

**DOES COOPER INDUSTRIES V. LEATHERMAN
TOOL GROUP, INC. REQUIRE DE
NOVO REVIEW BY STATE
APPELLATE COURTS?**

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For a number of years, the United States Supreme Court has been very delicately considering the manner in which U.S. courts of appeals review rulings by district courts on punitive damage verdicts. In *Cooper Industries, Inc. v. Leatherman Tool Group, Inc.*,¹ the United States Supreme Court held that trial court rulings on the constitutionality of punitive damage awards are subject to *de novo* appellate review in the federal court system.² Although the case made no specific mention of the applicability of the requirement for *de novo* appellate review to the state court system, *Cooper* has been followed by at least six state appellate courts.³ Usually, these courts give little explanation for following the decision of *Cooper* other than a brief reference to the Supremacy Clause of the Federal Constitution or a determination that some aspect of the Constitution controls. The purpose of this article is to review the current status of *de novo* review by state appellate courts in light of the decision of the U.S. Supreme Court in *Cooper* and its relationship to punitive damage awards.

I.
HISTORICAL PROLOGUE

Many years ago, the United States Supreme Court held that the Seventh Amendment to the United States Constitution preserves the right to trial by jury as it existed at common law in 1791. At that time, English trial judges rarely interfered with

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1. 532 U.S. 424 (2000).

2. *Id.* at 443.

3. The courts that have followed the *de novo* directive of *Cooper* are: Cent. Bering Sea Fisherman's Assn. v. Anderson, 54 P.3d 271 (Alaska 2002); Sand Hill Energy v. Ford Motor Co., 83 S.W.3d 483 (Ky. 2002); Aken v. Plains Elec. Generation and Transmission Coop., Inc., 49 P.3d 662 (N.M. 2002); Leisinger v. Jacobson, 651 N.W.2d 693 (S.D. 2002); Acceptance Ins. Co. v. Brown, 2001 Ala. LEXIS 255 (Ala. 2001); St. John v. Coisman, 799 So. 2d 1110 (Fla. Dist. Ct. App. 2001).

a jury's assessment of damages, though they reserved the power to order a new trial where the verdict was grossly excessive or so "monstrous" as to shock the conscience of the court.⁴

Generally, appellate courts only considered issues of law and did not reevaluate decisions made by trial courts on the basis of evidence.⁵ Indeed, during the early stages of American jurisprudence, the Supreme Court maintained that "orders granting or denying a new trial based on the amount of damages were simply not reviewable."⁶

Beginning in about 1955, the Justices of the Supreme Court indicated that they were beginning to regard the question of the size of damage awards as open to further examination.⁷ A review of the decisions of the United States courts of appeals indicates a movement to give similar scrutiny to the size of damage awards. By 1996, all of the federal circuit courts had determined that orders for a new trial are in fact subject to review for abuse of discretion.⁸ The U.S. Supreme Court ultimately recognized that standard in *Gasperini v. Center for Humanities, Inc.*⁹ The *Gasperini* case was a diversity action in which the defendant had challenged the compensatory award as excessive under New York law.¹⁰ The Court applied the abuse of discretion standard.¹¹ *Gasperini* did not involve punitive damages issues. Just four years later, the U.S. Supreme Court in *Cooper* adopted the *de novo* standard for federal appellate review of punitive damage awards.

Perhaps we should pause here and consider what *de novo* review generally means. *Black's Law Dictionary* defines the phrase as an "appeal in which the appellate court uses the trial court's record but reviews the evidence and law without deference to the trial court's rulings."¹² It is as if no action whatever had been instituted in the court below. However, *de novo* review in appellate proceedings does not generally mean that there is a complete reopening

4. *The Supreme Court on Punitive Damages: Do Juries Matter? . . . Do Judges?*, 6 CIV. JUST. DIG. 1, 1 (2001).

5. *Id.*

6. *Id.*

7. *Id.* (citing *Neese v. S. Ry. Co.*, 350 U.S. 77 (1955) and *Grunenthal v. Long Island R.R. Co.*, 393 U.S. 156 (1968)).

8. *Id.*

9. 518 U.S. 415 (1996).

10. *Id.* at 418–19.

11. *Id.* at 419.

12. BLACK'S LAW DICTIONARY 94 (7th ed. 1999).

and retrial of the case, in which new evidence may be introduced, unless the law so provides.¹³

II. U.S. SUPREME COURT MINDSET

In order to understand the analysis of the judicial mindset of the U.S. Supreme Court, it is necessary to scrutinize the views of the members of that Court, not only in the context of a published opinion, but also in respect to comments from the bench at oral argument. For example, *Tri County Industries, Inc. v. District of Columbia*¹⁴ involved efforts by a company to convert an old warehouse in Washington, D.C. into a facility to detoxify contaminated dirt.¹⁵ The District of Columbia government revoked the company's permit after extensive neighborhood protests.¹⁶ Tri County successfully sued in the U.S. district court for a violation of its procedural due process rights and the jury awarded five million dollars in damages, primarily for lost future earnings.¹⁷ The trial judge agreed to grant the motion by the District of Columbia for a new trial unless Tri County conceded to a remittitur of one million dollars.¹⁸ The trial judge stated that the award by the jury for lost profits "shocked the judicial conscience."¹⁹ The company chose a new trial instead of payment of a remittitur, resulting in a jury award of only \$100.00 in nominal damages.²⁰

The appellate saga then began with the U.S. Court of Appeals for the District of Columbia reinstating the original jury verdict.²¹ That court stated that rulings that set aside a verdict by the jury are subject to "a more searching inquiry" than that involved in the denial of a new trial.²² The appellate court determined that the trial judge was originally correct in excluding the evidence provided by the District of Columbia and the grant of a new trial, based on revised rulings, was an abuse of discretion.²³

13. *Wilmington Trust Co. v. Baldwin*, 195 A. 287, 295 (Del. Super. Ct. 1937).

14. 200 F.3d 836 (D.C. Cir. 2000), *modified*, 208 F.3d 1066 (D.C. Cir. 2001), *cert. dismissed as improvidently granted*, 531 U.S. 287 (2001).

15. *Id.* at 838.

16. *Id.*

17. *Id.* at 839.

18. *Id.*

19. *Id.* at 842.

20. *Id.*

21. *Id.* at 843.

22. *Id.* at 842-43 (citing *Langevine v. District of Columbia*, 106 F.3d 1018 (D.C. Cir. 1997)).

23. *Id.* at 842.

Originally, the United States Supreme Court “granted certiorari on the question of whether the ‘more searching inquiry’ conflicts with the broad deference accorded to the trial judge discretion standard approved in the *Gasperini* case.”²⁴ At oral argument in the United States Supreme Court, the District of Columbia claimed that the case was about judicial deference to trial judge findings.²⁵ However, comments from the bench indicated that a majority of the court felt that the Seventh Amendment governed the standard of appellate review, so that the right to trial by jury in a civil case should not be examined in any manner other than according to the rules of the common law.²⁶ Justice Ruth Bader Ginsburg, writer of the *Gasperini* majority opinion, observed that relying on that holding was improper; while *Gasperini* mandated that a district court in a diversity case give effect to state law limiting damages, it did not speak to the distinction between grants or denials of new trials or weaken the principle that appellate courts may not substitute their findings for those of the jury.²⁷ Chief Justice William Rehnquist noted that examining grants and denials of new trials under a uniform standard was “counter-intuitive” considering the role of the jury.²⁸ Justice Antonin Scalia politely pointed out to his colleagues that he had opposed the majority in *Gasperini* and had advised that if appellate review was permitted, a stricter standard for reviewing the grant of a new trial would be warranted.²⁹ Justice Stephen Breyer opined that the phrase “more searching inquiry” was merely a “throwaway line” by the circuit court and cautioned that since “there is no matter so close to the heart of the trial bar as the Seventh Amendment,” the Court singling out a particular verbal formulation would quickly call into question differing formulae used across circuits.³⁰ All of this is of no greater value than an amateur psychological inquiry into the mind of the U.S. Supreme Court. Within a week of the oral argument, the Supreme Court routinely dismissed the writ for *certiorari* as “improvidently granted” without further explanation.³¹

24. *The Supreme Court on Punitive Damages: Do Juries Matter? . . . Do Judges?*, *supra* note 4, at 2; see *District of Columbia v. Tri County Indus., Inc.*, 530 U.S. 1305 (2000). R

25. *The Supreme Court on Punitive Damages: Do Juries Matter? . . . Do Judges?*, *supra* note 4, at 2. R

26. *Id.*

27. *Id.*

28. *Id.*

29. *Id.*

30. *Id.*

31. *District of Columbia v. Tri County Indus., Inc.*, 531 U.S. 287 (2001).

III.

COOPER V. LEATHERMAN

The academic discussion of the effect of *Cooper* on state appellate courts is not conducted in a vacuum. Essentially it is the connection between damages, the constitutional right to a jury trial, and the standards of appellate review that are in question, all in the context of the practical effect on punitive damages awards.

The posture of *Cooper* both procedurally and substantively is worthy of additional review. Leatherman Tool Group marketed its Pocket Survival Tool (“PST”), a small portable multi-functional tool, during the 1980s.³² In 1995, Cooper Industries copied the design and the basic features of the tool, added a few features of its own, and marketed the product under the name of “ToolZall.”³³ Leatherman sued in the U.S. district court in Oregon claiming “trade-dress infringement, unfair competition and false advertising under § 43(a) of the Trademark Act of 1946 . . . and a common-law claim of unfair competition for advertising and selling an ‘imitation’ of the PST.”³⁴ The jury awarded Leatherman \$50,000 in compensatory damages and \$4.5 million in punitive damages.³⁵ Cooper then moved to overturn the punitive damages award as “grossly excessive” under *BMW of North America, Inc. v. Gore*.³⁶ The district court denied the motion and enjoined Cooper from marketing the ToolZall.³⁷

Cooper appealed to the Ninth Circuit, challenging both the injunction and the punitive damages award.³⁸ The Ninth Circuit issued two opinions.³⁹ In a published opinion, the Court set aside the injunction and held that the overall appearance of Leatherman’s tool was not protectable trade.⁴⁰ In an unpublished opinion, the Court upheld the punitive damages award applying an abuse of discretion standard of review.⁴¹ The Ninth Circuit held

32. *Cooper Indus., Inc. v. Leatherman Tool Group, Inc.*, 532 U.S. 424, 427 (2001).

33. *Id.*

34. *Id.* at 428.

35. *Id.* at 429.

36. *Id.*

37. *Id.*

38. *Id.*

39. *Id.*

40. *Id.* at 429–30; *see also*, *Leatherman Tool Group v. Cooper Indus.*, 199 F.3d 1009 (9th Cir. 1999).

41. *Cooper*, 532 U.S. at 430–31; *see also*, *Leatherman Tool Group, Inc. v. Cooper Indus.*, Nos. 98-35147, 98-35415, 1999 WL 1216844, at *1–*2 (9th Cir. Dec. 17, 1999).

that Cooper's actions amounted to "passing off," which gave Cooper an unfair advantage, and that Cooper's failure to remedy the problem promptly demonstrated "an indifference to legal consequences."⁴² The Ninth Circuit concluded that the district court had not abused its discretion in refraining from reducing the punitive damages award,⁴³ and upheld the punitive damages award against the challenge that it violated the constitution of Oregon.⁴⁴ The Ninth Circuit remanded the case for reconsideration of the award of attorney's fees.⁴⁵

The United States Supreme Court vacated and remanded the matter.⁴⁶ The majority held that it was error for the Ninth Circuit to apply an abuse of discretion standard of review.⁴⁷ Justice Stevens, the author of the majority opinion, wrote that punitive and compensatory damages "serve distinct purposes."⁴⁸ While the latter are meant to redress a "concrete loss," the former are "quasi-criminal" and "operate as 'private fines' intended to punish the defendant and to deter future wrongdoing."⁴⁹ Justice Stevens continued that the nature of the inquiry also differs: "[a] jury's assessment of the extent of a plaintiff's injury is essentially a factual determination, whereas its imposition of punitive damages is an expression of its moral condemnation."⁵⁰ The Court noted that several states have enacted statutes limiting the size of punitive damages awards.⁵¹ When a jury award stays within those boundaries, and no constitutional issues are raised, federal appellate courts are only to review for an abuse of discretion.⁵² The Court went on to observe that substantive constraints imposed by the Due Process Clause of the Fourteenth Amendment trump even state legislative discretion.⁵³

As *Cooper* noted, in earlier decisions such as *United States v. Bajakajian*⁵⁴ and *Ornelas v. United States*,⁵⁵ the Court "engaged in an

42. *Cooper*, 1999 WL 1216844, at *1-*2.

43. *Cooper*, 532 U.S. at 431 (quoting *Cooper*, 1999 WL 1216844, at *1-*2).

44. *Id.* at 430.

45. *Cooper*, 199 F.3d at 1010-11.

46. *Cooper*, 532 U.S. at 443.

47. *Id.* at 431.

48. *Id.* at 432.

49. *Id.* (citations omitted).

50. *Id.* (citation omitted).

51. *Id.* at 433.

52. *Id.*

53. *Id.*

54. 524 U.S. 321 (1998).

55. 517 U.S. 690 (1996).

independent examination of relevant criteria.”⁵⁶ In *Bajakajian*, the Court found that excessive fine claims under the 8th Amendment are subject to *de novo* review.⁵⁷ In *Ornelas*, the Court held that trial judges’ determinations of reasonable suspicion and probable cause should be reviewed *de novo* on appeal.⁵⁸ The *Cooper* court found the reasoning in *Ornelas* particularly instructive in that gross excessiveness, like reasonable suspicion and probable cause, is an imprecise concept.⁵⁹ These legal rules “acquire content only through application,” particularly on a “case-by-case application at the appellate level.”⁶⁰ The Court stated that applying *de novo* review tends to “unify precedent and stabilize the law.”⁶¹ Accordingly, the U.S. Supreme Court concluded that “courts of appeals should apply a *de novo* standard of review when passing on district courts’ determination of the constitutionality of punitive damages awards.”⁶²

Although the vote of the U.S. Supreme Court in *Cooper* is properly recorded as 8 to 1, Justices Scalia and Thomas joined the majority only with great reluctance.⁶³ Justice Thomas stated that he would vote to overrule the *Gore* case, but did not have the opportunity here.⁶⁴ Justice Scalia in a bittersweet recitation, reiterated his view that “excessive punitive damages do not violate the Due Process Clause,” a position that he had taken in dissent in *Gore*.⁶⁵ He again expressed his view that the court “should review for abuse of discretion (rather than *de novo*) fact-bound constitutional issues which, in their resistance to meaningful generalization, resemble the question of excessiveness of punitive damages.”⁶⁶ Justice Scalia cited his dissents in *Ornelas* and *Gore*.⁶⁷ Justice Ginsburg dissented in a lengthy opinion on the principle that the trial by jury was paramount and that the Ninth Circuit properly identified abuse of discretion as the appropriate standard of appellate review.⁶⁸

56. *Cooper*, 532 U.S. at 435.

57. *Bajakajian*, 524 U.S. at 336–37 & n.10.

58. *Ornelas*, 517 U.S. at 697.

59. *See Cooper*, 524 U.S. at 436.

60. *Id.*

61. *Id.*

62. *Id.*

63. *See id.* at 443–44 (Thomas, J., concurring, Scalia, J., concurring).

64. *Id.* at 443 (Thomas, J., concurring).

65. *Id.* (Scalia, J., concurring).

66. *Id.* at 443–44 (Scalia, J., concurring).

67. *Id.* (Scalia, J., concurring).

68. *Id.* at 444–45 (Ginsburg, J., dissenting).

IV. WHAT FOLLOWS

Some argue that *de novo* review of punitive damages awards is possible only because the federal constitutional right to a jury trial does not include a right to the assessment by the jury of punitive damages. Most states have a right to a jury trial which is frequently considered to be inviolate under the state constitution and does include a right to jury assessment of the amount of any punitive damages awarded.⁶⁹

One of the first concerns that obviously arise in any analysis of the relationship of *Cooper* to the authority of state constitutions is the application of the Supremacy Clause of the United States Constitution. When a state court upholds a punitive damage award because it is complying with the requirements of the constitution of that state, and when that award is rendered by a jury authorized to determine such damages, it could be argued that the United States Supreme Court must respect the result because it may not be arbitrary or fundamentally unfair. Seven years prior to *Cooper*, the U.S. Supreme Court in *TXO Production Corp. v. Alliance Resources Corp.*⁷⁰ held that a compensatory award of \$19,000 and a \$10 million punitive damage award was not so grossly excessive as to violate due process. The Court acknowledged its intention to defer to the state court decision by saying, "Assuming that fair procedures were followed, a judgment that is a product of that process is entitled to a strong presumption of validity. Indeed, there are persuasive reasons for suggesting that the presumption should be irrefutable . . . or virtually so."⁷¹

69. As an example, the North Carolina constitution provides in Article I, Section 25, that the "ancient mode of trial by jury is one of the best securities of the rights of the people and shall remain sacred and inviolate." N.C. Const., art I, § 25. Article VI, Section 13 also provides that "[n]o rule of procedure or practice" adopted for the use of the courts "shall abridge substantive rights or abrogate or limit the right of trial by jury." N.C. Const., art IV, § 13. The North Carolina Supreme Court has held that Article I, Section 25 was intended to preserve the same jury rights that existed at common law or by statute at the time the 1868 North Carolina constitution was adopted. *N.C. State Bar v. DuMont*, 286 S.E.2d 89 (N.C. 1982). Included in the jury determinations was the question of the amount of punitive damages. *Wylie v. Smitherman*, 30 N.C. (8 Ired.) 236 (1848), 1848 WL 1279.

70. 509 U.S. 443, 457 (1993).

71. *Id.* at 457.

V.
CURRENT STATE POSITIONS

Although the direct language of *Cooper* indicates that such a *de novo* review is to be conducted in the federal system, a number of state courts have quickly joined the band wagon of *de novo* review in regard to punitive damages. Alabama and Kentucky have clearly adopted the *Cooper* rationale, making it applicable to state appellate courts. Alabama was first with its majority decision in *Acceptance Insurance Co. v. Brown*.⁷² The Supreme Court of Kentucky, in a four to three decision in *Sand Hill Energy, Inc. v. Ford Motor Company*,⁷³ followed what the majority called the mandate of *Cooper*, stating that “[n]o longer may appellate courts defer to trial courts on questions of excessiveness of punitive damages and limit their review to [an] abuse of discretion [standard],”⁷⁴ but rather they must evaluate the amount of punitive damages *de novo*.

A. *Alabama*

The facts of the *Brown* case involve an attempted burglary at a convenience store owned and operated by Leo Brown and his wife Gloria.⁷⁵ When the Browns returned to the store they had closed earlier in the evening, they discovered a man named Scott, “standing with the store’s padlock in his hand and he appeared to be ‘messing with the front door.’”⁷⁶ After a verbal inquiry, Leo Brown fired two shots in an attempt to scare Scott away.⁷⁷ Leo then hit Scott on the head with a rifle and Scott fled.⁷⁸ Gloria Brown fired a pistol and shot Scott in the abdomen where he was seriously injured.⁷⁹ As a result of this encounter, Scott filed a tort action against the Browns and secured a judgment.⁸⁰ He recovered \$30,000 in compensatory damages and \$20,000 in punitive damages against Leo and Gloria Brown.⁸¹

The Browns, who had a commercial, general liability insurance policy with Acceptance Insurance Company, filed suit against the company based on its failure to defend and indemnify them in re-

72. 2001 Ala. LEXIS 255 (June 29, 2001).

73. 83 S.W.3d 483, 493 (Ky. 2002).

74. *Id.*

75. 2001 Ala. LEXIS 255, at *4–6.

76. *Id.* at *6.

77. *Id.*

78. *Id.* at *7–8.

79. *Id.* at *8.

80. *Id.* at *6.

81. *Id.* at *15.

gard to Scott's action.⁸² Only Gloria Brown's suit went to trial.⁸³ In the principal action, the jury returned a verdict for Gloria on all counts for a total of \$270,000 and also awarded \$1.2 million in punitive damages.⁸⁴ Following the verdict, the court granted the motion by acceptance of a remittitur and ordered that the compensatory damages be reduced to \$105,000 (\$30,000 for count two, and \$75,000 for count one and three) and the punitive damages be reduced to \$300,000.⁸⁵ Gloria acquiesced to the remittitur.⁸⁶

The Supreme Court of Alabama determined that, considering the Supreme Court's declaration in *Cooper*, they would review the punitive damages award *de novo*.⁸⁷ In conducting the *de novo* review, the court also considered the guideposts established in *Gore* and the factors set out in *Hammond v. City of Gadsden* and *Green Oil Co. v. Hornsby* that pertained to the question of excessiveness.⁸⁸ The Court concluded that the trial court judge should have further decreased the amount of punitive damages awarded by the jury.⁸⁹ The majority reasoned that "[i]n light of the fact that Brown's total compensatory damages amounted to no more than \$60,000 . . . her punitive-damages award should amount to no more than \$180,000."⁹⁰ In the event that this further reduction was not acceptable to Brown, then the judgment of the trial court would be reversed and the cause remanded for a new trial.⁹¹

Five justices concurred in the majority opinion, another justice concurred in result, and Chief Justice Moore and Justice Woodall concurred in part and dissented in part.⁹² As stated by Chief Justice Moore, the jury thought the defendant's conduct was egregious enough for a punitive award of \$1.2 million and the trial judge, who was present during the trial, reduced that award to \$300,000.⁹³ The most important element of Chief Justice Moore's dissent was his open questioning of whether *Cooper* mandated an appellate court in Alabama to apply a *de novo* standard of review for punitive damage

82. *Id.* at *1, *15.

83. *Id.* at *1.

84. *Id.* at *17-18.

85. *Id.* at *19.

86. *Id.*

87. *Id.* at *57-58.

88. *Id.*

89. *Id.* at 59.

90. *Id.*

91. *Id.*

92. *Id.*

93. *Id.* at *59-60 (Moore, J., concurring in part and dissenting in part).

awards.⁹⁴ Justice Woodall dissented to the extent of the remittitur of compensatory and punitive damages.⁹⁵

B. *Kentucky*

The Kentucky Supreme Court considered the amount of punitive damages in *Sand Hill* and determined that “[n]o longer may appellate courts defer to trial courts on questions of excessiveness of punitive damages and limit their review to an abuse of discretion,” but must “review the amount of punitive damages *de novo*,” based on the holding of the United States Supreme Court in *Cooper*.⁹⁶

Sand Hill involved a products liability action claiming wrongful death brought by the estate of Smith against Ford Motor Company.⁹⁷ At the time of the accident, Smith was working for Sand Hill Energy, Inc., unloading bags of ammonium nitrate from a Ford pickup truck.⁹⁸ “The vehicle was parked on a 4% downhill grade, with the motor running and the transmission set in park.”⁹⁹ When Smith was standing “behind the vehicle, the transmission ‘migrated’ from park to reverse, and the vehicle moved backwards and up the incline,” and he was “crushed to death against a storage shed.”¹⁰⁰

Smith’s estate presented evidence at trial that the design of the truck’s transmission was defective, resulting in a propensity of the truck to “migrate from mispositioned false park to powered reverse due to engine vibration.”¹⁰¹ Evidence was also presented that the Ford company was aware of this problem years before even manufacturing the 1977 model of the truck causing Smith’s death.¹⁰² Ford reacted to such evidence by pointing to the fact that at the time of the accident, the vehicle was in generally deplorable condition, being sixteen years old and with a minimum of 143,000 miles, and furthermore that “crucial mechanical parts were broken, misaligned, worn or loose, and that other crucial parts had been replaced with makeshift parts.”¹⁰³ Ford alleged that “the engine and

94. *Id.*

95. *Id.*

96. *Sand Hill Energy, Inc. v. Ford Motor Co.*, 83 S.W.3d 483, 493 (Ky. 2002).

97. *Id.* at 485.

98. *Id.*

99. *Id.* at 485–86.

100. *Id.* at 486.

101. *Id.*

102. *Id.*

103. *Id.*

transmission had been entirely rebuilt, that there was internal and external leakage of brake fluid, and concluded that dirt, debris, and corrosion were the likely cause of the accident.”¹⁰⁴ However, in 1980, “Ford modified the transmission design at issue here to protect against unexpected shifts from park to powered reverse,”¹⁰⁵ and the company “was also required by . . . the National Highway Traffic Safety Association . . . to send out more than 22 million warnings of the possibility of unintended park to powered reverse shifts in its vehicles.”¹⁰⁶

In the end, the jury issued a verdict against Ford, awarding compensatory damages of three million dollars and punitive damages of twenty million dollars.¹⁰⁷ The Kentucky Court of Appeals reversed the decision “on grounds of misallocation of peremptory challenges,” ordering a new trial without reaching the other issues raised during the appeal.¹⁰⁸ The Kentucky Supreme Court granted discretionary review and considered the entire case.¹⁰⁹

The pertinent issue for our consideration is related to the punitive damage award and its ultimate reduction. The majority of the Kentucky Supreme Court determined that the evidence supported an award of \$15 million in punitive damages, with the effect of reducing the original punitive damages award by \$5 million.¹¹⁰

The majority of the court first examined the history of the appellate review standard for punitive damage awards in the commonwealth. For a number of years, the court “observed the ‘first blush’ rule which focused on whether the amount of punitive damages appeared to have been given under the influence of passion or prejudice and in disregard of the evidence.”¹¹¹ This standard was modified in *Davis v. Graviss*¹¹² and *Cooper v. Fultz*,¹¹³ where it was explained that “the trial court and appellate court have different functions.”¹¹⁴ The trial court has the responsibility of deciding whether the award appears to have been given “under the influence

104. *Id.*

105. *Id.*

106. *Id.* at 486–87.

107. *Id.* at 485.

108. *Id.*

109. *Id.*

110. *Id.* at 496.

111. *Id.* at 493 (citing *Koch v. Stone*, 332 S.W.2d 529 (Ky. 1960)).

112. 672 S.W.2d 928 (Ky. 1984) (finding that differences between appellate and trial functions lead to an appellate practice which does “not direct the appellate judge to decide if the verdict shocks his conscience or causes him to blush”).

113. 812 S.W.2d 497 (Ky. 1991).

114. *Id.* at 501 (quoting *Davis*, 672 S.W.2d at 932–33).

of passion or prejudice or in disregard of the evidence or the instructions.”¹¹⁵ On the other hand, the appellate function was described in *Prater v. Arnett*¹¹⁶ to the effect that “the appellate court no longer steps into the shoes of the trial judge to inspect the action of the jury from his perspective,”¹¹⁷ but rather “[n]ow, the appellate court reviews only the actions of the trial judge to determine if his actions constitute an error of law. There is no error of law until the trial judge is said to have abused his discretion.”¹¹⁸ The opinion in *Fultz* stated that the appellate court will not “substitute [its] judgment on excessiveness or inadequacy” unless there is a clearly erroneous finding by the trial court.¹¹⁹ Moreover, the question of excessiveness is “dependent on the nature of the underlying evidence.”¹²⁰

The Kentucky court then proceeds to announce that as of “May of 2001 . . . the role of appellate courts was changed by the Supreme Court of the United States where federal constitutional questions are preserved and presented for review.”¹²¹ The majority wrote, “No longer may appellate courts defer to trial courts on questions of excessiveness of punitive damages and limit their review to abuse of discretion. We must now return to our former role and review the amount of punitive damages *de novo*.”¹²² The opinion further recites that the decision in *Owens-Corning v. Golightly*¹²³ “contains an excellent analysis of Kentucky law on review of punitive damage awards as it existed prior to” the federal case of *Cooper*.¹²⁴ The court continued to express confidence “that the trial judge discharged his duty to review under the ‘first blush’ rule.”¹²⁵ However, the court then invoked what it termed its “new responsibility to review the amount of punitive damages *de novo*” by simply stating that it had “considered the factors set forth in *Gore* and a number of decisions from other jurisdictions.”¹²⁶

115. *Id.*

116. 648 S.W.2d 82, 86 (Ky. Ct. App. 1983).

117. *Sand Hill Energy, Inc. v. Ford Motor Co.*, 83 S.W.3d 483, 493 (Ky. 2002) (quoting *Prater*, 648 S.W.2d at 86)).

118. *Id.* at 493 (quoting *Prater*, 648 S.W.2d at 86).

119. *Cooper v. Fultz*, 812 S.W.2d 497, 501 (Ky. 1991).

120. *Id.*

121. *Sand Hill*, 83 S.W.3d at 493.

122. *Id.* (citing *Cooper Indus., Inc. v. Leatherman Tool Group, Inc.*, 532 U.S. 424 (2001)).

123. 976 S.W.2d 409 (Ky. 1998).

124. *Sand Hill*, 83 S.W.3d at 496.

125. *Id.*

126. *Id.*

The decision of the court in *Sand Hill* reflected the earlier decision in *Golightly* to the effect that:

the assessment of punitive damages requires consideration of not only the nature of the defendant's act, but also the extent of the harm resulting to the plaintiff. In other words, the jury is to consider not only the defendant's conduct, but the relationship of that conduct to the injury suffered by this particular plaintiff.¹²⁷

The court concluded that such a standard was not inconsistent with enumerated provisions of *Gore*.¹²⁸

Sand Hill was not an easy decision, as is reflected by the 4 to 3 vote.¹²⁹ There was a concurring opinion, and three justices dissented.¹³⁰ However, none of the extensive dissents touched the question of the propriety of adopting the *Cooper de novo* review requirements.¹³¹

The case that occasioned the opinion in *Sand Hill* was orally argued May 17, 2001, and the matter was under vigorous discussion from that time until its rendition on May 16, 2002. Some objective observers might believe that the majority was achieved because of a view that the award of punitive damages was significant enough in the amount of \$15 million that a reduction of only \$5 million to that sum was not unjust. If that reasoning prevailed among the members of the majority, it would comport with the philosophy expressed in both *Fowler* and *Golightly*. Interestingly enough, none of the members of the majority ventured to make any written statement by means of a concurring opinion as to the rationale for their individual votes.

1. Remittitur

In announcing its decision in *Cooper*, the United States Supreme Court, perhaps unwittingly, made possible the use of additur and remittitur in future civil cases. "Additur" is adding to an award and "remittitur" is reducing an award. The additions or reductions can be made at any stage of the proceedings, but here we focus

127. *Id.* (quoting *Golightly*, 976 S.W.2d at 412); see also *Fowler v. Mantooth*, 683 S.W.2d 250, 253 (Ky. 1984) ("Thus we recognize *two* elements involved in assessing punitive damages: (1) the nature and extent of the harm to the plaintiff, and (2) the character of the defendant's act.").

128. *Id.*

129. See generally *id.*

130. *Id.*

131. *Id.* at 501-16.

primarily on the role of the appellate court in either adding to or subtracting from the judgment.

We must add that at the time *Sand Hill* was tried in the circuit court, the controlling legal standard for punitive damages in Kentucky was § 411.184(1)(c), which required a determination that the defendant acted with “flagrant indifference to the rights of the plaintiff and with a subjective awareness that such conduct will result in human death or bodily harm.”¹³² The Kentucky Supreme Court had previously held this statute to be unconstitutional in *Williams v. Wilson*.¹³³ However, in *Sand Hill* no challenge was made to the constitutionality of the statute and the matter was tried on the statutory standard.

For a number of years, Kentucky had followed the principle that there was no authority for the court to reduce punitive damages. *Hanson v. American National Bank and Trust Co.*¹³⁴ was a case in which a borrower sued for fraud and misrepresentation against a lender. The circuit judge entered a judgment for the borrower, awarding \$1,065,000 in compensatory damages and \$5,775,000 in punitive damages, less the funds the borrower owed.¹³⁵ Hanson, the lender, appealed. The intermediate court of appeals remanded for reconsideration of punitive damages but otherwise affirmed.¹³⁶ The court of appeals had determined that because the award of the jury for compensatory damages was substantial, that award would itself be “a deterrent to future deceptive practices and that in comparing the punitive damages assessed by the jury with the fraud that caused it, when taking into consideration the relevant statutory factors, the jury’s award of punitive damages was disproportionate.”¹³⁷ The court of appeals further asserted that “to the extent the award of punitive damages exceeded three times the compensatory damages, it was excessive and the excess should be remitted or a new trial ordered.”¹³⁸

The Kentucky Supreme Court unanimously rejected such a rationale stating that it was “unaware of any authority in [Kentucky]. . . for court ordered remittitur of punitive damages or for the fixing of the amount of such damages,” and it specifically de-

132. KY. REV. STAT. ANN. § 411.184(1)(c) (Michie 1992).

133. 972 S.W.2d 260 (Ky. 1998).

134. 865 S.W.2d 302 (Ky. 1993).

135. *Id.* at 306.

136. *Id.*

137. *Id.* at 310.

138. *Id.*

clined to establish such a precedent in this case.¹³⁹ The court determined that the punitive damage award of \$5,775,000 in favor of the borrower in a lender fraud case was not grossly excessive so as to violate substantive due process. Nor was the award the product of passion or prejudice where the trial judge gave appropriate jury instructions and the jury found the lender had fraudulently induced the borrower to restructure the loan on terms that the lender had no intention of performing.¹⁴⁰

The *Hanson* court observed that it was aware that “Congress has enacted statutes that establish the amount of exemplary damages [sometimes known as punitive damages] by permitting treble damages in certain cases” and that “[t]hese caps are specified for certain statutory actions, not constitutionally protected actions.”¹⁴¹ The *Hanson* court further stated that it was “not inclined to enact law on the measure of punitive damages” because that decision was a legislative matter, so long as it could be accomplished consistent with the Kentucky Constitution.¹⁴² The court also expressed its reverence for the “sanctity of the jury verdict,” which it described as “at the heart of our judicial system.”¹⁴³

Stating that it “discern[ed] no short coming [sic] in the instructions given that violat[ed] the standards set forth in *Hanson*,” the majority in *Sand Hill* indicated that no other argument had been advanced “sufficient to persuade [the court] to reexamine [its] long-standing practices and the authorities upon which they are based.”¹⁴⁴ However, the majority concluded that the role of appellate courts was changed by the United States Supreme Court in May of 2001 with the rendition of *Cooper*.¹⁴⁵ The Kentucky Supreme Court asserted that it should “return to [its] former role and review the amount of punitive damages *de novo*.”¹⁴⁶ The court cited *Leatherman* for the proposition that “the Due Process Clause of the Fourteenth Amendment to the Federal Constitution imposes substantial limits on [state] discretion.”¹⁴⁷ It further reasoned that the Eighth Amendment to the Federal Constitution prohibited exces-

139. *Id.*

140. *Id.* at 310–11.

141. *Id.* at 311.

142. *Id.*

143. *Id.*

144. *Sand Hill Energy, Inc. v. Ford Motor Co.*, 83 S.W.3d 483, 493 (Ky. 2002).

145. *Id.*

146. *Id.*

147. *Id.* at 494 (quoting *Cooper Indus., Inc. v. Leatherman Tool Group, Inc.*, 532 U.S. 424 (2001)).

sive fines and cruel and unusual punishment and that the Due Process Clause made such prohibitions applicable to the states.¹⁴⁸

The decision in *Hanson* was the “largest punitive damage award ever finally affirmed by Kentucky courts.”¹⁴⁹ The Kentucky Supreme Court acknowledged that it had in recent years issued decisions with “no particular disinclination to uphold such awards where the evidence justified it.”¹⁵⁰ The language of the majority opinion indicates by implication that the Supremacy Clause of the United States Constitution required Kentucky to reintroduce remittitur and the procedural process of *de novo* review. However, the Supremacy Clause was not formally acknowledged in the language of the opinion.

C. Other States

In New Mexico, the rule has been that a punitive damage award will be upheld if substantial evidence supports the findings of the jury.¹⁵¹ In *Aken v. Plains Electric Generation and Transmission Coop., Inc.*,¹⁵² the state supreme court stated:

Whatever the contours of the *Cooper Industries* holding may be when substantively applied, one immediate question is raised by the inexplicitness of the opinion. That is, whether *de novo* review is constitutionally required or was imposed by the Court in the exercise of its supervisory authority over federal courts. If the latter, we are not necessarily bound by the holding.¹⁵³

The court cited *Smith v. Phillips*¹⁵⁴ for the proposition that “Federal courts have no supervisory authority over state judicial proceedings and may intervene only to correct wrongs of constitutional dimension.”¹⁵⁵ The New Mexico court concluded that *Cooper* required *de novo* review as a matter of U.S. constitutional law.¹⁵⁶

The *Aken* court explained the rationale for the *Cooper Industries* ruling:

148. *Id.*; see, e.g., *Furman v. Georgia*, 408 U.S. 238 (1972) (applying Eighth Amendment constraints to state death penalty laws).

149. *Sand Hill*, 83 S.W.3d at 495.

150. *Id.* at 495–96 (citing *Owens-Corning v. Golightly*, 976 S.W.2d 409 (Ky. 1998); *Kroger Co. v. Willgruber*, 920 S.W.2d 61 (Ky. 1996); *Farmland Mut. Ins. Co. v. Johnson*, 36 S.W.3d 368 (Ky. 2000)).

151. See *Green Tree Acceptance, Inc. v. Layton*, 769 P.2d 84, 87 (N.M. 1989).

152. 49 P.3d 662 (N.M. 2002).

153. *Id.* at 668 (citing *Smith v. Phillips*, 455 U.S. 209, 221 (1982)).

154. 455 U.S. 209, 221 (1982).

155. *Aken*, 49 P.3d at 668 (quoting *Smith*, 455 U.S. at 221).

156. *Id.*

[A] *de novo* standard of review should apply to a determination of the constitutionality of punitive damages . . . to allow the concept of “gross excessiveness” of those awards to become better defined legally through appellate pronouncements on the excessiveness of awards in particular cases. Gross excessiveness is like “reasonable suspicion” or “probable cause” which are “fluid concepts that take their substantive content from the particular context in which the standards are being assessed.”¹⁵⁷

According to the *Aken* court, in *Cooper* the Supreme Court explained that “gross excessiveness is in turn a legal principle that will acquire an increasingly cogent definition to be articulated by appellate courts, as opposed to there being no real rhyme or reason touching on awards considered reasonable before *Cooper Industries*.”¹⁵⁸ As a result, independent review is essential “if appellate courts are to maintain control of, and to clarify, the legal principles”¹⁵⁹ and because “*de novo* review ‘tends to unify precedent.’”¹⁶⁰

Thus, the New Mexico court applied *de novo* review, noting that substantial evidence review differs from *de novo* review, under which the court makes an “independent assessment of the record.”¹⁶¹ The court opined that the Supreme Court expressed the solution to this problem in stating that: “We need not, and indeed we cannot, draw a mathematical bright line between the constitutionally acceptable and the constitutionally unacceptable that would fit every case. We can say, however, that [a] general concern of reasonableness . . . properly enters into the constitutional calculus.”¹⁶² The New Mexico high court concludes that this statement suggests that “the proper standard of review is as follows: that an appellate court must read the record before it bearing in mind, with respect to each relevant factor announced in *BMW* . . . whether the jury’s award of punitive damages is comparatively reasonable.”¹⁶³

157. *Id.* (citing *Cooper Indus., Inc. v. Leatherman Tool Group, Inc.*, 532 U.S. 424, 436 (2001) (quoting *Ornellas v. United States*, 517 U.S. 690, 696 (1996))) (double quotation marks omitted).

158. *Id.* at 668.

159. *Id.* (citing *Cooper*, 532 U.S. at 436 (quoting *Ornellas*, 517 U.S. at 690, 697)).

160. *Id.* (internal quotations omitted).

161. *Id.* at 668.

162. *Id.* at 668–69 (quoting *BMW of N. Am. v. Gore*, 517 U.S. 559, 582–83 (1996) (quoting *TXO Prod. Corp. v. Alliance Res. Corp.*, 509 U.S. 443, 458 (1993) (quoting *Pac. Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1, 18 (1991) (alteration and omission in *TXO*))) (internal quotations omitted).

163. *Id.* at 669.

The Oregon Court of Appeals determined, in *Williams v. Philip Morris, Inc.*,¹⁶⁴ that the phrase *de novo review*, as used in Oregon, does not apply to a review of legal holdings, but rather is limited to a review of factual findings.¹⁶⁵ As regarding *Cooper*, the Oregon court observed that “the Court held that a jury’s determination of the *amount* of punitive damages was not a ‘fact’ within the *Gasperini* rule and thus was subject to a broader scope of appellate rule than it had established in that case.”¹⁶⁶

The intermediate appellate court concluded that “what *Cooper Industries* does is to require an appellate court to review the trial court’s decision on the amount of punitive damages as a matter of law—that is, by plenary review—rather than for an abuse of discretion.”¹⁶⁷ Thus the rule in *Cooper* was viewed by the Oregon Court of Appeals to be consistent with the manner in which it had always reviewed the decisions of the trial courts on punitive damages.¹⁶⁸

The South Dakota approach is found in *Leisinger v. Jacobson*.¹⁶⁹ In that decision, the South Dakota Supreme Court, considering *Cooper*, chose to “follow the courts that find the abuse of discretion standard applies to issues regarding excessive punitive damages unless the issue has been raised as a constitutional violation, which is reviewed *de novo*.”¹⁷⁰

In *Time Warner Entertainment Co. v. Six Flags Over Georgia*,¹⁷¹ the Georgia Court of Appeals determined that *Cooper* does not apply to excessive punitive damage claims brought under state and federal common law but only to claims raised under the Federal Constitution’s Due Process Clause,¹⁷² and therefore held that state and federal appellate courts may adopt an abuse of discretion standard in reviewing common law excessiveness claims.¹⁷³ The Georgia court cites the Indiana Court of Appeals case *Stroud v. Lints*,¹⁷⁴ which concluded that an abuse of discretion standard was appropriate for a

164. 48 P.3d 824 (Or. Ct. App. 2002).

165. *Id.* at 836 n.17.

166. *Id.* at 837 (citing *Cooper Indus., Inc. v. Leatherman Tool Group, Inc.*, 532 U.S. 424, 437–40 & n.11 (2001)).

167. *Id.*

168. *Id.*

169. 651 N.W.2d 693 (S.D. 2002).

170. *Id.* at 696 & n.2.

171. 563 S.E.2d 178 (Ga. Ct. App. 2002).

172. *Id.* at 181.

173. *Id.*

174. 760 N.E.2d 1176 (Ill. App. Ct. 2002).

common law excessiveness claim because no federal constitutional claim was implicated.¹⁷⁵

The Alaska Supreme Court weighed in on the subject in *Central Bering Sea Fisherman Ass'n v. Anderson*,¹⁷⁶ a case involving wrongful termination. Alaska held that it will utilize a *de novo* standard in examining whether punitive damages are grossly excessive and therefore unconstitutional under the Federal Constitution.¹⁷⁷ Earlier, in the case of *Evans v. State*,¹⁷⁸ in a footnote, Alaska stated that it declined "to follow those state courts that have interpreted analogous constitutional trial by jury provisions to prohibit damage caps."¹⁷⁹

VI. CONCLUSION

This brief survey has been intended to show the method and approach of various state supreme courts in their individual analyses of the relationship of *de novo* review and its resulting impact on punitive damage awards in state court trials. It is interesting to note that almost every state supreme court that has considered the issue tacitly assumes the inescapable application of the Supremacy Clause of the United States Constitution. Several courts conclude that *Cooper* should be given application because of the Supremacy Clause of the U.S. Constitution. It would appear that a case-by-case, state-by-state approach has become the pattern of operation. However, the net result appears to be that trial court decisions on the constitutionality of punitive damage awards are subject to *de novo* appellate review. That concept is being quickly accepted by state supreme courts and punitive damage awards are being reviewed and, in many cases, significantly reduced.

175. *Time Warner*, 563 S.E.2d at 181.

176. 54 P.3d. 271 (Alaska 2002).

177. *Id.* at 277.

178. 56 P.3d 1046 (Alaska 2002).

179. *Id.* at 1051 n.30.