subject a defendant to punishment as well as the severity of the punishment that a state may impose. .... Ohio law has clearly established that insurers can be liable in compensatory and punitive damages if they act in bad faith. ... This court has reinstated a jury verdict of over \$13 million in compensatory damages alone in a bad faith insurance case. .... Large punitive damage awards occur in other jurisdictions as well. The Utah Supreme Court recently reinstated a \$ 145 million punitive damages award in a bad faith case. *Campbell v. State Farm Mut. Auto. Ins. Co.* (2001), ...

We believe that Anthem and AICI had sufficient notice that they were facing the potential of large punitive damages awards if they were found guilty of bad faith. Thus, the third *BMW* factor does not indicate an unconstitutional award in this case.

Therefore, in considering the three guideposts set forth by the court in *BMW*, we find that Anthem and AICI had fair notice of the conduct that would subject them to punishment as well as the severity of the possible punishment. The award in this case was not grossly excessive under the federal Constitution and did not violate the appellees' due process rights.

#### Excessiveness Under Ohio Law

While not grossly excessive under the federal Constitution, we find that the punitive damages award in this case was excessive under Ohio law.

"The purpose of punitive damages is not to compensate a plaintiff, but to punish and deter certain conduct." *Moskovitz v. Mt. Sinai Med. Ctr.* (1994), 69 Ohio St.3d 638.... We held in *Wightman* that "a punitive damages award is more about defendant's behavior than the plaintiff's loss." .... The focus of the award should be the defendant, and the consideration should be what it will take to bring about the twin aims of punishment and deterrence as to that defendant. We do not require, or invite, financial ruination of a defendant that is liable for punitive damages. While certainly a higher award will always yield a greater punishment and a greater deterrent, the punitive damages award should not go beyond what is necessary to achieve its goals. The law requires an effective punishment, not a draconian one.

...

The jury had before it evidence of AICI's net profit in 1998 of approximately \$172 million dollars. The jury's award was between one-fourth and one-third of that figure. While that fraction of a defendants' annual profit will not always be excessive, we find that as to these particular defendants in this particular case it is. The figure it yields is extremely high. The largest punitive damages award to come before this court for review in at least the last decade is the \$15 million award in *Wightman*. That case involved a very large company, Consolidated Rail Corporation, which did not argue that the award was disproportionate to its income or net worth.

We do believe that appellees' actions in this case merit a historic punitive damages award. Their industry's central role in the lives of so many Ohioans requires that. The award must be sufficient to persuade Anthem to pay more attention to patient care; to install a system in which appeals are answered, and not purposely delayed; to achieve a system where appeals move forward on their own merit, and are not dropped because Anthem has outlasted the patient in the waiting game. The award must respect the fact that Anthem's bad acts were perpetrated on people who were in their most desperate state. And the award must reflect that, unlike in *Wightman*, the central event in this case was not accidental.

Can an appropriate punitive damages award cure Anthem any more than doctors can cure cancer? The bureaucracy will always be in place, but, like chemotherapy to cancer,

an effective award can tame it, keep it from spreading, and minimize its harmful effects. But, also like chemotherapy, an award must be at a level where it does not create its own overriding problems.

Taking that all into account, we hold that a punitive damages award doubling the award in *Wightman* would have been appropriate in this case. The \$49 million jury award here was over three times the award in *Wightman*. We therefore find that the punitive damages award was excessive under Ohio law, and that the trial court's failure to so find was so unreasonable as to constitute an abuse of discretion.

... A \$ 30 million award is appropriate as to the profits of the corporations involved and appropriate in the scheme of past punitive damages awards in Ohio.

### Remittitur

The power to order a remittitur is not limited to trial courts. ... The court in *Chester Park Co. v. Schulte* (1929), ..., set forth the four criteria necessary for a court to order a remittitur: (1) unliquidated damages are assessed by a jury, (2) the verdict is not influenced by passion or prejudice, (3) the award is excessive, and (4) the plaintiff agrees to the reduction in damages.

Here, we have a damages award assessed by the jury that this court has deemed excessive. The question remains whether the jury was influenced by passion and prejudice. The trial judge, who sits in the best position to judge a jury's motivations, did not find that the jury's decision was the result of passion and prejudice. It appears that the jury rather scientifically decided to take between one-third and one-fourth of the annual net income of Anthem. We do not find that award to be shockingly wrong. We simply believe that a figure that equals one-sixth of annual net earnings, that is more in line with the history of punitive damages awards in Ohio to be more appropriate. We agree with the trial court that the award was free from passion and prejudice.

The fourth factor, the acceptance of the plaintiff, is, of course, up to Dardinger. We are imposing a remittitur of \$19 million, so that the total punitive damages award is \$30 million. We also have another condition.

As was stated above, a punitive damages award is about the defendant's actions. "The purpose of punitive damages is not to compensate a plaintiff but to punish the guilty, deter future misconduct, and to demonstrate society's disapproval." ...At the punitive-damages level, it is the societal element that is most important. The plaintiff remains a party, but the de facto party is our society, and the jury is determining whether and to what extent we as a society should punish the defendant.

There is a philosophical void between the reasons we award punitive damages and how the damages are distributed. The community makes the statement, while the plaintiff reaps the monetary award. Numerous states have formalized through legislation a mechanical means to divide a punitive damages award between the plaintiff and the state. In some states, the state's portion goes to a special fund, in others, to the general fund. .... In Ohio, punitive damages are an outgrowth of the common law. ... Therefore, Ohio's courts have a central role to play in the distribution of punitive damages. Punitive damages awards should not be subject to bright-line division, but instead should be considered on a case-by-case basis, with those awards making the most significant societal statements being the most likely candidates for alternative distribution.

Clearly, we do not want to dissuade plaintiffs from moving forward with important societal undertakings. The distribution of the jury's award must recognize the effort the plaintiff undertook in bringing about the award and the important role a plaintiff plays in bringing about necessary changes that society agrees need be made. Plaintiffs themselves might get involved in how the award is distributed ...

In this case, should Dardinger accept this court's remittitur, the jury's punitive damages award would be reduced to \$30 million. To that \$30 million would be added statutory postjudgment interest. ... From that corpus, \$10 million should go to Dardinger. From the remainder should be drawn an amount for the payment of litigation fees, including attorney fees. The amount of attorney fees should be determined by the contract between Dardinger and his attorney, and should be based upon the amount originally in the corpus, \$30 million plus statutory interest. The final net amount remaining after the prescribed payments should go to a place that will achieve a societal good, a good that can rationally offset the harm done by the defendants in this case. Due to the societal stake in the punitive damages award, we find it most appropriate that it go to a state institution. In this case we order that the corpus of the punitive damages award go to a cancer research fund, to be called the Esther Dardinger Fund, at the James Cancer Hospital and Solove Research Institute at the Ohio State University.

#### Evidentiary Issue

The court of appeals found that the trial court had erred in allowing into evidence the personal salaries of Anthem and AICI executives. The court found that "this evidence was not specifically material to the merits of this action."

Plaintiff argues that the introduction of executive salaries was necessary to demonstrate that a financial incentive system was in place to encourage decisions to deny treatment. Also, in dealing with the punitive damages award, the jury had to look at what it might take to send a message to Anthem and AICI. We find the executive salaries to be marginally relevant in that regard

In making evidentiary close calls such as this one, the trial court is in the best place to make a decision. "The trial court has broad discretion in the admission and exclusion of

evidence and unless it has clearly abused its discretion and the defendant has been materially prejudiced thereby, this court should be slow to interfere." ...

We reverse the judgment of the court of appeals on this issue.

### Conclusion

Accordingly, we reverse the judgment of the court of appeals, reinstate the jury's verdicts, subject the punitive damages award to a remittitur of \$19 million as well as other conditions, and reverse the judgment of the court of appeals on the remaining evidentiary issue.

Judgment accordingly.

\* \* \*

DOUGLAS, RESNICK, F.E. SWEENEY and PFEIFER, JJ., concur.

DOUGLAS, J., concurs separately.

MOYER, C.J., and LUNDBERG STRATTON, J., concur in part and dissent in part.

COOK, J., concurs in part and dissents in part.

### **CONCURBY: DOUGLAS**

I respectfully concur with the majority in order to achieve a final result in this matter. My own personal opinion, however, is that the Court of Appeals judgment should be reversed and the judgment of the trial court reinstated. As I read some of the other writings, herein, I believe they express much the same opinion but reach a somewhat different result. So there will be no question of today's announcement being a majority decision, I concur.

### **DISSENTBY: MOYER, COOK**

MOYER, C.J., concurring in part and dissenting in part. Although I do not subscribe to all of the rhetoric in the majority opinion, I concur with the majority's holding to the extent that it reverses the judgment of the court of appeals on the evidentiary issue and reinstates the jury verdict against Anthem Insurance Cos., Inc. ("AICI"). Nevertheless, I dissent from the majority on the issue of punitive damages for two reasons: the majority (1) orders an unprecedented alternative distribution of punitive damages, and (2) fails to remand the cause to the court of appeals on the issue of remittitur. I address each reason separately.

## I. Alternative Distribution

I dissent to the majority's partial distribution of the punitive damages award to a charitable organization. In the context of this case, there is no more appropriate recipient of a partial distribution of punitive damages than the James Cancer Hospital. I am therefore sympathetic to the motives of the majority, but I believe that such a practice, established by this court and absent statutory authorization, is fraught with unintended and undesirable consequences.

My research reveals that every American court that engages in the alternative distribution of punitive damages awards has acted pursuant to statutory authorization.<sup>n1</sup> This form of judicial restraint is born of good reason. For the majority's holding today, rendered without precise standards or guidelines, sanctions a judge's unbridled discretion to allocate punitive damages to his or her preferred charity, and leaves open the question of how courts should determine the percentage of punitive damages subject to such distribution.

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<sup>n1</sup> In April 1996, the Alabama Supreme Court ordered that one-half of punitive damages awards in future non-wrongful-death tort actions be allocated to the general state fund after litigation expenses are paid. *Life Inc. Co. of Georgia v. Johnson* (Ala.1996), 684 So. 2d 685, 702. In August 1997, however, the court abandoned this approach. *Life Ins. Co. of Georgia v. Johnson* (Ala.1997), 701 So. 2d 524, 532 (concluding that, in the wake of *BMW of N. Am., Inc. v. Gore* [1996... "it is not necessary to share punitive awards with the state treasury in order to prevent windfalls to those who pursue claims against tortfeasors").

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Further, I disagree with the majority's conclusion that Ohio courts should play a "central role" in the distribution of punitive damages to the extent that I do not consider the General Assembly precluded from modifying the common law of punitive damages by the enactment of legislation. As the majority concedes, "numerous states have formalized through legislation a mechanical means to divide a punitive damages award between the plaintiff and the state." These states have recognized that the legislative branch is better equipped to establish a uniform mechanism for alternative distribution, thereby controlling judicial discretion and--in states authorizing the distribution of punitive damages to a general state fund--eliminating any inequity among potential recipients. In view of the majority's holding, Ohio may benefit from such legislation.

...

Despite this well-settled principle of Ohio law, the plaintiff in this case will have no opportunity to challenge the alternative distribution of punitive damages in any Ohio court. The gravity of this point is further exacerbated by the fact that litigants in other states have successfully challenged the alternative distribution of punitive damages. ... I

strongly object to the extinguishment of a right that has been so consistently protected under Ohio jurisprudence.

The doctrine of remittitur has historically been used to correct excessiveness in the *amount* of jury awards, ... and not as a mechanism to correct perceived deficiencies in the law of punitive damages. I would not expand the doctrine of remittitur beyond this time-honored principle.

## II. Remand

Because a majority of the court of appeals concluded that the issue of punitive damages was moot, it did not review the trial court's determination that the punitive damages award was not excessive. In view of this procedural posture, I would make no determination as to whether the award is or is not excessive and would remand the cause to the court of appeals to determine whether the trial court abused its discretion when it denied the motion for remittitur.

For the foregoing reasons, I concur in part and dissent in part.

LUNDBERG STRATTON, J., concurs in the foregoing opinion.

COOK, J., concurring in part and dissenting in part.

Like the Chief Justice, I agree with the majority that appellees invited the error here, if any, concerning their treatment as a single entity. I also agree with the Chief Justice that, in light of our requisite reversal, the majority errs in refusing to remand this cause to the court of appeals for consideration of those issues that court held moot. Therefore, I dissent from the majority's atypical distribution of the punitive-damages award.

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## Questions

1. What is the three-pronged test the court applies to determine whether the punitive damages satisfy the federal constitution?
2. The court indicates that companies can receive fair notice of potential punitive damage awards by looking at previous awards in court cases. Is this circular reasoning?
3. What is the purpose of a punitive award in this case? Who will ultimately pay the award?
4. How should the optimal level of punitive damages be determined? How does the court determine the requisite level of punitive damages? On what basis does the court reduce the punitive damage award?
5. What are the economic arguments for punitive damages and doesn't the defendant receive all of the punitive damages in this case? Also, why didn't the court

appropriate the entire punitive damage award for OSU?