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## Raised Eyebrow Test Produces Further Head-Scratching: Punitive Damages in *Ondrisek v. Hoffman, The*

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## NOTE

# The “Raised Eyebrow” Test Produces Further Head-Scratching: Punitive Damages in *Ondrisek v. Hoffman*

698 F.3d 1020 (8th Cir. 2012)

VALERIE SHANDS\*

### I. INTRODUCTION

Since the 1980s the federal courts have struggled with how to address the perceived increase in the amount and frequency of punitive damages awards.<sup>1</sup> The Supreme Court of the United States finally created a judicial test to determine when an award was so excessive that it violated due process,<sup>2</sup> yet it remains ambiguous and difficult for lower courts to apply.<sup>3</sup> The test involves weighing the reprehensibility of the defendant’s actions, the ratio of punitive damages to compensatory damages, and the comparable criminal and civil punishments typically imposed upon a similar bad actor.<sup>4</sup> The most weight is to be given to the reprehensibility prong.<sup>5</sup> The ratio of punitive to compensatory damages is supposed to be close to 4:1, or if the

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1. See *TXO Prod. Corp. v. Alliance Res. Corp.*, 509 U.S. 443, 500 (1993) (O’Connor, J., dissenting) (“[T]he frequency and size of [punitive damages] awards have been skyrocketing.”); Michael L. Rustad, *Unraveling Punitive Damages: Current Data and Further Inquiry*, 1998 WIS. L. REV. 15, 23 (tracking the growth of punitive damages awards in the 1970s and 1980s).

2. See *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 568 (1996) (“Only when an award can fairly be categorized as ‘grossly excessive’ in relation to these interests does it enter the zone of arbitrariness that violates the Due Process Clause of the Fourteenth Amendment.”).

3. See generally Neil B. Stekloff, *Raising Five Eyebrows: Substantive Due Process Review of Punitive Damages Awards After BMW v. Gore*, 29 CONN. L. REV. 1797, 1817 (discussing how the judicial test “do[es] not provide much guidance to future courts in reviewing punitive damages awards for substantive due process violations”).

4. *Gore*, 571 U.S. at 574-75.

5. *Id.* at 575.

case involves substantial compensatory damages, 1:1, but at all times certainly less than 10:1.<sup>6</sup>

The Eighth Circuit has used the test for the past eight years to varying effect.<sup>7</sup> The circumstances of the instant case, *Ondrisek v. Hoffman*, lent themselves well to the possible re-evaluation of how the Eighth Circuit applies the Supreme Court's test. *Ondrisek* is unique in that the Defendant's actions are the most reprehensible reviewed by the Eighth Circuit since the test was revised in 2003.<sup>8</sup> This case, therefore, gave the Eighth Circuit an opportunity to clarify the application of the test and set forth clear standards by using *Ondrisek* as a high-water mark against which future cases could have been measured. Unfortunately, the Eighth Circuit did not seize this opportunity and kept a previous, less reprehensible case as its high-water mark.

Although the Eighth Circuit declined to make any changes, *Ondrisek* remains an excellent opportunity to review the court's punitive damages jurisprudence and detect trends in its application. When compared to other Eighth Circuit cases since the Supreme Court laid out the punitive damages test, *Ondrisek* reveals that the Eighth Circuit tends to consider cases with "substantial" compensatory damages to be \$500,000 and over,<sup>9</sup> whereas the Supreme Court tends to consider "substantial" to be \$1 million and over.<sup>10</sup> While the Eighth Circuit has a lower threshold for what constitutes "substantial" compensatory damages, it will more frequently apply a ratio higher than 1:1, despite the Supreme Court's contrary recommendation.<sup>11</sup> Furthermore, the Eighth Circuit tends to emphasize the ratio prong of the test, not the reprehensibility prong, as the most important factor.<sup>12</sup> The Eighth Circuit also de-emphasizes the third prong of the test, comparable criminal and civil punishments, to such an extent that it is sometimes completely omitted.<sup>13</sup>

*Ondrisek* reveals that although the Eighth Circuit uses the same test as the Supreme Court, it certainly applies it differently.<sup>14</sup> When comparing *Ondrisek* and other Eighth Circuit cases, one sees a subtle pattern that diverg-

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6. *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 425 (2003); *Gore*, 517 U.S. at 581; *Pac. Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1, 23 (1991).

7. Compare *Boerner v. Brown & Williamson Tobacco Co.*, 394 F.3d 594, 603 (8th Cir. 2005) (holding that a 1:1 ratio was proper), with *Ondrisek v. Hoffman*, 698 F.3d 1020, 1030 (8th Cir. 2012) (holding a 10:1 ratio unconstitutional), and *Haynes v. Stephenson*, 588 F.3d 1152, 1158 (8th Cir. 2009) (finding a 2,500:1 ratio proper).

8. See *infra* Appendix A.

9. *Stogsdill v. Healthmark Partners, L.L.C.*, 377 F.3d 827, 833 (8th Cir. 2004).

10. *Exxon Shipping Co. v. Baker*, 554 U.S. 471, 513 (2008); *State Farm*, 538 U.S. at 425.

11. See *infra* Part V.B. for a chart depicting the application of the *Gore* Guideposts in Eighth Circuit Cases.

12. See *infra* Part V.B.2.

13. See *infra* Part V.B.4.

14. See *infra* Part V.C.

es from the Supreme Court's jurisprudence. However, these differences are not yet distinct enough for the Supreme Court to have granted certiorari to resolve the inconsistencies.<sup>15</sup>

## II. FACTS AND HOLDING

### A. Background

In *Ondrisek v. Hoffman*, two eighteen-year old escapees from a religious cult sued the group's leader for battery, outrage, and conspiracy.<sup>16</sup> Spencer Ondrisek and Seth Calagna, Plaintiffs, were both raised in Tony Alamo Christian Ministries (TACM),<sup>17</sup> an obscure religious sect led by Tony Alamo,<sup>18</sup> a self-professed "spiritual leader" and "prophet" of God.<sup>19</sup> Alamo and TACM espouse a variety of "unorthodox religious beliefs,"<sup>20</sup> such as polygamy, child brides, public beatings, compulsory fasting for children, and government conspiracy.<sup>21</sup> Alamo also taught that those who leave TACM become homosexuals and go to hell.<sup>22</sup> Alamo had complete control of members' finances<sup>23</sup> and instituted a variety of rules that resulted in near-complete isolation from the outside world.<sup>24</sup> At age eight, the Plaintiffs were made to work several hours per day without pay,<sup>25</sup> which allegedly grew to forty hours per week by age fifteen, and seventy hours per week by age eighteen.<sup>26</sup>

Both boys endured considerable physical and verbal abuse.<sup>27</sup> The Plaintiffs alleged that they had to listen daily to "rebuke tapes," wherein Alamo told TACM members that they would never amount to anything and would go to hell.<sup>28</sup> Alamo himself told Ondrisek as a child that if he disobeyed, he

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15. The Supreme Court denied the defendant's petition for writ of certiorari. *Hoffman v. Ondrisek*, 133 S. Ct. 1820 (2013).

16. *Ondrisek v. Hoffman*, 698 F.3d 1020, 1023-24 (8th Cir. 2012).

17. *Id.* at 1023.

18. *Id.* at 1020. Tony Alamo is the pseudonym of Bernie Hoffman. *Id.* at 1023.

19. Appellant's Opening Brief Amended, *Ondrisek*, 698 F.3d 1020 (No. 11-3003), 2012 WL 948049, at \*2.

20. *Ondrisek*, 698 F.3d at 1028.

21. Brief of Appellees, *Ondrisek*, 698 F.3d 1020 (No. 11-3003), 2012 WL 1029825, at \*2-6.

22. *Id.* at \*5.

23. *Ondrisek*, 698 F.3d at 1023.

24. *Id.* This included not traveling outside of the TACM compounds unaccompanied, not speaking to outsiders unless it was to "witness," not attending public school, not watching television, and not listening to the radio. *Id.*

25. *Id.*

26. Brief of Appellees, *supra* note 21, at \*7.

27. *Ondrisek*, 698 F.3d at 1024.

28. Brief of Appellees, *supra* note 21, at \*6.

would be enlisted in the military and shot.<sup>29</sup> Moreover, Alamo even admitted to having the Plaintiffs “hit in the face, with open handed slaps” fifteen to twenty times, then “hit with a wooden paddle” by an adult twenty to forty times.<sup>30</sup> This happened on multiple occasions when the Plaintiffs were as young as twelve.<sup>31</sup> The bases for these punishments were minor offenses, such as horseplay or talking about Harry Potter.<sup>32</sup> These serious beatings, carried out at Alamo’s direction by his enforcer, John Kolbeck, resulted in bruising, blood, and swelling that did not abate for days or weeks, and even resulted in permanent damage.<sup>33</sup> These beatings were so severe on one occasion that Ondrisek passed out and Calagna vomited on himself.<sup>34</sup> The beatings were not exclusive to the Plaintiffs; at age fourteen, Calagna was forced to watch as his elderly father was beaten until he was crying and could not stand or crawl.<sup>35</sup> Both Plaintiffs contemplated suicide, “unable to imagine that death would be worse” than what they had to suffer through on a daily basis.<sup>36</sup> The boys escaped separately from the compound at age eighteen, but remain plagued by nightmares, flashbacks, and other psychological issues.<sup>37</sup>

*Ondrisek v. Hoffman* was not the first lawsuit brought in connection with TACM and Alamo. Plaintiffs also sued the enforcer who actually hit the boys, Kolbeck, in a separate suit, resulting in a damages award of \$500,000 in compensatory damages and \$1 million dollars in punitive damages for the Plaintiffs.<sup>38</sup> In an earlier case, *Miller v. Tony & Susan Alamo Foundation*, Alamo was sued for battery and the emotional distress of two other boys.<sup>39</sup> An adult hit the boys with a paddle 10 times and 140 times respectively, in very much the same circumstances as the Plaintiffs were abused in *Ondrisek*.<sup>40</sup> The first boy received \$1,000 in compensatory damages and \$5,000 in punitive damages, and the second received \$50,000 in compensatory damages and \$500,000 in punitive damages (a 5:1 and 10:1 ratio respectively).<sup>41</sup> The district court characterized Alamo’s conduct as “monstrous” and “cold blooded.”<sup>42</sup> Throughout the years, the Secretary of Labor has repeatedly sued TACM for not paying its workers, improper recordkeeping, and

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29. *Id.* at \*7.

30. Appellant’s Opening Brief Amended, *supra* note 19, at \*5-6, \*13.

31. *Id.*

32. *Ondrisek*, 698 F.3d at 1024.

33. *Id.* Ondrisek has permanent scarring and damage to his hand. *Id.*

34. Brief of Appellees, *supra* note 21, at \*12, \*15.

35. *Id.* at \*10-11.

36. *Ondrisek*, 698 F.3d at 1024 (internal quotation marks omitted).

37. Brief of Appellees, *supra* note 22, at \*12-13, \*18.

38. *Ondrisek*, 698 F.3d at 1030.

39. 748 F. Supp. 695 (W.D. Ark. 1990).

40. *Id.* at 697, 699.

41. *Id.* at 698-99.

42. *Id.* at 698, 700.

other labor law violations.<sup>43</sup> More recently, Alamo was convicted and received a 175-year sentence and \$250,000 in fines<sup>44</sup> on “10 counts of transporting minors across state lines for illicit sex.”<sup>45</sup> These minors were known in the media as “child brides” who had been “spiritually wed” to Alamo when they were allegedly as young as eight.<sup>46</sup>

### B. At Trial

The Plaintiffs sued Alamo in Federal Court, alleging battery, outrage, and conspiracy.<sup>47</sup> At trial, the jury returned a verdict in favor of the Plaintiffs, awarding \$3 million each in compensatory damages and \$30 million each in punitive damages, which the district court declined to remit.<sup>48</sup>

Alamo raised four points of error on appeal: first, that he should be found not liable under the First Amendment freedom of religion clause; second, the district court erred in refusing to instruct the jury in his proposed instruction on battery, which included a statement about corporal punishment being a complete defense to battery; third, that there was insufficient evidence for a finding of outrage; and fourth, that the compensatory and punitive damages were excessive.<sup>49</sup>

On appeal, the Eighth Circuit Court of Appeals affirmed in part and reversed in part.<sup>50</sup> It summarily dismissed Alamo’s first three claims.<sup>51</sup> As to his First Amendment freedom of religion claim, the court merely noted that freedom of religious belief was not absolute and does not extend to permitting “injuries to the ‘equal rights of others.’”<sup>52</sup> It also held that any error on the part of the district judge in not instructing the jury about corporal punishment as a complete defense to battery was harmless and did not affect the amount

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43. See, e.g., Brock v. Tony & Susan Alamo Found., 842 F.2d 1018 (8th Cir. 1998) (affirming a district court award of relief for employees under the Fair Labor Standards Act); Donovan v. Tony & Susan Alamo Found., 722 F.2d 397 (8th Cir. 1983) (holding that the Fair Labor Standards Act applied to the Foundation due to its commercial purpose, and as such, its employees were covered by the Act’s provisions), *aff’d* Tony & Susan Alamo Found. v. Sec’y of Labor, 471 U.S. 290 (1985).

44. Jon Grambell, *Tony Alamo, Evangelist, Sentenced to 175 Years for Sex Crimes*, HUFFINGTON POST (Nov. 13, 2009, 8:35 PM), [http://www.huffingtonpost.com/2009/11/13/Tony-Alamo-Evangelist-Sen\\_n\\_357709.html](http://www.huffingtonpost.com/2009/11/13/Tony-Alamo-Evangelist-Sen_n_357709.html).

45. Ondrisek v. Hoffman, 698 F.3d 1020, 1024 (8th Cir. 2012).

46. *Women: We were Child Brides in U.S.*, CNN (June 23, 2010, 9:15 AM), <http://www.cnn.com/2010/LIVING/06/23/o.child.brides.stories/index.html>.

47. Ondrisek, 698 F.3d at 1024.

48. *Id.*

49. *Id.*

50. *Id.* at 1031.

51. *Id.* at 1024-27.

52. *Id.* at 1024.

of compensatory damages.<sup>53</sup> With regard to Alamo's claim that his conduct did not rise to the level of outrage, the court held that they did not have the power to review this point because it was not preserved for appeal.<sup>54</sup>

Next, the court turned to the issue of the compensatory damages.<sup>55</sup> It determined that "[t]he jury properly weighed the evidence, finding that Alamo continually verbally and physically abused Ondrisek and Calagna" and that Alamo's part in orchestrating and supervising the beatings "justif[ied] the compensatory damages awarded against him."<sup>56</sup> Finally, the court weighed the jury's 10:1 punitive damages ratio.<sup>57</sup> Under the *Gore* factors for punitive damages,<sup>58</sup> the court determined that this case was one of "extreme reprehensibility" and "justif[ied] significant punitive damages," but found the \$30 million in punitive damages to be excessive due to the high punitive-to-compensatory damages ratio.<sup>59</sup> It remitted that amount to \$12 million each (a 4:1 ratio).<sup>60</sup> In remitting the punitive damages award, the Eighth Circuit held that no matter how reprehensible the defendant's actions, a ratio of 10:1 cannot be sustained, and *Eden Electrical* remains the high water mark.<sup>61</sup>

### III. LEGAL BACKGROUND

#### A. Supreme Court Jurisprudence

*Pacific Mutual Life Insurance Co. v. Haslip* was the first case in which the Supreme Court held that the Due Process Clause may require limitations on the size of punitive damage awards.<sup>62</sup> The Haslips had purchased bundled health and life insurance through Pacific Mutual, under which Pacific Mutual would provide the life insurance coverage and Union would provide the health insurance.<sup>63</sup> The Haslips were to send one check for both insurance payments to Pacific Mutual, who was to send Union's share of the insurance premiums on to Union's office.<sup>64</sup> However, the Haslips' Pacific Mutual insurance agent misappropriated most of their payments for himself and did not forward their premiums on to Union, so the Haslips' health insurance cover-

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53. *Id.* at 1026-27.

54. *Id.* at 1025.

55. *Id.* at 1027.

56. *Id.*

57. *Id.* at 1029.

58. *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 574, 580, 583 (1996).

59. *Ondrisek*, 698 F.3d at 1029, 1030-31.

60. *Id.* at 1031.

61. *See infra* Part V.C.

62. 499 U.S. 1, 17-19 (1991).

63. *Id.* at 4.

64. *Id.* at 5.

age lapsed.<sup>65</sup> Unsurprisingly, the agent did not inform the Haslips of the lapse, so when the Haslips needed their health insurance, but were denied for nonpayment, they sued.<sup>66</sup>

The Supreme Court upheld the jury's punitive damages award of "more than 4 times the amount of compensatory damages, [and] more than 200 times the out-of-pocket expenses of respondent Haslip" given the "objective criteria" of the case, but did note that the award "may be close to the line" of constitutional excessiveness.<sup>67</sup> The Court held that giving a judge or jury unlimited discretion to determine the amount of punitive damages could create "extreme results that jar one's constitutional sensibilities."<sup>68</sup> It went on to say that this danger could be mitigated by "reasonableness and adequate guidance from the court," but did not provide such guidance.<sup>69</sup> In her dissent, Justice O'Connor argued that the majority had not gone far enough in limiting punitive damages,<sup>70</sup> given the recent "explosion in the frequency and size of punitive damages awards"<sup>71</sup> where "[m]edians as well as averages [were] skyrocketing."<sup>72</sup>

Two years later, another excessive punitive damages case came before the Supreme Court in *TXO Production Corp. v. Alliance Resources Corp.*<sup>73</sup> In that case, the jury awarded the plaintiff \$19,000 in compensatory damages for slander of title and \$10 million in punitive damages.<sup>74</sup> The Court rejected both the plaintiff's and the defendant's proposed tests for the validity of punitive damages<sup>75</sup> and declined to make any bright line rule or test regarding what would be considered an unconstitutionally large punitive damages award.<sup>76</sup> The Court explicitly rejected considering the ratio of punitive to compensatory damages, holding that "we do not consider the dramatic disparity between the actual damages and the punitive award controlling in a case of this character."<sup>77</sup> In affirming the 524:1 ratio, the Court held that the award was not "so 'grossly excessive'" as to be impermissible.<sup>78</sup>

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65. *Id.*

66. *Id.*

67. *Id.* at 23.

68. *Id.* at 18.

69. *Id.*

70. *See id.* at 43 (O'Connor, J., dissenting).

71. *Id.* at 61.

72. *Id.* at 62.

73. 509 U.S. 443, 446 (1993).

74. *Id.*

75. *Id.* at 456.

76. *Id.* at 458.

77. *Id.* at 462.

78. *Id.*



This seeming reversal from *Haslip*, which had suggested that any ratio higher than 4:1 approached the limits of due process,<sup>79</sup> was justified by the Court in a later case on the rationale that the *TXO* court had affirmed the award on the basis of “the harm to the victim *that would have ensued* if the tortious plan had succeeded,” which would have been “not more than 10 to 1.”<sup>80</sup>

Just three years later, however, in *BMW of North America, Inc. v. Gore*, the Court did exactly what it had declined to do in *Haslip* and *TXO*: it created a test to measure the validity of punitive damages.<sup>81</sup> In this landmark case, Gore sued the manufacturer of his “new” BMW car, which he discovered had sustained minor damage, been repainted, and passed off as new in accordance with BMW’s national policy.<sup>82</sup> The jury awarded compensatory damages of \$4,000, but also awarded him \$4 million in punitive damages.<sup>83</sup> The Alabama Supreme Court reduced this amount to \$2 million (a 1000:1 ratio to a 500:1 ratio), on the grounds that BMW could not be punished for out-of-state actions.<sup>84</sup>

After granting certiorari, the Supreme Court for the first time struck down a jury award as excessive and in violation of the Due Process Clause.<sup>85</sup> It held that in order to be in line with the Constitution, a punitive award must comport with a test (the *Gore* Test): (1) the award must relate to the conduct occurring within the state;<sup>86</sup> (2) the defendant must receive fair notice of the conduct that will subject him to punishment; and (3) the defendant must have fair notice of the severity of the penalty that the state may impose.<sup>87</sup> It produced three important “Guideposts” (the *Gore* Guideposts) for lower courts to follow in regards to the third element: (1) the “degree of reprehensibility” of the defendants’ actions; (2) the ratio between compensatory and punitive damages; and (3) the difference between the given punitive damage award and the criminal and civil penalties for similar conduct.<sup>88</sup> The most important Guidepost to consider is the “degree of reprehensibility” of the defendant’s conduct.<sup>89</sup>

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79. *Pac. Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1, 23 (1991). It must be noted that *Haslip* focused on what procedures must be followed by a jury when determining punitive damages and not so much on setting forth a quantitative ratio for determining those damages. *Id.* at 18. The “test” set forth by *Haslip* may therefore be better characterized as persuasive dicta than substantive law.

80. *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 581 (1996) (emphasis added).

81. *Id.* at 574-75.

82. *Id.* at 563-64.

83. *Id.* at 565.

84. *Id.* at 567.

85. *Id.* at 574-75.

86. *Id.* at 572.

87. *Id.* at 574.

88. *Id.* at 574-75.

89. *Id.* at 575.

When considering the first Guidepost, the degree of reprehensibility, the Court approved consideration of several factors (the *Gore* Factors), including: if the harm was physical or economic; whether the conduct was in reckless disregard for the health and safety of others; whether it was intentional, malicious, or deceitful; whether the target of the conduct was in a vulnerable position; and whether the defendant repeatedly engaged in the conduct even knowing that it was harmful.<sup>90</sup>

When considering the second *Gore* Factor, the ratio, the Court again “rejected the notion that the constitutional line is marked by a simple mathematical formula, even one that compares actual *and potential* damages to the punitive award.”<sup>91</sup> The Court went on to say that low compensatory awards may justify a higher ratio, and higher awards may support a lower ratio.<sup>92</sup> It concluded that “[i]n most cases, the ratio will be within a constitutionally acceptable range, and remittitur will not be justified . . . .”<sup>93</sup> Thus, the Court did not provide even a suggestion of an appropriate ratio, merely noting that when the punitive damage award was so great as to be “breathtaking” it “must surely ‘raise a suspicious judicial eyebrow.’”<sup>94</sup>

The dissenting opinions, one written by Justice Antonin Scalia and joined by Justice Clarence Thomas, and one written by Justice Ruth Bader Ginsburg, vehemently opposed the majority’s new test.<sup>95</sup> Scalia noted that the determination of punitive damages is not an analytical decision, since it measures the “community’s sense of indignation or outrage” and what punishment the defendant deserves, and it is therefore best left to the jury, “the voice of the community,” to decide.<sup>96</sup> He also claimed that the test set forth by the majority “does nothing at all except confer an artificial air of doctrinal analysis upon its essentially ad hoc determination that this particular award of punitive damages was not ‘fair.’”<sup>97</sup> Scalia critically remarked, “In truth, the ‘guideposts’ mark a road to nowhere; they provide no real guidance at all.”<sup>98</sup> Ginsburg voiced a similar opinion, noting that the majority’s test was so vague it ultimately only amounted to a “raised eyebrow” test.<sup>99</sup>

The last punitive damages case of note decided by the Supreme Court was *State Farm Mutual Automobile Insurance Co. v. Campbell* in 2003.<sup>100</sup> In this case, the Campbells attempted to pass six cars at once on a two-lane

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90. *Id.* at 576.

91. *Id.* at 582 (emphasis in original).

92. *Id.*

93. *Id.* at 583.

94. *Id.* (quoting *TXO Prod. Corp. v. Alliance Res. Corp.*, 509 U.S. 443, 481 (1993) (O’Connor, J., dissenting)).

95. *Id.* at 601 (Scalia, J., dissenting); *id.* at 607 (Ginsburg, J., dissenting).

96. *Id.* at 600 (Scalia, J., dissenting).

97. *Id.* at 606.

98. *Id.* at 605.

99. *Id.* at 613 (Ginsburg, J., dissenting).

100. 538 U.S. 408 (2003).

highway, resulting in a deadly car accident.<sup>101</sup> The Campbells, who were uninjured, were eventually found to be 100% at fault.<sup>102</sup> Even though State Farm's investigators knew Mr. Campbell was likely at fault, it decided to contest the claim and declined a settlement offer from both other parties for \$50,000, the policy limit.<sup>103</sup> Moreover, it assured the Campbells that they were safe from liability and that they did not need to procure separate counsel.<sup>104</sup> State Farm agents altered their records to make the Campbells seem less culpable.<sup>105</sup> When the Campbells were found to be liable for nearly \$186,000 in damages in the ensuing jury trial, the insurance company refused to pay the extra and told the Campbells to put a for sale sign on their house.<sup>106</sup> The Campbells sued State Farm for bad faith.<sup>107</sup>

The jury awarded the Campbells \$2.6 million in actual damages and \$145 million dollars in punitive damages.<sup>108</sup> The district court remitted the actual damages to \$1 million, but upheld the punitive award (a 145:1 ratio).<sup>109</sup> The Supreme Court, however, determined that the case was "neither close nor difficult," and held that the punitive damages award was grossly excessive and in violation of the Due Process Clause.<sup>110</sup> The Court held that "in practice, few awards exceeding a single-digit ratio between punitive and compensatory damages, to a significant degree, will satisfy due process."<sup>111</sup> The Court quoted the 4:1 ratio from *Haslip*, holding that this ratio is "instructive" but not "binding."<sup>112</sup> It went on to note that "[w]hen compensatory damages are substantial, then a lesser ratio, *perhaps only equal to compensatory damages*, can reach the outermost limit of the due process guarantee."<sup>113</sup> The Court found that the \$1 million dollars of compensatory damages were substantial and remanded the case.<sup>114</sup>

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101. *Id.* at 412-13.

102. *Id.*

103. *Id.* at 413.

104. *Id.*

105. *Id.* at 419.

106. *Id.* at 413.

107. *Id.*

108. *Id.* at 415.

109. *Id.* at 415-16.

110. *Id.* at 418.

111. *Id.* at 425.

112. *Id.*

113. *Id.* (emphasis added). The Supreme Court gave further weight to this 1:1 ratio in the maritime case of *Exxon Shipping Co. v. Baker*, holding that the 5:1 punitive damages levied against Exxon for the *Exxon Valdez* oil spill in Alaska were excessive and a 1:1 ratio was appropriate. 554 U.S. 471, 513 (2008).

114. *State Farm*, 538 U.S. at 429.

*B. Eighth Circuit Jurisprudence*

The Eighth Circuit has dealt with nine cases involving significant punitive damages awards similar to those in *Ondrisek*.<sup>115</sup> In *Williams v. ConAgra Poultry Co.* an employee sued his company for hostile work environment and wrongful termination based upon disparate treatment<sup>116</sup> and numerous instances of “egregious racial harassment” against black workers.<sup>117</sup> This harassment included racist remarks and “threatening actions, such as nooses left at the work stations of black employees, a black doll hung by a noose in the factory, and invitations extended to black employees to attend Ku Klux Klan (KKK) hunting parties at which they would be the hunted.”<sup>118</sup> None of the actions were directed at the plaintiff personally.<sup>119</sup> The Eighth Circuit noted that it was unclear how many of these incidents actually affected the Plaintiff; who seemed to have wholesale adopted the allegations of another employee in an earlier case.<sup>120</sup> The jury awarded him approximately \$2 million in compensatory damages and \$12 million in punitive damages.<sup>121</sup> The court remitted the damages to \$600,000 each,<sup>122</sup> in part because the award was far in excess of what an analogous case under Title VII would allow (\$30,000)<sup>123</sup> and because the ratio exceeded the level that the Supreme Court suggested was constitutional.<sup>124</sup> Notably, the court held that the \$600,000 award here was “a lot of money,” enough to fall into the 1:1 ratio for substantial awards suggested in *State Farm*.<sup>125</sup> The court did not examine the reprehensibility of the employer’s conduct under the *Gore* Factors, simply noting that it was not so “egregiously reprehensible” to warrant a higher ratio than the recommended 1:1.<sup>126</sup>

*Stogsdill v. Healthmark Partners, L.L.C.* involved a malpractice action against a nursing home after nurses carelessly and fraudulently mischarted an elderly patient’s condition and failed to treat her or contact the physician, even after the patient complained and asked several times for the doctor.<sup>127</sup> The decedent died in the hospital of a perforated bowel after several days of constipation; the doctor testified that she appeared to be pregnant due to the

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115. This Note was researched and written in November, 2012, and has not been updated for new Eighth Circuit cases meeting this criteria since that time.

116. 378 F.3d 790, 793 (8th Cir. 2004).

117. *Id.* at 796.

118. *Id.* at 793.

119. *Id.* at 794.

120. *Id.* at 797-98.

121. *Id.* at 793.

122. *Id.* at 799.

123. *Id.* at 798.

124. *Id.* at 796.

125. *Id.* at 799.

126. *Id.*

127. 377 F.3d 827, 830-31 (8th Cir. 2004).

amount of free stool in her abdomen.<sup>128</sup> The jury awarded the patient's estate \$500,000 in compensatory damages and \$5 million in punitive damages, which was more than eight times the company's net worth.<sup>129</sup> In contrast to *Williams*, the court fully detailed the *Gore* Guideposts, finding the degree of reprehensibility to be substantial,<sup>130</sup> the \$500,000 of compensatory damages to be likewise substantial,<sup>131</sup> and the legal penalties to be nowhere near the amount necessary to warrant such a high award.<sup>132</sup> The court concluded that the 4:1 ratio suggested in *Haslip* was appropriate and remitted the punitive damages award to \$2 million.<sup>133</sup>

*Diesel Machinery, Inc. v. B.R. Lee Industries, Inc.* arose from a contract dispute wherein a manufacturer unlawfully terminated Diesel Machinery's franchise agreement with them.<sup>134</sup> Eight months into the contract the manufacturer unilaterally terminated the agreement because it had acquired another product line and planned to use that line's pre-existing dealer network to sell its products.<sup>135</sup> The manufacturer had terminated several other dealership agreements across the country.<sup>136</sup> The jury awarded the plaintiff company \$665,000 in actual damages and \$4.3 million in punitive damages, which the district court remitted to \$2.66 million.<sup>137</sup> On appeal, the court set forth the *Gore* factors and determined that the last two, repetitive conduct and deliberate intent,<sup>138</sup> were present, and that the manufacturer's conduct was "sufficiently reprehensible to justify the punitive damage award [of 4:1]."<sup>139</sup> It also rejected the contention that the award was substantial enough to justify a 1:1 ratio, relying on the 4:1 ratio and \$500,000 compensatory award in *Stodsgill*.<sup>140</sup> Finally, it noted that while the criminal penalties were minimal, the civil penalties "could be substantial."<sup>141</sup> The court ultimately upheld the award.<sup>142</sup>

In *JCB, Inc. v. Union Planters Bank*, a manufacturer of heavy construction equipment and a bank were both creditors of Machinery, Inc., who had bought construction equipment from JCB on credit and taken out a

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128. *Id.* at 830.

129. *Id.* at 829.

130. *Id.* at 832.

131. *Id.* at 833.

132. *Id.* at 834.

133. *Id.*

134. 418 F.3d 820, 826 (8th Cir. 2005).

135. *Id.* at 827-28.

136. *Id.* at 828.

137. *Id.* at 826.

138. *Id.* at 839.

139. *Id.* at 840.

140. *Id.*

141. *Id.*

142. *Id.*

loan from the bank.<sup>143</sup> Machinery, Inc. filed for bankruptcy and JCB took back its equipment.<sup>144</sup> The bank, however, unlawfully entered onto JCB's property, repossessed the equipment without notice, and auctioned it off despite JCB's protests.<sup>145</sup> The jury found for JCB on the conversion claim (awarding \$1,446,500 in compensatory and \$1,150,000 in punitive damages) and on the trespass claim (awarding \$1 in nominal damages and a \$1,087,500 punitive damages award).<sup>146</sup> The court determined that the reprehensibility of the bank's conduct in this case was comparable to that of the defendant in *Diesel Machinery*.<sup>147</sup> On the conversion claim the court held that, given that the amount of compensatory damages was substantial, a 1:1 ratio was warranted.<sup>148</sup> On the trespass claim the court reduced the award by one tenth to \$108,750, given the minimal criminal punishment and comparable civil cases.<sup>149</sup>

*Moore v. American Family Mutual Insurance Co.* was another bad faith insurance claim, wherein the plaintiff's newly purchased duplex was destroyed by a fire and the insurance company refused to pay on the unsubstantiated theory that Moore had intentionally set fire to the duplex.<sup>150</sup> The jury returned an award of approximately \$1.15 million in actual damages and \$1.15 million in punitive damages.<sup>151</sup> The court concluded that the harm to Mr. Moore was more than simple economic harm since he suffered reputational harm, emotional distress, and economic harm from the criminal charges filed against him when he was accused of arson.<sup>152</sup> Moreover, there was evidence that the insurance company's treatment of the Moore claim "was typical of how it handled similar claims."<sup>153</sup> The civil penalties for the insurance company's actions could have included the loss of their license in the forum state, which the judge noted "might well prove much more costly than a punitive damages award" of \$1.15 million.<sup>154</sup> The court ultimately concluded that the "relevant ratio here is one to one and well within the acceptable range."<sup>155</sup>

In *White v. McKinley*, White sued his ex-wife, Tina, and a police officer for various torts and violations of his constitutional rights after Tina falsely accused him of molesting her daughter.<sup>156</sup> White married Tina, who had two

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143. 539 F.3d 862, 867 (8th Cir. 2008).

144. *Id.* at 868.

145. *Id.*

146. *Id.* at 869.

147. *Id.* at 875.

148. *Id.* at 876.

149. *Id.* at 877.

150. 576 F.3d 781, 784 (8th Cir. 2009).

151. *Id.*

152. *Id.* at 790.

153. *Id.*

154. *Id.* at 791.

155. *Id.*

156. 605 F.3d 525, 528 (8th Cir. 2010).

children from a previous marriage.<sup>157</sup> The biological father agreed to terminate his parental rights so that White could adopt the children, but only after Tina threatened to charge the biological father with child molestation.<sup>158</sup> When her subsequent marriage to White deteriorated, Tina made a false police report about White shoving her, and when the police came to talk to her about the report she alleged that White had been molesting her daughter for years.<sup>159</sup> The officer investigating the charges began a sexual relationship with Tina and throughout the investigation made several crucial errors and omissions that would likely have exonerated White.<sup>160</sup> In an effort to avoid wrongful incarceration, White fled the country, but was captured and returned.<sup>161</sup> In his suit against Tina and the officer, the jury found in favor of White and awarded \$14 million dollars in actual damages and \$1 million in punitive damages against both Tina and the officer.<sup>162</sup> Only the officer challenged the award as excessive.<sup>163</sup> The court did not quantify the reprehensibility of the officer's conduct or consider comparable civil or criminal punishments, but when affirming simply noted that the punitive damages award was only 7% of the actual damages award.<sup>164</sup>

In *Ondrisek*, the Eighth Circuit gave great consideration to three previous cases it had decided.<sup>165</sup> The first case was *Eden Electrical, Ltd. v. Amana Co.*, in which Amana, a manufacturing company, decided to induce a "sucker" distributing company (Eden Electrical) to enter into an exclusive dealership agreement it had no intention of honoring.<sup>166</sup> In this agreement, Amana would offload outdated "junk" inventory onto the distributor in exchange for \$2.4 million dollars.<sup>167</sup> As soon as Eden Electrical paid them the money, Amana terminated the distributorship, ceased communications, and appointed another company to be its real distributor.<sup>168</sup> Amana's agents had expressed a desire to "f\*\*\*" and "kill" Eden Electrical after taking its money in the sham dealership plot.<sup>169</sup> Throughout the discovery and trial process Amana and its executives further lied and perjured themselves in an effort to cover up their intentional wrongdoing.<sup>170</sup> The jury awarded \$2.1 million dollars in compensatory damages and \$18 million dollars in punitive damages; the trial judge

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157. *Id.*

158. *Id.*

159. *Id.* at 529.

160. *Id.* at 529-30.

161. *Id.* at 530.

162. *Id.* at 531.

163. *Id.* at 538.

164. *Id.* at 538-39.

165. *Ondrisek v. Hoffman*, 698 F.3d 1020, 1029-30 (8th Cir. 2012).

166. 258 F. Supp. 2d 958, 961-62 (N.D. Iowa 2003).

167. *Id.*

168. *Id.* at 963.

169. *Eden Elec., Ltd. v. Amana Co.*, 370 F.3d 824, 829 (8th Cir. 2004).

170. *Eden Elec.*, 258 F. Supp. 2d at 963-64.

remitted the punitive damages award to \$10 million dollars.<sup>171</sup> On appeal, the Eighth Circuit affirmed the 4.8:1 ratio<sup>172</sup> on the grounds that Defendant's conduct was "extraordinarily reprehensible."<sup>173</sup>

The second case the Eighth Circuit emphasized, *Consenco Finance Servicing Corp. v. North American Mortgage Co.*, involved mortgage companies competing in the subprime lending market.<sup>174</sup> North American Mortgage (NAM) solicited several of Consenco's employees to leave Consenco for NAM and encouraged those employees to bring with them some of Consenco's information on which customers to target and said customers' private financial information.<sup>175</sup> At trial, the jury found for Consenco on its claims and awarded it \$3.5 million in actual damages and \$18 million in punitive damages (a 5.1:1 ratio).<sup>176</sup> The district court declined to remit the punitive damages award.<sup>177</sup> On appeal, the Eighth Circuit held that NAM's conduct was "sufficiently reprehensible" to support punitive damages, but given "the nature of [NAM's] conduct and the harm suffered solely by Consenco," it determined that the award was excessive and remitted it to \$7 million (a 2:1 ratio).<sup>178</sup>

The third case was *Boerner v. Brown & Williamson Tobacco Co.*, in which the widower of a lifelong smoker sued the makers of Pall Mall cigarettes.<sup>179</sup> At trial, the jury found for the plaintiff on his defective design claim and awarded him a little over \$4 million in compensatory damages and \$15 million in punitive damages (a 3.5:1 ratio).<sup>180</sup> The Eighth Circuit held that Defendant's conduct was "highly reprehensible," in that:

Pall Mall cigarettes were extremely carcinogenic and extremely addictive – substantially more so than other types of cigarettes; the sale of this defective product occurred repeatedly over the course of many years despite American Tobacco's knowledge that the product was dangerous to the user's health; and American Tobacco actively misled consumers about the health risks associated with smoking. Moreover, the reprehensible conduct was shown to relate directly to the harm suffered by Mrs. Boerner: a most painful, lingering death following extensive surgery.<sup>181</sup>

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171. *Eden Elec.*, 370 F.3d at 826.

172. *Id.*

173. *Id.* at 829.

174. 381 F.3d 811, 814 (8th Cir. 2004).

175. *Id.* at 815.

176. *Id.* at 814.

177. *Id.* at 818.

178. *Id.* at 825.

179. 394 F.3d 594, 598 (8th Cir. 2005).

180. *Id.*

181. *Id.* at 602-03.



Although the court noted that “the degree of reprehensibility is the ‘most important indicium of the reasonableness of a punitive damages award,’”<sup>182</sup> the court remitted the damages down to \$5 million, a 1.2:1 ratio, on the ground that the second *Gore* Guidepost calls for a smaller ratio when the compensatory award is already high.<sup>183</sup> The court quoted *State Farm*: “When compensatory damages are substantial, then a lesser ratio, perhaps only equal to compensatory damages, can reach the outermost limit of the due process guarantee.”<sup>184</sup>

These nine cases form the basis of Eighth Circuit precedence regarding excessive punitive damages litigation and play an important part in evaluating the outcome of *Ondrisek v. Hoffman*.

#### IV. INSTANT DECISION

On appeal before the Eighth Circuit, Alamo first argued that the large punitive damages award should be eliminated altogether because it was not designed to deter him, but to punish him for his “unorthodox religious beliefs.”<sup>185</sup> In support, he asserted that since he was incarcerated serving a 175 year sentence, and therefore could not repeat his conduct, there was no deterrence value.<sup>186</sup> The Eighth Circuit rejected this argument, holding that the two recognized policy objectives for punitive damage awards, to punish the wrongdoer and deter similar wrongful conduct in others,<sup>187</sup> clearly justified a punitive damages award in this situation.<sup>188</sup>

The court considered Alamo’s second argument, that the excessive amount of the award violated due process and Arkansas law, at length.<sup>189</sup> Since Arkansas has adopted the federal substantive due process analysis for excessive punitive damages awards, the court analyzed the federal and state questions together by applying the *Gore* Test and Guideposts, noting that the first Guidepost, reprehensibility, was the most important factor of the three.<sup>190</sup> The court then laid out the specific factors it could consider when determining reprehensibility:

[1] the harm caused was physical as opposed to economic; [2] the tortious conduct evinced an indifference to or a reckless disregard of the health or safety of others; [3] the target of the conduct had financial

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182. *Id.* at 602.

183. *Id.* at 603.

184. *Id.* (quoting *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 425 (2003)).

185. *Ondrisek v. Hoffman*, 698 F.3d 1020, 1028 (8th Cir. 2012).

186. *Id.*

187. *Id.* at 1027 (citing *Exxon Shipping Co. v. Baker*, 554 U.S. 471, 492 (2008)).

188. *Id.* at 1028.

189. *Id.* at 1028-31.

190. *Id.* at 1028.

vulnerability; [4] the conduct involved repeated actions or was an isolated incident; and [5] the harm was the result of intentional malice, trickery, or deceit, or mere accident.<sup>191</sup>

In applying the *Gore* Factors to the instant case, the court determined that the harm caused was physical in nature, “evidenced a reckless disregard for the health and safety” of the Plaintiffs, and was particularly reprehensible in that Alamo was “in a position of trust as a religious leader, yet he continually abused that power to subject children to substantial physical and emotional abuse.”<sup>192</sup> Moreover, this was not the first time Alamo had been found liable for battering children, and in *Miller*, the lesser damages imposed<sup>193</sup> had not deterred him from repeating his conduct, so greater damages were appropriate.<sup>194</sup> The court thus concluded Alamo’s actions were “exceptionally reprehensible, justifying significant punitive damages.”<sup>195</sup>

As to the second factor, the court agreed that the 10:1 ratio of punitive damages to compensatory damages was unconstitutionally excessive, despite the reprehensibility of Alamo’s actions.<sup>196</sup> The court set forth the prevailing standards on damage award ratios from *State Farm*, *Gore*, and *Haslip*, noting that when “compensatory damages are substantial, then a lesser ratio, perhaps only equal to compensatory damages, can reach the outermost limit of the due process guarantee” and that “an award of more than four times the amount of compensatory damages might be close to the line of constitutional impropriety.”<sup>197</sup> Given that the Supreme Court of the United States had already determined that a \$1 million compensatory award was substantial, the \$3 million compensatory award in *Ondrisek* undoubtedly also qualified as substantial.<sup>198</sup>

The court then recounted three instances in which it had reviewed punitive damages cases with compensatory damages greater than \$1 million and a ratio of greater than 1:1.<sup>199</sup> After reviewing the damage ratios in *Eden Electrical*, *Consenco*, and *Boerner*, the *Ondrisek* court then turned to the third Guidepost in *Gore* and compared punitive damages in similar civil cases.

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191. *Id.* (quoting *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 419 (2003)).

192. *Id.* at 1029.

193. In the previous case, one boy received \$1,000 in compensatory damages and \$5,000 in punitive damages, the second received \$50,000 in compensatory damages and \$500,000 in punitive damages (a 5:1 and 10:1 ratio respectively). *Miller v. Tony & Susan Alamo Found.*, 748 F. Supp. 695, 698-99 (W.D. Ark. 1990).

194. *Ondrisek*, 698 F.3d at 1029.

195. *Id.*

196. *Id.* at 1030.

197. *Id.* at 1029 (quoting *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 425 (2003)).

198. *Id.* (citing *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 426 (2003)).

199. *Id.* at 1029-30.

The court considered both predecessors of the instant case. In *Miller*, the damages were 10:1, but the court noted that the compensatory damages in *Miller* were significantly smaller (\$50,000) and that the case was not appealed.<sup>200</sup> In *Kolbeck*, the ratio was only 2:1, but Kolbeck was “only carrying out Alamo’s orders.”<sup>201</sup>

The court then compared the instant case to *Eden Electrical*, *Consenco*, and *Boerner*. The court also attached an appendix containing a chart detailing all Eighth Circuit Cases appealed on the basis of excessive punitive damage awards since *Gore*.<sup>202</sup> It held that Alamo’s conduct was more reprehensible than in *Consenco* or *Boerner*, and concluded that “a reduction to 2:1 or 1:1 was not required.”<sup>203</sup> And, although Alamo’s actions were no less reprehensible than those of the defendant in *Eden Electrical*, the greater compensatory damages awarded in the instant case warranted a ratio of only 4:1, or \$12 million per plaintiff.<sup>204</sup>

## V. COMMENT

### A. Methodology

*Ondrisek v. Hoffman* illuminates the difficulties with applying the *Gore* Guideposts and other Supreme Court precedent. Supreme Court jurisprudence regarding punitive damages has varied, with the general trend indicating that high ratio punitive damages awards are becoming a thing of the past.<sup>205</sup> In 1991, the *Haslip* Court determined that awards in excess of 4:1 may be near the constitutional limit.<sup>206</sup> In 1993, the Court in *TXO* rejected the use of ratios in the given decision and affirmed a 524:1 award.<sup>207</sup> In 1996, the *Gore* Court again reversed course, citing with approval *Haslip*’s 4:1 ratio and reinterpreting the ratio in *TXO* to be “not more than 10 to 1” when considering the potential harm the plaintiff could have suffered.<sup>208</sup> In *State Farm* in 2003 the Court agreed with the 4:1 ratio in *Haslip*, as well as the 10:1 maximum ratio in *TXO*, but suggested that a 1:1 ratio is appropriate for

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200. *Id.* at 1030.

201. *Id.*

202. *Id.* at 1031 n.4.

203. *Id.* at 1030.

204. *Id.* at 1030-31.

205. See generally *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 426 (2003) (reversing 145:1 ratio); *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 560 (1996) (reversing 500:1 ratio); *TXO Prod. Corp. v. Alliance Res. Corp.*, 509 U.S. 443, 462 (1993) (affirming 524:1 ratio); *Pac. Mut. Life Ins. Co v. Haslip*, 499 U.S. 1, 23 (1991) (affirming 4:1 ratio).

206. *Haslip*, 499 U.S. at 23.

207. *TXO*, 509 U.S. at 462.

208. *Gore*, 517 U.S. at 581.

high compensatory damages cases.<sup>209</sup> In a relatively short span of time the Court has greatly restrained the ability of juries to impose outlier verdicts where punitive damages are excessively large.

The Eighth Circuit has had the difficult task of applying these amorphous standards to cases in its own jurisdiction, with mixed success.<sup>210</sup> Since *Gore*, the Eighth Circuit has entertained 27 cases that disputed whether punitive damage awards were excessive,<sup>211</sup> which ultimately resulted in ratios as high as 100:1<sup>212</sup> and punitive damages as much as \$18 million.<sup>213</sup> There are two particular areas of concern which this subsection addresses: first, the depth of analysis with which the *Gore* Guideposts are applied to cases, and second, the degree to which the factors are useful at all in determining the constitutionality of punitive damages.

In an attempt to weigh the appropriateness of the punitive damages award in *Ondrisek* with the rest of Eighth Circuit punitive damages cases, I constructed two charts for comparison purposes, much like the Eighth Circuit did in its opinion in *Ondrisek*. I selected the cases that were handed down in 2004 or later, after *State Farm* was decided, and in which the amount of punitive damages was held to be substantial (i.e., \$500,000 and over).<sup>214</sup> This produced nine cases for comparison.

I then charted these nine cases, along with *Ondrisek*, based on the *Gore* Guideposts: the compensatory damages awarded, the final ratio, the reprehensibility of the conduct based on the *Gore* Factors, and the comparable civil and criminal punishments.<sup>215</sup> The Supreme Court held in *State Farm* that “[t]he existence of any one of [the *Gore*] factors weighing in favor of a plaintiff may not be sufficient to sustain a punitive damages award; and the absence of all of them renders any award suspect.”<sup>216</sup> Thus, I included the number of *Gore* Factors that were present in each case. As further means of measuring reprehensibility, I included how many of these factors were particularly compelling, based upon both my own judgment and the weight the court seemed to give to that factor, which I discuss in greater detail in the text. I judged the severity of the comparable civil and criminal punishments on a high/low scale based on whether the conduct amounted to a felony in

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209. *State Farm*, 538 U.S. at 425.

210. See generally *Ondrisek v. Hoffman*, 698 F.3d 1020, 1031 n.4 (8th Cir. 2012) (providing an appendix that lists Eighth Circuit cases addressing the constitutionality of punitive damages).

211. *Id.*

212. See *United States v. Big D Enters., Inc.*, 184 F.3d 924, 933 (8th Cir. 1999).

213. See *Consenco Fin. Servicing Corp. v. N. Am. Mortg. Co.*, 381 F.3d 811, 825 (8th Cir. 2004).

214. See, e.g., *Stogsdill v. Healthmark Partners, L.L.C.*, 377 F.3d 827, 833 (8th Cir. 2004) (holding that a punitive damages award of \$5,000,000 was “conscience-shocking” and violated due process).

215. See *infra* Appendix A.

216. *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 419 (2003).

criminal cases or fines and liability in excess of \$500,000 in similar civil cases. For example, a case that could have been a felony would be rated high, whereas a civil case with a potential of \$150,000 worth of compensatory damages would be rated low.

Of course, the chart should not be considered authoritative. The *Gore* Guideposts are, after all, merely guidance in determining when a punitive award violates due process; it is not a mechanistic test. The chart is to be used for only comparison purposes to find general trends in the application of the *Gore* Guideposts, the same way the Eighth Circuit attached a similar chart in the appendix to its opinion.

*B. Comparison*

*Gore Guideposts as Applied to Eighth Circuit Cases*

<i>Case Name &amp; Description</i>	<i>Compensatory Damages</i> <sup>217</sup>	<i>Ratio</i>	<i>Gore Factors Present</i> <sup>218</sup>	<i>Compelling Gore Factors</i> <sup>219</sup>	<i>Comparable Punishments</i>
<i>Eden Electrical Fake Dealership</i>	\$2,100,000	4.8:1	1	1	High
<i>Ondrisek Abuse in Cult</i>	\$3,000,000	4:1	5	4	High
<i>Stodsgill Nurse Malpractice</i>	\$500,000	4:1	3	2	High
<i>Diesel Machinery Dealership Contract</i>	\$665,000	4:1	2	0	High
<i>Consenco Subprime Mortgages</i>	\$3,500,000	2:1	2	1	High
<i>Boerner Death of Smoker</i>	\$4,025,000	2:1	4	1	High
<i>Williams Employment Discrimination</i>	\$600,000	1:1	3	2	High
<i>Moore Insurance: Arson</i>	\$1,150,000	1:1	3	2	High
<i>JCB Conversion: Machinery</i>	\$1,446,500	0.77:1	1	0	High
<i>White Child Molestation</i>	\$14,000,000	0.07:1	4	2	High

217. These compensatory damages amounts have been taken from the chart in *Ondrisek v. Hoffman*, 698 F.3d 1020, 1031 n.4 (8th Cir. 2012).

218. *See infra* Appendix A.

219. *See infra* Appendix A.

The first case, *Consenco*, involved institution-wide wrongdoing by a subprime mortgage lending institution that was stealing a competitor's information on customers.<sup>220</sup> When reviewing the *Gore* Factors in this case, only two factors are present, and only one of them was particularly compelling. It is clear that the victim mortgage company was neither particularly vulnerable nor physically harmed by the aggressor mortgage company's actions. While the aggressor company did encourage their new hires to bring over their competitor's information with them,<sup>221</sup> evidencing intentionality, it was not particularly malicious in nature, simply a dubious business practice to get ahead in the market. The only truly compelling factor in this case was that this "encouragement" to bring over their competitor's information was a company-wide occurrence repeated many times.<sup>222</sup>

*Boerner* was a typical tobacco tort suit from 2005.<sup>223</sup> The tobacco company used trickery and evidenced a casual disregard for their consumers' health and safety by intentionally misleading them about the safety of Pall Mall cigarettes.<sup>224</sup> Unsurprisingly, the use of the highly carcinogenic cigarettes resulted in Mrs. Boerner's slow death from lung cancer.<sup>225</sup> On the other hand, Mrs. Boerner was an adult fully capable of reading the Surgeon General's warnings about the effect of cigarettes, which were published as early as 1965.<sup>226</sup> Since she continued to smoke for a good fifteen years after the warnings began being published,<sup>227</sup> there was clearly some element of comparative fault in this case. Additionally, the tobacco company did not have any malicious intent to inflict lung cancer and death upon Mrs. Boerner.<sup>228</sup> Finally, the tobacco company's actions were only indirectly responsible for Mrs. Boerner's death. The only factor that was particularly compelling in this case was how the tobacco company's actions affected many different customers over a period of many years.

At first blush, *Williams v. ConAgra Poultry Co.* appears to be an immensely compelling case for punitive damages: the white employees acted outrageously in harassing the black employees.<sup>229</sup> An examination of the *Gore* Test and *Gore* Factors, however, reveals a more modest case overall.

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220. *Consenco Fin. Servicing Corp. v. N. Am. Mortg. Co.*, 381 F.3d 811, 815 (8th Cir. 2004).

221. *Id.*

222. *Id.* at 817.

223. *Boerner v. Brown & Williamson Tobacco Co.*, 394 F.3d 594 (8th Cir. 2005).

224. *Id.* at 602-03.

225. *Id.* at 598.

226. See Cent. for Disease Control, *History of the Surgeon General's Reports on Smoking and Health*, CDC.GOV, [http://www.cdc.gov/tobacco/data\\_statistics/sgr/history/](http://www.cdc.gov/tobacco/data_statistics/sgr/history/) (last updated July 6, 2009).

227. *Boerner*, 394 F.3d at 598.

228. *Id.* at 603.

229. 378 F.3d 790, 793 (8th Cir. 2004).

The employer's agents showed a severe disregard for the black employee's mental health and safety by creating an intimidating environment where violence seemed imminent.<sup>230</sup> The actions of the employer's agents were clearly malicious and intentional in nature, not mere negligence. The black employees were relatively vulnerable, given that they were subordinates whose livelihoods depended upon their jobs. On the other hand, however, there was no physical harm done to the plaintiff, or any other black employee. Also, as the Eighth Circuit noted, it was unclear how many of the prior incidents actually affected the Plaintiff; he seemed to have just copied the allegations of another employee in an earlier case.<sup>231</sup> All told, there were three *Gore* Factors present, but only two – intentional or malicious conduct and repetitive occurrences – were truly compelling.<sup>232</sup>

*Stodgill*, the nursing home case,<sup>233</sup> is even less compelling, as far as excessive punitive damages cases go. The most persuasive factor in this case was the amount of physical harm the decedent underwent, up to and including her wrongful death.<sup>234</sup> Also compelling was the decedent's vulnerability. She was a woman confined to a wheelchair in a nursing home.<sup>235</sup> Her degree of comprehension and ability to communicate, which would have affected the degree of her vulnerability, were unclear. The nurses' disregard for her health and safety by improper charting and failure to bring the doctor were also noteworthy.<sup>236</sup> What really diminished the overall weight of this case was the lack of intent displayed by the nurses. This was a case of negligence, not malice.<sup>237</sup> The point of punitive damages is to punish the defendant for his conduct, and negligent conduct is less worthy of punishment than deliberate, unapologetic conduct like that of *Alamo*.<sup>238</sup> To be sure, this was a terrible event worthy of significant compensatory damages, but it ultimately amounted to a run-of-the-mill medical malpractice claim. To award this case a 4:1 punitive damages ratio was a bit excessive when compared to the other cases.<sup>239</sup>

*Diesel Machinery* involved a cancelled dealership contract because the manufacturer wanted to sell its product line in its own stores,<sup>240</sup> and it was

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230. *Id.* at 797-98.

231. *Id.* at 793-94.

232. *See infra* Appendix A.

233. *Stodgill v. Healthmark Partners, L.L.C.*, 377 F.3d 827 (8th Cir. 2004).

234. *See id.* at 830.

235. *Id.*

236. *Id.* at 832.

237. *Id.*

238. *See, e.g., id.* at 829-30 (noting that “an award of punitive damages requires proof that the defendant acted wantonly in causing the injury or with such a conscious indifference to the consequences that malice may be inferred”).

239. *Id.* at 834.

240. *Diesel Machinery, Inc. v. B.R. Lee Indus., Inc.*, 418 F.3d 820, 826-28 (8th Cir. 2005).

not a particularly compelling case. There was no physical harm done to the plaintiff company; the harm was only a lost dealership contract.<sup>241</sup> The manufacturer did not act in disregard for the dealer's health and safety.<sup>242</sup> The "victim" company was a business that sought legal representation,<sup>243</sup> which did not make them particularly vulnerable. Although the manufacturer terminated several contracts around the country,<sup>244</sup> the decision cannot be characterized as malicious; indeed, it appeared to have been strictly a business decision (albeit a poor one). However, it was done intentionally, without regard for the law or consideration of the dealers.<sup>245</sup> This case has only two *Gore* Factors present, the repetitiveness of the conduct and intentional trickery, but neither is particularly compelling. Nevertheless, the damages ratio was 4:1.<sup>246</sup>

*JCB, Inc. v. Union Planters Bank* was a case involving a debtor third party whose creditor bank illegally repossessed and sold the debtor's equipment that was stored on a another creditor's property.<sup>247</sup> This case is similar to *Diesel Machinery* in several ways: there was no physical harm inflicted, the parties were both companies that make multimillion dollar business deals,<sup>248</sup> and there was little disregard for the company's health or safety. Unlike *Diesel Machinery*, the conduct was intentional and can be aptly characterized as "trickery," but evidence indicated that this scheme was only perpetrated once. All told, only one *Gore* Factor was present, and it was not very persuasive.

*Moore*, the alleged arson and bad faith insurance case,<sup>249</sup> was a moderately compelling case. Moore was not particularly vulnerable as an average adult. However, although Moore was not physically assaulted, the trial court aptly pointed out that he suffered serious harm by being falsely accused of arson.<sup>250</sup> The insurance company evidenced a disregard for Moore's mental health and safety because it knew or should have known that such a severe false accusation would inflict emotional distress, and it similarly disregarded any threats to his physical health and safety that may have resulted from his incarceration.<sup>251</sup> The insurance carrier's decision to accuse Moore of arson was a fairly routine business practice and seemed more economically motivated than by personal malice.<sup>252</sup> Three of the *Gore* Factors

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241. *Id.* at 829.

242. *Id.*

243. *Id.*

244. *Id.* at 828-29.

245. *Id.* at 840.

246. *Id.* at 840.

247. 539 F.3d 862, 867 (8th Cir. 2008).

248. *Id.* at 867-68.

249. *Moore v. Am. Family Mut. Ins. Co.*, 576 F.3d 781, 784 (8th Cir. 2009).

250. *Id.* at 790.

251. *Id.*

252. *Id.*



were present, and two of them – harm inflicted and repetitiveness – were fairly compelling here.

The most compelling punitive damages case yet has been *White*, in which Plaintiff was falsely accused of molesting his stepdaughter.<sup>253</sup> Like in *Moore*, Plaintiff suffered severe harm stemming from false accusations that were more than purely economic in nature.<sup>254</sup> Defendants also displayed a disregard for White's economic health by effectively ruining his life and his physical health and safety,<sup>255</sup> since pedophiles tend to be ostracized in prison. While Plaintiff was not particularly vulnerable, given his status as a capable adult, his wife's conduct was shockingly malicious and the police officer's manipulation of the case can be characterized as trickery. Also, this was not his wife's first time threatening to accuse a husband of molesting her daughter, indicating repeated conduct on her part.<sup>256</sup> Four of the five *Gore* Factors were present, and the harm White suffered and the malice displayed by the defendants were particularly compelling.

### 1. Reprehensibility: *Eden Electrical* Versus *Ondrisek*

According to the *Gore* Guideposts, one must first consider the reprehensibility of Alamo's conduct.<sup>257</sup> *Ondrisek* sets an unprecedented high in the category of reprehensibility. It is the only Eighth Circuit case in the decade since *State Farm* wherein all five *Gore* factors are present, and four of them are extremely compelling.<sup>258</sup>

The *Gore* Factors ask whether the harm was physical or economic, whether the conduct was in reckless disregard for the health and safety of others, whether it was intentional, malicious, or deceitful, whether the target of the conduct was in a vulnerable position, and whether the defendant repeatedly engaged in the conduct even knowing that it was harmful.<sup>259</sup> As for physical harm, the boys were subject to severe mental and physical abuse.<sup>260</sup> There was also an element of economic harm because they performed extensive work for the compound without pay starting at a very young age.<sup>261</sup> This harm was done in blatant disregard for the mental and physical safety of the boys, since they both sustained permanent injuries and contemplated suicide.<sup>262</sup> As for the Plaintiffs' vulnerability, it is clear that they were extreme-

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253. *White v. McKinley*, 605 F.3d 525, 528 (8th Cir. 2010).

254. *Id.* at 530.

255. *Id.* at 531.

256. *Id.* at 528.

257. *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 575 (1996).

258. *See infra* Appendix A.

259. *Gore*, 517 U.S. at 576.

260. *Ondrisek v. Hoffman*, 698 F.3d 1020, 1024 (8th Cir. 2012).

261. *Id.* at 1023.

262. *Id.* at 1024.

ly vulnerable given their young age, isolated upbringing, and lack of parental protection.<sup>263</sup> Moreover, Alamo was in a position of great power over them as the head of their religious order and entire community.<sup>264</sup> As for the isolation or repetitiveness of the defendant's actions, it went on throughout the Plaintiffs' childhoods.<sup>265</sup> Moreover, Alamo was quite aware of the legal effect of his actions, given the previous lawsuit alleging the same conduct years earlier.<sup>266</sup> The only thing that could have made *Ondrisek* even more compelling under a *Gore* Factor analysis was direct evidence that Alamo tormented the Plaintiffs exclusively out of malice. While one may certainly infer that there was some degree of intentional malice present, there is not enough evidence to make this factor as compelling as the other four.

While the *Gore* Factors are not dispositive, they are fair indicators of reprehensibility. However, even common moral principles indicate that this situation is completely reprehensible. Because of the extreme reprehensibility evidenced by Alamo in this case, *Ondrisek* occupies a special place in Eighth Circuit punitive damages jurisprudence. If *Ondrisek* tops the reprehensibility chart, then district courts would have a concrete high-water mark to compare the cases before them to.<sup>267</sup> In essence, *Ondrisek* was an opportunity to provide clarity and consistency to lower courts and bring greater harmony to punitive damages decisions in the Eighth Circuit.

This opportunity appears to have been a missed one, however. The court notably skirted the opportunity to compare Alamo's conduct to that of *Amana* in *Eden Electrical*, the court's earlier high-water mark.<sup>268</sup> The court wrote: "This panel does not suggest that Alamo's actions are any less reprehensible than the defendant's conduct in [*Eden Electrical*], but – given the larger compensatory damage award here – the punitive damages should not exceed a 4:1 ratio to maintain the notions of fundamental fairness and due process."<sup>269</sup> Despite having this elaborate test to measure the reprehensibility of defendants' conduct and constructing a detailed chart for comparison purposes, the Eighth Circuit refused to use these tools to draw conclusions, and instead jumped right to the issue of the ratio.

However, it is easy enough to apply the *Gore* Test to the present case and reach the conclusion that the Eighth Circuit so notably refused to draw. The results of this application show that *Ondrisek* should have been the new high-water mark and would have necessitated a ratio the same or higher than *Eden Electrical*, thereby surpassing the 4:1 ratio set out in *Haslip*.<sup>270</sup> The

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263. *Id.* at 1023-24.

264. *Id.* at 1029.

265. *Id.* at 1023-24.

266. *See supra* notes 35-40 and accompanying text.

267. *See infra* Appendix A.

268. *Ondrisek*, 698 F.3d at 1029-30.

269. *Id.* at 1030-31.

270. *Pac. Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1, 23 (1991).

compensatory and punitive damages in the two cases are roughly comparable: \$2.1 million in compensatory damages and \$10 million in punitive damages in *Eden Electrical*,<sup>271</sup> compared to \$3 million in compensatory damages and \$12 million in punitive damages in *Ondrisek*.<sup>272</sup> However, the reprehensibility of the defendants' conduct is not comparable, and that is the most important factor.<sup>273</sup>

In *Eden Electrical*, both parties were multi-million-dollar companies assisted by legal counsel.<sup>274</sup> In *Ondrisek*, on the other hand, the victims were vulnerable boys taken advantage of by a religious leader.<sup>275</sup> In *Eden Electrical*, there was only evidence of one fraudulent scheme.<sup>276</sup> In *Ondrisek*, the abuse went on for years,<sup>277</sup> and Alamo had been sued before for precisely the same actions.<sup>278</sup> In *Eden Electrical*, the victim company lost only money (albeit, a substantial amount of it).<sup>279</sup> The Plaintiffs in *Ondrisek*, however, sustained economic as well as very severe physical damage.<sup>280</sup> Seth Calagnia had to watch his father be beaten until his father cried and could not get up.<sup>281</sup> Both boys had to listen to Alamo tell them repeatedly that they were worthless and would go to hell.<sup>282</sup> Further, both boys contemplated suicide based on the repeated physical and emotional abuse they suffered.<sup>283</sup> The two cases simply do not compare.

It is clear that the reprehensibility of the defendant's actions should have favored making *Ondrisek* the high-water mark over *Eden*. Although the Supreme Court asserts that the reprehensibility of the defendant's conduct is the most important factor,<sup>284</sup> the *Ondrisek* decision belies this claim since the defendant's conduct in *Ondrisek* was far more reprehensible than *Eden Electrical*, and yet the Plaintiff received a lower ratio in *Ondrisek*.

It is *Eden Electrical*, then, which continues to present a problem when harmonizing punitive damages cases in the Eighth Circuit. In *Eden Electrical*, the damages awarded were slightly lower, the degree of reprehensibility

271. *Eden Elec., Ltd. v. Amana Co.*, 370 F.3d 824, 826 (8th Cir. 2004).

272. *Ondrisek*, 698 F.3d at 1027, 1031.

273. *Ondrisek*, 698 F.3d at 1024.

274. *Eden Elec., Ltd. v. Amana Co.*, 258 F. Supp. 2d 958, 959 (N.D. Iowa 2003).

275. *Ondrisek*, 698 F.3d at 1029.

276. *Eden Elec.*, 370 F.3d at 829.

277. *Ondrisek*, 698 F.3d at 1023-24.

278. *Miller v. Tony & Susan Alamo Found.*, 748 F. Supp. 695, 699 (W.D. Ark. 1990).

279. *See Eden Elec.*, 258 F. Supp. 2d at 963.

280. *Ondrisek*, 698 F.3d at 1023-24.

281. *Id.* at 1024; Brief of Appellees, *supra* note 21, at \*10-11.

282. Brief of Appellees, *supra* note 21, at \*6.

283. *Ondrisek*, 698 F.3d at 1024.

284. *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 575 (1996) ("Perhaps the most important indicium of the reasonableness of a punitive damages award is the degree of reprehensibility of the defendant's conduct.").

was by far lower, and yet the multiplier was .8 higher than in *Ondrisek*.<sup>285</sup> Indeed, it had a .8 ratio higher than any other case.<sup>286</sup> Perhaps the easiest thing for the court to do would have been to overturn, expressly or implicitly, the award in *Eden Electrical* and present the 4:1 ratio to be the new maximum. After all, the award was in 2004, a full nine years ago, the facts are easily distinguishable from *Ondrisek*, and *Eden Electrical* was one of the first cases applying the *State Farm* decision. It would have been a simple matter to distinguish *Eden Electrical* on any of these grounds or not bring the case up at all. However, the court selected *Eden Electrical* as one of the three cases to review as precedent and fully set forth the factual background of that case and its high-water 4.8:1 ratio.<sup>287</sup> On the flimsy grounds of the small difference in compensatory damages between the two cases, the court effectively held in *Ondrisek* that *Eden Electrical* would remain the Eighth Circuit high-water mark with a 4.8:1 ratio.<sup>288</sup>

The concept of a ratio is inherently flawed. Compensatory damages are different for a reason; they equal whatever amount it takes to make a plaintiff whole.<sup>289</sup> Punitive damages, on the other hand, are meant to punish and deter similar future conduct.<sup>290</sup> In *Eden Electrical*, the compensatory damages were meant to make Eden Electrical's business whole after Amana's fraudulent scheme.<sup>291</sup> In *Ondrisek*, the compensatory damages were to make the boys whole after all the terrible abuse they suffered while growing up.<sup>292</sup> The Eighth Circuit used the small differences in the cases' compensatory damages to support a different, higher multiplier for *Eden Electrical*, even though in truth the amounts of the compensatory damages should be completely unrelated to the amount of punitive damages awarded, and the multipliers are just random numbers. The court's justification for keeping *Eden Electrical* as its high-water mark is unpersuasive and at odds with the purpose of punitive damages.

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285. See "Gore Guideposts as Applied to Eighth Circuit Cases" *supra* Part V.B. (compare *Ondrisek* with *Eden Electrical*).

286. See "Gore Guideposts as Applied to Eighth Circuit Cases" *supra* Part V.B.

287. *Ondrisek*, 698 F.3d at 1029-30.

288. *Id.* at 1030-31.

289. See, e.g., *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 419 (2003) ("It should be presumed that a plaintiff has been made whole for his injuries by compensatory damages, so punitive damages should only be awarded if the defendant's culpability . . . is so reprehensible as to warrant the imposition of further sanctions to achieve punishment or deterrence.").

290. *Id.* at 416; *Pac. Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1, 19 (1991).

291. See *Eden Elect., Ltd. v. Amana Co.*, 370 F.3d 824, 826 (8th Cir. 2004).

292. See *Ondrisek*, 698 F.3d at 1027.

## 2. Under-Emphasis on Reprehensibility

Also of note is the lack of emphasis placed by the court on the reprehensibility of the defendant's conduct and the court's overemphasis on the ratio. For example, the chart in the Eighth Circuit's appendix to *Ondrisek* focused on quantifying cases by the ratio of punitive to compensatory damages and made no mention of reprehensibility.<sup>293</sup> While this omission could be attributed to a number of things, the fact that they were compared by ratio and award size alone is still significant.

In *Ondrisek*, the lesser emphasis on reprehensibility is particularly noticeable. As detailed above, the extreme reprehensibility of Alamo's acts evidently did not warrant a ratio equal to or higher than *Eden Electrical*, even though Amana's conduct was far less reprehensible than Alamo's. A similar effect is observed in the other cases.

In *Stogsdill*, the gross negligence of the nurses hardly rises to the level of the deliberate conduct of Alamo, but it had the same overall ratio of 4:1.<sup>294</sup> The defendant's conduct in *Moore*, the arson-insurance case, was quite reprehensible, as Mr. Moore had to deal with economic damages from the bad faith of the insurance company and criminal charges for arson.<sup>295</sup> Yet, despite the reprehensible conduct by the insurance company, Moore only received a 1:1 ratio.<sup>296</sup> In *Williams*, the conduct of Mr. Williams' employer and employees was also quite reprehensible, given the extremely hostility and threatening behavior black employees received, but he, too, only received a 1:1 ratio, despite this high degree of reprehensibility.<sup>297</sup>

*White* is perhaps the only case wherein the actions of the defendants are close to those of Alamo in *Ondrisek*. Maliciously and falsely accusing one's husband of sexually molesting his adopted daughter, then covering up evidence that would exonerate him,<sup>298</sup> is utterly reprehensible by society's standards. The defendants' actions resulted in White's wrongful conviction as a pedophile and completely ruined his life.<sup>299</sup> Despite this, White only received a 0.07:1 ratio of punitive to compensatory damages, which is the smallest ratio yet in cases that qualify as having a "substantial" compensatory damages award.<sup>300</sup>

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293. See *id.* at 1031 n.4.

294. See *Stogsdill v. Healthmark Partners, L.L.C.*, 377 F.3d 827, 831, 833 (8th Cir. 2004).

295. *Moore v. Am. Family Mut. Ins. Co.*, 576 F.3d 781, 790-91 (8th Cir. 2009).

296. *Id.* at 791.

297. *Williams v. ConAgra Poultry Co.*, 378 F.3d 790, 799 (8th Cir. 2004).

298. *White v. McKinley*, 605 F.3d 525, 528-29 (8th Cir. 2010).

299. See generally *id.* at 538.

300. *Id.* at 539. It is important to remember that in *White* the jury chose to award only \$1 million in punitive damages; this was not a case of remittance by the court. *Id.*

The brief attention paid to the reprehensibility prong and the lack of weight it is given leads to the conclusion that reprehensibility is not, in fact, the most important factor in the Eighth Circuit. Instead, the most important factor is the ratio.

### 3. The Ratio Requirement Pile-Up

The ratio requirement also merits consideration. According to Supreme Court jurisprudence, a 1:1 ratio is recommended in cases in which the compensatory damages awarded are “substantial.”<sup>301</sup> In *Ondrisek* the Plaintiffs received \$3 million in compensatory damages.<sup>302</sup> This suggests that a 1:1 ratio would certainly be appropriate here, although the presiding court has some latitude to adjust this number if there are exceptional circumstances.<sup>303</sup> The Supreme Court denied certiorari in *Eden Electrical*,<sup>304</sup> which had a higher ratio and lower reprehensibility,<sup>305</sup> and this suggests that no more than three (if any) justices would have found that a 4.8:1 ratio does not violate due process, even in cases where the compensatory damages are substantial. Taken further, this indicates that the 1:1 ratio mentioned in *State Farm*<sup>306</sup> is not a very rigid rule. The 4:1 ratio in *Ondrisek* might not be as daring as the holding in *State Farm* suggests.

The Eighth Circuit’s analysis slightly varies from the Supreme Court’s jurisprudence. First, it sets a lower threshold for a compensatory damages award to be considered “substantial”<sup>307</sup> but routinely allows for ratios higher than 1:1 in such cases.<sup>308</sup> Indeed, of ten cases with substantial damages, six have a ratio of more than 1:1 and four have a ratio of 4:1 or more.<sup>309</sup> However, the court seems to suggest in *Ondrisek* that it now considers a “substantial” amount of compensatory damages to be \$1 million, which is back in harmony with the Supreme Court but goes against earlier Eighth Circuit precedent.<sup>310</sup> The court stated, “In the years since *Gore*, this court has seldom reviewed the punitive damages with compensatory damages greater than \$1 million.”<sup>311</sup> While this is certainly not dispositive, it is relevant that the Eighth Circuit chose to only compare *Ondrisek* to other cases above \$1 mil-

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301. *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 425 (2003).

302. *Ondrisek v. Hoffman*, 698 F.3d 1020, 1027 (8th Cir. 2012).

303. *State Farm*, 538 U.S. at 425-26.

304. *Amana Co. v. Eden Elec., Ltd.*, 543 U.S. 1150 (2005).

305. See “*Gore* Guideposts as Applied to Eighth Circuit Cases” *supra* Part V.B.

306. The 1:1 ratio was given greater weight after *Exxon Shipping Co. v. Baker*, 554 U.S. 471, 514-15 (2008). See cases cited *supra* note 113.

307. See *Stogsdill v. Healthmark Partners, L.L.C.*, 377 F.3d 827, 833 (8th Cir. 2004).

308. See “*Gore* Guideposts as Applied to Eighth Circuit Cases” *supra* Part V.B.

309. See “*Gore* Guideposts as Applied to Eighth Circuit Cases” *supra* Part V.B.

310. *Ondrisek v. Hoffman*, 698 F.3d 1020, 1029 (8th Cir. 2012).

311. *Id.*

lion, not \$500,000, the current marker.<sup>312</sup> Yet, even re-adjusting the threshold for what is considered a “substantial” compensatory damage award back to \$1 million, four of the seven cases would still be above a 1:1 ratio.<sup>313</sup> The Eighth Circuit seems to err towards affirming higher ratios, even in cases with substantial compensatory awards.

Despite its tendency to frequently affirm higher ratios of damages than suggested to be constitutional by *State Farm*, the Eighth Circuit has never reached the point of affirming a 5:1 ratio in a case in which damages were substantial.<sup>314</sup> While this does have the desired effect of restricting outlier punitive damage awards,<sup>315</sup> it also creates a pile-up of 4:1 ratio cases.<sup>316</sup> *Stogsdill* and *Diesel Machinery* are both 4:1 ratio cases that have a far lower reprehensibility score, yet have the same ratio as *Ondrisek*.<sup>317</sup> This might be explained by the lower compensatory damages awarded in each, \$500,000 and \$665,000 respectively.<sup>318</sup> The court noted in both cases that the amount of compensatory damages awarded was “substantial,” as it also did in both *Ondrisek* and *Eden Electrical*, but the damages were still only about one fifth the amount of the awards in *Ondrisek* and *Eden Electrical*.

#### 4. Comparable Punishments

The third prong of the *Gore* Guideposts, comparable civil and criminal punishments, appears to be by far the least important factor for consideration in Eighth Circuit cases. In three of the analyzed cases (*Williams*, *Moore*, and *Stogsdill*), the Eighth Circuit did a full analysis of criminal and civil punishments.<sup>319</sup> In one case the court did a very brief analysis of this Guidepost (*Diesel Machinery*).<sup>320</sup> In five cases, no comparison was made by the court at all (*White*, *JCB*, *Boerner*, *Eden Electrical*, and *Consenco*).

*Ondrisek* falls into the second category. The court at least addressed the third Guidepost, but it reduced the entire analysis into two sentences.<sup>321</sup> In

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312. Recall that the Eighth Circuit determined in *Stogsdill v. Healthmark Partners, L.L.C.*, that a \$500,000 compensatory damages award was held to be substantial. 377 F.3d 827, 829 (8th Cir. 2004).

313. See “*Gore* Guideposts as Applied to Eighth Circuit Cases” *supra* Part V.B.

314. See “*Gore* Guideposts as Applied to Eighth Circuit Cases” *supra* Part V.B.

315. See *Pac. Mut. Life Ins. Co v. Haslip*, 499 U.S. 1, 61-62 (1991) (O’Connor, J., dissenting).

316. See “*Gore* Guideposts as Applied to Eighth Circuit Cases” *supra* Part V.B.

317. See “*Gore* Guideposts as Applied to Eighth Circuit Cases” *supra* Part V.B.

318. See “*Gore* Guideposts as Applied to Eighth Circuit Cases” *supra* Part V.B.

319. *Moore v. Am. Family Mut. Ins. Co.*, 576 F.3d 781, 791 (8th Cir. 2009); *Williams v. ConAgra Poultry Co.*, 378 F.3d 790, 798 (8th Cir. 2004); *Stogsdill v. Healthmark Partners, L.L.C.*, 377 F.3d 827, 834 (8th Cir. 2004).

320. *Diesel Machinery, Inc. v. B.R. Lee Indus., Inc.*, 418 F.3d 820, 840 (8th Cir. 2005).

321. *Ondrisek v. Hoffman*, 698 F.3d 1020, 1030 (8th Cir. 2012).

those two sentences, the court compared the damages in the instant case to those in *Kolbeck* and *Miller* but did not consider any other civil cases or potential criminal punishments Alamo could have received, as the *Gore* Test requires them to do. The only analysis the court did was to differentiate the facts of *Ondrisek* from the prior two cases involving abuse in TACM.<sup>322</sup> The third prong of the *Gore* Test undeniably received short shrift from the Eighth Circuit in the instant case. However, this might be a reflection of the fact that this Guidepost provides very little guidance, since all of the cases this author reviewed warranted significant criminal or civil liability.<sup>323</sup>

### C. The Problem & Solutions

This review of Eighth Circuit cases with substantial compensatory damages awards reveals several disturbing trends. The *Gore* Guideposts call for an evaluation of the constitutionality of punitive damages based upon the compensatory damages awarded, the final ratio, the reprehensibility of the conduct based on the *Gore* Factors, and the comparable civil and criminal punishments.<sup>324</sup>

The first Guidepost, the ratio, has become the ultimate yardstick of constitutionality in Eighth Circuit cases. All of the jury awards were reduced in order to comply with *Haslip*'s 4:1 ratio requirement,<sup>325</sup> if they were not already under that ratio. The sole exception is *Eden Electrical*, whose additional 0.8 multiplier is hardly significant considering the 524:1 ratio the Supreme Court approved in *TXO*.<sup>326</sup> Several awards have been cut down even further to 1:1 ratios, as per *State Farm*.<sup>327</sup> This creates a pile up of cases with awards in the 4:1 ratio range and the 1:1 ratio range that are factually distinct but treated the same.

The second Guidepost, reprehensibility, has been significantly deemphasized despite the Supreme Court's claim that it is the most important factor to weigh when considering the constitutionality of punitive damages awards.<sup>328</sup> This Guidepost's importance has been replaced with the ratio of punitive damages to compensatory damages as the most relevant concern. *Ondrisek* had a slightly lower ratio than *Eden Electrical*, despite how much more compelling its *Gore* Factor analysis was. This same mismatch of ratio and reprehensibility analysis holds true in the other eight cases with "substantial" punitive damages awards reviewed by the Eighth Circuit.

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322. *Id.*

323. See "*Gore* Guideposts as Applied to Eighth Circuit Cases" *supra* Part V.B.

324. See "*Gore* Guideposts as Applied to Eighth Circuit Cases" *supra* Part V.B.

325. *Pac. Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1, 23 (1991).

326. *TXO Prod. Corp. v. Alliance Res. Corp.*, 509 U.S. 443, 459, 462 (1993).

327. *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 480, 425 (2003).

328. See *supra* Part V.B.2.



The third Guidepost, comparable punishments, has been even further reduced in importance. Few cases gave this Guidepost more than a sentence of analysis, and in fully half of the cases *no* analysis was made.

When the Supreme Court handed down the *Gore* Test, lower courts were to first consider the reprehensibility of the defendant's conduct, then the ratio of damages, and third, the severity of comparative civil and criminal punishments. The Eighth Circuit today jumps straight to the ratio, glosses over the reprehensibility, and avoids consideration of comparable punishments entirely. This creates a baffling hierarchy of cases with no clear benchmark for trial courts to evaluate their cases against, which no doubt results in widely inconsistent punitive damages awards and frequent appeals.

The Eighth Circuit is not wholly to blame, however. The *Gore* Test, in an effort to provide greater guidance, has merely given courts semi-objective criteria to use in making subjective judgments. It has been critiqued from the start as giving a veneer of objectivity to a completely subjective process.<sup>329</sup> As the dissenting justices in *Gore* predicted,<sup>330</sup> the Guideposts provide little to no guidance. It is no wonder that the Eighth Circuit has seized upon the ratio requirement as the main factor of punitive damages analysis; it only involves some quick math, no real analysis, and looks suitably objective on paper.

This problem has been further complicated in the Eighth Circuit by the ratio caps set forth in *Haslip* and *State Farm*. Punitive damages are driven by an analysis of *facts*, and drawing bright line tests to analyze facts is notoriously difficult. This is why determinations of fact are often handed off to the jury to decide. Instead, the Eighth Circuit is forced into a role where it must evaluate not only the facts of the case, but also the jury's evaluation of those facts. It understandably attempts to circumnavigate these difficulties by affirming or overturning awards based upon pure numbers. Thus, the court mechanistically assigns cases almost uniformly at whole number integer multipliers clustered around the 4:1 and 1:1 marks – even when those cases are factually distinct from one another.

Unquestionably, the Supreme Court needs to provide better guidance for evaluating punitive damages awards, and the Eighth Circuit needs to adhere to that advice more closely than they have adhered to the existing guidance in *Gore*. The problem is clear: outlier juries award excessive punitive damages. Perhaps instead of fixing the excessive damages, the better solution is to fix the outlier juries. This could be accomplished by providing the jury with a revised set of jury instructions regarding the limits of punitive damag-

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329. See *BMW of N. Am. v. Gore*, 517 U.S. 559, 599 (U.S. 1996) (Scalia, J. dissenting).

330. See *id.* at 605 (“In truth, the ‘guideposts’ mark a road to nowhere; they provide no real guidance at all.”); *id.* at 613 (Ginsburg, J., dissenting) (noting that the *Gore* Test “has only a vague concept of substantive due process, a ‘raised eyebrow’ test as its ultimate guide . . .”) (internal citation omitted).

es.<sup>331</sup> It could also be fixed by retrying only the issue of the amount of damages before a new jury.<sup>332</sup> This would be feasible because there are relatively few outlier juries,<sup>333</sup> so retrials would be infrequent, and the new juries would be unlikely to also be outliers. Moreover, a new trial on the issue of damages would encourage both parties to settle to avoid the costs of retrying the case. Or, one may simply defer to the jury's determination, as Justice Scalia suggests in his dissent in *TXO*, since the punitive damages decision is a subjective decision "about the appropriate degree of indignation or outrage" and is better left to the discretion of the jury, who act as the "voice of the community."<sup>334</sup>

## VI. CONCLUSION

*Ondrisek* presents us with a chance to review Eighth Circuit jurisprudence through the lens of a model case. *Ondrisek* has been the most factually reprehensible case to be appealed to the Eighth Circuit since *State Farm* was handed down, according to both common moral principles and the test the Supreme Court formulated in *Gore*. The Eighth Circuit was presented with a chance to shed light on its application of the *Gore* Test and the constitutional amount of punitive damages. Instead, however, the court declined to set aside its previous high-water mark ruling in *Eden Electrical* and sidestepped a comparison of the reprehensibility of the cases.

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331. The Oklahoma legislature evidently thought along the same lines, as it amended its punitive damages law so that it now divides the procedure up into a two step process, and the jury decides the amount of damages according to a variable schedule. See 8 Okla. Prac., Product Liability Law § 12:18 (2012 ed.) (citing 23 Okla. Stat. § 9.1(B) (Supp. 2005) and Oklahoma Uniform Jury Instructions – Civil § 5.6 (2002)).

332. Several courts seem to agree with this approach. See, e.g., *Bach v. First Union Nat. Bank*, 149 F. App. 354, 366 (6th Cir. 2005) ("This fact compels the conclusion that the punitive damage award is duplicative, and that either a new trial on punitive damages or a remittitur of the damages awarded is appropriate.") (emphasis added); *CGB Occupational Therapy, Inc. v. RHA Health Servs. Inc.*, 357 F.3d 375, 392 (3d Cir. 2004) (The court "determined that the jury's punitive damages determination must be reversed and the case remanded for a new trial on the question of punitive damages."); *Goddard v. Farmers Ins. Co. of Oregon*, 120 P.3d 1260, 1284 (Ore. 2005) (in an appeal based on excessive punitive damages in a bad faith insurance claim, the Supreme Court of Oregon ordered the case remanded for a new trial solely on the issue of punitive damages, unless the plaintiff agreed to a remitter of 3x the compensatory damages).

333. See, e.g., Joseph J. Chambers, IN RE EXXON VALDEZ: APPLICATION OF DUE PROCESS CONSTRAINTS ON PUNITIVE DAMAGES AWARDS, 20 ALASKA L. REV. 195, 200-01 (2003) (quoting several sources refuting the perceived "punitive damages crisis" on the basis that this belief is "based upon anecdotal evidence derived only from a few well-known outlier cases").

334. *Gore*, 517 U.S. at 600 (1996) (Scalia, J., dissenting).

Although *Ondrisek* represents a missed opportunity, it still provides some illumination as to Eighth Circuit trends in punitive damages. A comparison of other recent cases reveals that the Eighth Circuit tends to have a lower threshold than the Supreme Court for what constitutes a “substantial” compensatory award. However, *Ondrisek* suggests that the threshold for what is “substantial” may have moved from \$500,000 to \$1 million. On the other hand, while the Eighth Circuit is at least sometimes willing to accept a lower threshold for what constitutes a substantial award, it is willing to consistently apply a higher ratio to those cases, despite the Supreme Court’s suggestion in *State Farm* that a 1:1 ratio is appropriate.

Contrasting *Ondrisek* with other cases also reveals certain trends that differ from Supreme Court jurisprudence. A comparison between *Ondrisek* and *Eden Electrical* reveals that the ratio requirement may be the most important consideration for the Eighth Circuit when assessing a punitive damages award, not the reprehensibility of the defendant’s conduct as the Supreme Court held in *Gore*. Moreover, the third prong of the *Gore* Guideposts is de-emphasized in most Eighth Circuit cases. Many cases give it short shrift, and in some cases it is not analyzed at all. This subtle re-ordering of the emphasis placed on the *Gore* Guideposts has evidently not been severe enough for the Supreme Court to do something about it, as it has not granted certiorari to any of the ten cases reviewed. Whatever the case may be, the Eighth Circuit missed a golden opportunity in *Ondrisek* to change the course of punitive damages in its jurisdiction, and it may have to wait another eight years before another case as unique as *Ondrisek* comes along.

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## APPENDIX A

## Presence of Gore Factors in Eight Circuit Cases with “Substantial” Damages

Case Name & Description	Physical Harm	Disregard for Health & Safety	Victim Vulnerability	Repeated Incidents	Intentional malice or trickery	Total Factors Present	Total Compelling Factors
<i>Consenco</i> <sup>335</sup> Subprime Mortgages	-	-	-	X	X	2	1
<i>Ondrisek</i> <sup>336</sup> Abuse in Cult	X	X	X	X	X	5	4
<i>Boerner</i> <sup>337</sup> Death of Smoker	X	X	-	X	X	4	1
<i>Eden Electrical</i> <sup>338</sup> Fake Dealership	-	-	-	-	X	1	1
<i>Williams</i> <sup>339</sup> Employment Discrimination	-	X	-	X	X	3	2
<i>Stodsgill</i> <sup>340</sup> Nursing Malpractice	X	X	X	-	-	3	2
<i>Diesel Machinery</i> <sup>341</sup> Dealership Contract	-	-	-	X	X	2	0
<i>JCB</i> <sup>342</sup> Conversion: Machinery	-	-	-	-	X	1	0
<i>Moore</i> <sup>343</sup> Insurance: Arson	X	X	-	X	-	3	2
<i>White</i> <sup>344</sup> Child Molestation	X	X	-	X	X	3	2

- = Gore factor is not present in case

X = Gore factor is present in case

X = Gore factor is both present and particularly compelling in case

335. *Consenco Fin. Servicing Corp. v. N. Am. Mortg. Co.*, 381 F.3d 811, 824-25 (8th Cir. 2004).

336. *Ondrisek v. Hoffman*, 698 F.3d 1020, 1029-30 (8th Cir. 2012).

337. *Boerner v. Brown & Williamson Tobacco Co.*, 394 F.3d 594, 602-03 (8th Cir. 2005).

338. *Eden Elec., Ltd. v. Amana Co.*, 370 F.3d 824, 828-29 (8th Cir. 2004).

339. *Williams v. ConAgra Poultry Co.*, 378 F.3d 790, 797-99 (8th Cir. 2004).

340. *Stodsgill v. Healthmark Partners, L.L.C.*, 377 F.3d 827, 832-34 (8th Cir. 2004).

341. *Diesel Machinery, Inc. v. B.R. Lee Indus., Inc.*, 418 F.3d 820, 839-40 (8th Cir. 2005).

342. *JCB, Inc. v. Union Planters Bank*, 539 F.3d 862, 875-77 (8th Cir. 2008).

343. *Moore v. Am. Family Mut. Ins. Co.*, 576 F.3d 781, 790-91 (8th Cir. 2009).

344. *White v. McKinley*, 605 F.3d 525, 538-39 (8th Cir. 2010).