THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM FLORENCE COUNTY
Court of Common Pleas

Michael G. Nettles, Circuit Court Judge

Case No. 2003-CP-21-1347

Jerome Mitchell, Jr.,.....Respondent,

v.

Fortis Insurance Company,.....Appellant.

BRIEF OF AMICUS CURIAE DRI—THE VOICE OF THE DEFENSE BAR

In Support of Defendant Fortis Insurance Company

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DRI—THE VOICE OF THE
DEFENSE BAR

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page

CASES

CONSTITUTION

OTHER AUTHORITIES

INTEREST OF AMICUS CURIAE

DRI—The Voice of the Defense Bar (DRI) is the national "voice of the defense bar." It is a 22,500-member national association of defense attorneys who represent insureds, insurance carriers, and corporations in the defense of civil litigation. Committed to enhancing the skills, effectiveness and professionalism of defense attorneys, DRI seeks to address issues germane to defense attorneys in the civil justice system, to promote appreciation of the role of the defense lawyer, and to improve the civil justice system. DRI has long been a voice in the ongoing effort to make the civil justice system more fair and efficient. It serves as a counterpoint to the plaintiffs' bar and seeks to balance the justice system nationwide.

DRI participates as amicus curiae in cases that raise issues of vital concern to its membership. This is such a case. Unless this Court revisits its decision in the present case—which involves one of the largest punitive awards ever permitted in the courts of this State—DRI's members and their clients will be forced to defend punitive damages cases on an uneven playing field. Plaintiffs seeking punitive damages will be free to seed the record with seemingly unimportant evidence, make minimal or no reliance on it at trial, but then invoke it post-trial in an effort to support a large punitive award that may have been based on entirely different considerations. If such evidence can be used by reviewing courts to support a large punitive exaction, then defendants and their counsel will be forced to devote precious trial time to refuting every piece of evidence that even conceivably might be invoked post-trial, no matter how tangential such evidence may seem at the time. As a practical matter, that may try the jury's (and trial court's) patience. It also may be impossible to do if the court has placed time limits on the trial, as it may take hours to demonstrate the invalidity of a single factual assertion made by a plaintiff's expert witness. Because these concerns may not have been apparent to this Court at

the time it rendered its initial decision, DRI submits that the views it expresses in this brief may be of assistance to the Court in resolving Fortis's rehearing petition.

STATEMENT OF THE ISSUES ON APPEAL

Although DRI agrees with Fortis that the Court's treatment of the three *BMW* guideposts warrants reconsideration, DRI limits itself in this amicus brief to explaining why the Court should reconsider its conclusion that the testimony that Plaintiff's medical expenses would amount to $1,081,189.40 assuming that he were to live to age 77 (the average life expectancy for a healthy male his age) supports a punitive award of $10 million.

SUMMARY OF ARGUMENT

This amicus brief seeks to explain the practical and fairness problems associated with the Court's use of Plaintiff's evidence that the present value of future costs to Fortis under his insurance policy was $1,081,189,40 (the "$1 million figure") to support its conclusion that a $10 million punitive award is not disproportionate to the "potential harm" to Plaintiff. Plaintiff's counsel stated clearly that this evidence was relevant to show that Fortis had a financial motive for rescinding the policy and that Plaintiff was *not* asking the jury to award damages on the basis of that figure. Plaintiff acquiesced in a jury instruction that stated that punitive damages must bear a reasonable relationship to the "harm caused" to the Plaintiff, and he never asked the jury to inflate the punitive award based on hypothetical damages that *could have* been, but were not, caused by the rescission. To the contrary, he expressly encouraged the jury to base the amount of punitive damages on a percentage of Defendant's surplus.

When the jury evidently accepted that suggestion and came back with a $15 million punitive award—100 times the compensatory damages on the tort claim—Plaintiff changed course. Realizing that his actual harm was insufficient to support the huge award, he argued, for the first time, that the award could have been based on a potential harm theory that the jury never had the opportunity to consider. He presented the trial court with two potential measures of potential harm—the policy's lifetime benefit cap, and potential damages for wrongful death. Then on appeal, he advanced, and this Court adopted, yet another measure—the alleged $1 million in medical expenses that Plaintiff allegedly would incur in the event he lives to age 77.

It is unfair to defendants to uphold a punitive damages award on the basis of evidence that was not invoked for that purpose at trial and that the defendant therefore had no reason to waste valuable trial time (and juror patience) contesting. The $1 million figure was offered at

trial for the sole purpose of proving that Fortis had a motive to rescind the policy. It was only on appeal, when this Court converted that figure into a measure of potential harm and then multiplied it more than 9 times, that the precise amount became significant—indeed, became far more significant than all other damages evidence.

In addition to being unfair to defendants in punitive damages cases, the Court's decision will have far-reaching and undesirable effects on litigation tactics. Because Plaintiff's bait-and-switch worked so well here, future plaintiffs are sure to seek to slip into the record all manner of evidence that might be invoked post-verdict to support a large punitive award, while defendants will be forced to defuse each piece of evidence introduced because they will have no assurance that the basis for punitive damages urged at the trial will be the same one used post-trial to support the verdict. Either trials will be greatly lengthened or defendants will be placed at the tactical disadvantage of having inadequate time to refute each item of evidence put into the record by the plaintiffs. In short, the consequences of the decision at issue are grave both for defendants and for the judicial system.

ARGUMENT

Rehearing Is Warranted Because This Court's Opinion Was Based On A New Theory That Was Not Presented To The Jury.

A. This Court's Opinion relies on a measure of potential harm that was not argued at trial.

This Court's September 14 Opinion affirmed the punitive award, as reduced, based entirely on a theory of "potential harm" that was neither litigated at trial nor presented to the jury. Op. No. 26718, 2009 WL 2948558 (S.C. Sup. Ct. filed Sept. 14, 2009) ("Op."). The Court rejected the jury verdict, "find[ing] that a 13.9 to 1 ratio, in this particular case, exceeds due process limits." Op. at *10. It then observed that punitive awards between 2.54 to 28 times

compensatory damages have been upheld "in cases involving particularly egregious conduct." *Id.* at *11. The Court went on, however, to reduce the punitive award in this case to $10 million, or 66.7 times the $150,000 compensatory award.

The Court reasoned that, though disproportionate to the compensatory damages, a $10 million punitive award is reasonably proportionate to the $1 million in future medical expenses that Plaintiff's expert testified he would incur if he were to live to age 77, which the Court equated with Plaintiff's "potential harm" from the rescission. But Plaintiff never sought to use the evidence about future medical expenses for this purpose at trial; the jury was not instructed to consider "potential harm" at all and instead was told that punitive damages must bear a reasonable relationship to the actual injury; and the verdict form supplies no indication that the jury did base its verdict on this measure of "potential harm" or any other. Indeed, it is absolutely clear that the jury did *not* base its punitive award on the $1 million figure. At trial, Plaintiff presented several methods for calculating punitive damages, all of which were based on Fortis's financial condition. Plaintiff argued for a punitive award based on percentages of Fortis's investment income over various periods of time (R. p. 1536, line 15–p. 1537, line 11)), and as a percentage of its capital surplus. R. p. 1537, lines 12–25. The jury's $15 million award was within rounding distance of one of those figures—"Five (5%) per cent of the capital surplus would be fourteen million eight hundred eighteen thousand two hundred (14,818,200)." R. p. 1537, lines 20–21.

By contrast, the $1 million figure that the Court relied on as its measure of potential harm was offered for the sole purpose of proving that Fortis had a financial incentive to rescind Plaintiff's policy. Plaintiff's counsel made that clear in his closing argument:

> And when dis- -- deciding whether Fortis acted willfully in reckless disregard, one of the things that you can also consider, besides all those reasons, is whether Fortis had a *financial incentive* to act the way they did.
>
> Linda Westman provided you her estimation of the costs, the minimum costs, facing Fortis Insurance Company if they can -- they kept Jerome in their books.
>
> * * * If Fortis's health care management team had done numbers, the minimum care costs they were looking at would have been in this range. *That's their financial incentive.*
>
> * * * [Adding in other costs, g]ives you a total of one million eight-one thousand and one hundred and eighty-nine dollars and forty (*$1,081,189.40*) cents, the treatment and costs that were facing Fortis Insurance Company at the time that they decided to rescind Jerome's policy.

R. p. 1532, line 8–p. 1533, line 21 (emphasis added).

In fact, Plaintiff's counsel was careful to explain that the $1 million figure was relevant *only* to show motive and was *not* part of Plaintiff's claim for damages:

> Now, *are we saying that you should give Jerome a million* ($1,000,000.00) dollars because that's what those numbers add up to? *No.* The importance of those numbers is to show you that, if Fortis sat down when they got these records and . . . [i]f they had thought to themselves, "How much is Jerome Mitchell, Jr., gonna cost us? You know, he might be in a wreck; he might get other diseases; he might cost us a bunch for things that have nothing to do with H.I.V. But H.I.V. alone, if he gets good care and never gets AIDS, alone, it's going to be over a million ($1,000,000.00) dollars present value in claims that we have to deal with."
>
> *That motive to save money is a big part of this case*, and His Honor will tell you you're entitled to consider that.

R. 1573, lines 3–19 (emphasis added). Indeed, this Court affirmed the introduction of that evidence on precisely that basis, explaining: "This evidence is probative of Fortis's financial motive to rescind Mitchell's policy, and we find it is relevant to Mitchell's allegations of bad faith." Op. at *12.

Even after the jury verdict, when it became clear that Plaintiff could not rely on actual harm to justify the huge punitive award, Plaintiff still did not advance the theory on which this Court's decision is based. Rather, Plaintiff argued that "the act of potential harm to Jerome from rescission of that policy is the six-million-dollar-lifetime cap" (R. p. 2444, lines 22–23; *see also*

R. p. 2445, lines 8–10)—a theory that this Court rejected as "unsupported by the evidence and too speculative" (Op. at *9)—and that wrongful-death damages would be available if Plaintiff had not received free medical care and had died as a result. R. p. 2445, lines 3–8; *see also* R. p. 2446, lines 9–12). This Court thus correctly found that no theory advanced at trial, and no facts found by the jury, could support a multi-million-dollar punitive award. Having so concluded, however, the Court should have either ordered a new trial or reduced the punitive damages to a modest multiple of the compensatory damages rather than invoking a new theory of "potential harm" to support a large punishment.

B. <u>This Court's use of a new damages theory on appeal is unfair to defendants.</u>

This Court's reliance on a theory that Plaintiff never disclosed at trial and on which the jury was not instructed sets a precedent that is unfair to defendants, who may be subject to massive judgments based on surprise theories and evidence that they had no reason to dispute at trial. Given Plaintiff's avowed purpose for introducing the $1 million figure at trial, Fortis had little reason to dispute its precise amount—there was no question that once Plaintiff's HIV status was disclosed, Fortis was likely to lose money on his policy. Indeed, any effort on Fortis's part to demonstrate the flaws in the $1 million figure might have appeared to the jurors to be a petty waste of their time. This evidence took on a qualitatively different character, however, when, for the first time on appeal, this Court not only adopted it as a basis for the punitive award, but multiplied it by 9.2. As a result of that unanticipated use of the evidence, the $1 million figure went from being relatively unimportant evidence bearing on motive to the sole basis for more than 98% of the total award.[1]

[1] The $36,000 award for breach of contract represented 0.35% of the total, and the $150,000 compensatory award on the bad faith claim comprised another 1.47%.

The situation here is very similar to one in which a party seeks to collaterally estop its adversary based on an issue that the adversary had no incentive to litigate in the prior case. As the Fourth Circuit has explained, "[w]hatever the differences among courts and commentators as to the 'actually litigated' requirement for issue preclusion, there has been general agreement—to the point of convention—that among the most critical guarantees of fairness in applying collateral estoppel is the guarantee that the party sought to be estopped had not only a full and fair opportunity but *an adequate incentive to litigate 'to the hilt' the issues in question*." *Prosise v. Haring*, 667 F.2d 1133, 1141 (4th Cir. 1981), *aff'd*, 462 U.S. 306 (1983). Likewise, the South Carolina Court of Appeals has adopted Section 28 of the Restatement (Second) of Judgments, which states that collateral estoppel is inappropriate if "the party sought to be precluded . . . did not have an adequate opportunity *or incentive* to obtain a full and fair adjudication." *Pye v. Aycock*, 325 S.C. 426, 438, 480 S.E.2d 455, 461 (Ct. App. 1997) (quoting RESTATEMENT) (emphasis added).

Under that standard, a party cannot be bound by a determination on an issue that it did not have adequate financial incentive to litigate. The U.S. Supreme Court stated in its seminal collateral estoppel case that "[i]f a defendant in the first action is sued for small or nominal damages, he may have little incentive to defend vigorously," and that binding a defendant to issues decided when little was at stake "may be unfair to a defendant." *Parklane Hosiery v. Shore*, 439 U.S. 322, 330 (1979). In support of that observation, the Court cited *Berner v. British Commonwealth Pacific Airlines*, 346 F.2d 532 (2d Cir. 1965), in which "application of offensive

collateral estoppel [was] denied where defendant did not appeal an adverse judgment awarding damages of $35,000 and defendant was later sued for over $7 million." 439 U.S. at 330.[2]

Just as it is unfair, and violates due process, to collaterally estop a party on the basis of a finding made in another proceeding that the party had inadequate incentive to contest, so too is it unfair and a violation of due process for a reviewing court to uphold a large punitive award on the basis of evidence that, because of the way the plaintiff tried the case, the defendant had no incentive to dispute.

In supplying a rationale for the punitive damages that the Plaintiff did not urge at trial and the jury did not employ, this Court also inadvertently infringed Fortis's right to jury trial under Article I, Section 14 of the South Carolina Constitution. If, for example, a jury were to find for a plaintiff on two tort causes of action, but impose punitive damages only with respect to one of them, and a reviewing court then were to find that the cause of action for which punitive damages were imposed was unsustainable, there can be no question that the jury-trial right would preclude the court from holding that the punitive damages could be upheld based on the other cause of action. The point is no different when there is one cause of action, but several potential grounds for setting punitive damages. If, as here, the ground on which the jury evidently based its award—the defendant's wealth—is invalid, it violates the jury-trial right for a reviewing court to supply an alternative basis after the fact, especially when that alternative basis was never argued to jury and, indeed, was affirmatively precluded by the jury instructions.

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[2] *See also, e.g., Bostick v. Flex Equip. Co.*, 147 Cal. App. 4th 80, 98 (2007) (refusing to bind party that "had no meaningful incentive for purposes of the action on the complaint to adjudicate the issue"); Michael L. Stokes, *Valuing Contaminated Property in Eminent Domain*, 19 TULANE ENVI. L.J. 221, 244 (2006) ("because the condemnation trial is narrowly focused on the issue of valuation, the landowner would have neither incentive nor opportunity to litigate causation or liability").

C. The use of new legal theories and new findings of fact on appeal will lead to overlitigation.

Transforming the $1 million figure from a collateral point relevant only to liability to the central justification for almost the entire judgment not only was violative of due process and the jury-trial right, but also sets a precedent that could substantially affect the way trials are conducted in South Carolina. Plaintiffs may try to build two records—one for the jury and one for the appeal. They will have an incentive to introduce as wide an array of evidence as possible but, simultaneously, to conceal the potential relevance of that evidence from the defense. Having argued one theory to the jury, plaintiffs will have the opportunity to stitch evidence together in a novel manner on appeal, presenting the reviewing court with legal and factual theories that bear little resemblance to what the jury heard and was asked to decide. The incentive for such opportunistic behavior is enhanced when appellate courts are willing to make *de novo* findings of fact.

This scenario is not far-fetched—it is exactly what happened here. As noted above, Plaintiff suggested to the jury an array of methods for calculating punitive damages, all of which were based on figures from Fortis's financial statements. Apparently following Plaintiff's suggestion, the jury awarded $15 million, approximately five percent of Fortis's capital surplus. Even if we cannot be certain that that was the basis for the jury's excessive award, we do know that the jury did *not* base its award on potential harm. Plaintiff never asked the jury to base punitive damages on his potential harm, much less proposed using the $1 million figure for that purpose. And, consistent with Plaintiff's approach at trial, the jury never was instructed that potential harm is relevant to punitive damages—to the contrary, it was instructed to "consider the relationship between any punitive damage and the harm *caused*." R. p. 1606, lines 11–12 (emphasis added). It was only on appeal that Plaintiff argued that the $1 million figure, which

came into the record disguised as evidence of Fortis's "financial incentive" to rescind, was actually a potential loss to Plaintiff. Following that change of strategy, this Court found for the first time that "the more appropriate measure of potential harm, supported by the evidence, is the present value of cost for the minimal evaluation and treatment of HIV over Mitchell's lifetime." Op. at *9.

The flaws in the $1 million figure highlight the disadvantages of appellate fact finding based on an incomplete record. As explained in more detail in Fortis's Petition and Reply Brief, the $1 million figure bears no resemblance to any potential harm to Plaintiff from the rescission, because:

- It is based on an assertion of life expectancy that is entirely unsupported by expert testimony, that the trial court rejected, and that this Court never considered;
- It includes medical costs that manifestly were not covered by the policy;
- It fails to account for insurance premiums, deductibles, and co-payments that Plaintiff manifestly was required to pay and that explained why he was unwilling to invoke his Fortis policy even when it was in force; and
- It includes treatment for conditions that there was no reason to believe Plaintiff would develop.

This Court's ruling also will create incentives for defendants to prolong litigation. A defendant will have to refute not only the inferences actually argued by the plaintiff, but also all conceivable implications of every piece of evidence, lest they leave an opening for a new theory on appeal. Here, Fortis would have had to introduce evidence showing that the estimate of Plaintiff's future medical expenses to the age of 77—invoked by Plaintiff solely to show the alleged motive for rescinding the policy—was not an appropriate measure of potential harm. Had Fortis known that the $1 million figure would be multiplied more than 9 times to produce a punitive damages figure, it would have disputed the precise amount, using evidence that would have been irrelevant had Plaintiff's evidence been used only to show that Fortis had a financial

incentive to rescind the policy. For example, Fortis might have introduced expert testimony about Plaintiff's life expectancy; the scope of the policy; premiums, deductibles, and co-payments, and how those figures would change over the next 60 years; and the types of treatment that Plaintiff might need over that period. Importantly, Fortis did not merely fail to foresee a factual inference that the jury might draw; this Court based the punitive award on a *legal theory* that was never argued below and on a finding of fact that the jury was never even *asked* to make. If defendants are unable to rely on the theories and questions that are presented to the jury, they will have no choice but to prolong litigation by disputing collateral or irrelevant issues.

Of course, it is also possible that the trial court would not have allowed Fortis to make a full record on every imaginable theory. South Carolina courts consistently employ Rule of Evidence 403 to limit litigation of collateral issues. *See, e.g., State v. Mekler*, 368 S.C. 1, 12, 626 S.E.2d 890, 896 (Ct. App. 2005) (affirming exclusion of evidence "because this was a matter collateral to the case in chief" where trial court had found that "it could unduly lengthen the trial"); *Hill v. USA Truck, Inc.*, 2007 WL 1574545, at *10 (D.S.C. May 30, 2007) ("If the Court had allowed the prior accident into evidence, it would also be obligated to allow Defendant's past accidents into evidence out of fairness to the plaintiff. This would result in a series of mini-trials that would greatly lengthen the trial and confuse the jury. The jury was asked to decide the facts of *this* accident. Expanding the scope of the trial to all of the parties' past accidents would have been improper under Rule 403."). The Fourth Circuit has warned that

> district courts have an affirmative duty to prevent trials from becoming protracted and costly affairs. Indeed, they must manage litigation to "avoid needless consumption of time." Particularly during the course of multi-week trials, witness questioning may skitter off in collateral directions. . . . And even when testimony is limited to relevant areas, they have the further obligation to ensure that the presentation of evidence does not become rambling and repetitious. Judicial resources are not limitless, and drawn-out trials make jury service increasingly incompatible with normal family and employment obligations.

United States v. Smith, 452 F.3d 323, 332 (4th Cir. 2006) (citations omitted).

Excluding defense evidence under Rule 403 will be an attractive option for trial courts when faced with evidence that is relevant only to refute theories that plaintiffs have chosen not to argue. But if appellate courts nonetheless consider those theories on appeal, they will do so on the basis of a lopsided record.

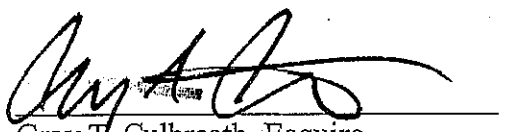
Alternatively, courts may place time limits on trial that will place defendants in the untenable position of having to choose which possible land mines to try to defuse, knowing that there is no time to defuse all of them. As this case well demonstrates, a single piece of evidence—here, the $1 million estimate—might take no more than a few minutes for the plaintiff to put into the record. But that same piece of evidence may be invalid in multiple respects that could take the defendant hours to explain. The asymmetry is a fact of life when the evidence is an essential building block of the plaintiff's case, but is grossly unfair when the evidence is introduced and used for an entirely different, limited, and, in the scheme of things, insignificant purpose.

CONCLUSION

The Court should grant rehearing, revise its Opinion to no longer rely on potential harm as a basis for supporting the punitive award, and either order a new trial or reduce the punitive damages to a modest multiple—no more than 4:1—of the compensatory damages.

Respectfully submitted,

COLLINS & LACY, P.C.

By: 

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PROOF OF SERVICE

I, the undersigned Administrative Assistant, of the law offices of Collins & Lacy, P.C., attorneys for Defense Research Institute, do hereby certify that I have served all counsel in this action with a copy of the pleadings hereinbelow specified by mailing a copy of the same by United States Mail, postage prepaid, to the following addresses:

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