No. 07-384

IN THE

Supreme Court of the United States

DANIEL MEASUREMENT SERVICES, INC.,
Petitioner,

v.

EAGLE RESEARCH CORP.,
Respondent.

On Petition for Writ of Certiorari to the Circuit Court of Putnam County, West Virginia

MOTION FOR LEAVE TO FILE BRIEF AND BRIEF OF WASHINGTON LEGAL FOUNDATION AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

Daniel J. Popeo
Richard A. Samp
(Counsel of Record)
Washington Legal Foundation
2009 Massachusetts Ave., NW
Washington, DC 20036
(202) 588-0302

Date: October 22, 2007

MOTION OF WASHINGTON LEGAL FOUNDATION FOR LEAVE TO FILE BRIEF AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

Pursuant to Rule 37.2 of the Rules of this Court, the Washington Legal Foundation (WLF) respectfully moves for leave to file the attached brief as *amicus curiae* in support of Petitioner. Counsel for Petitioners has consented to the filing of this brief. WLF wrote to counsel for Respondents to request consent but did not receive a response. Accordingly, this motion for leave to file is necessary.

WLF is a non-profit public interest law and policy center with supporters in all 50 States. WLF devotes a substantial portion of its resources to defending free-enterprise, individual rights, and a limited and accountable government.

In particular, WLF regularly participates in tort reform efforts. WLF is concerned that economic development and consumer welfare not be impeded by improper and/or excessive damage awards in tort actions. To that end, WLF regularly participates in court proceedings touching upon the propriety and scope of damage awards. *See, e.g., State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408 (2003); *United States v. Bajakajian*, 524 U.S. 321 (1998); *BMW of North America v. Gore*, 517 U.S. 559 (1996).

WLF also has regularly supported efforts to expand the due process rights of litigants to seek appellate review of allegedly excessive or improper damage awards. *See, e.g., Cooper Industries, Inc. v. Leatherman Tool Group, Inc.*, 532 U.S. 424 (2001); *Honda Motor Co. v. Oberg*, 512 U.S. 415 (1994).

WLF fully supports Petitioner's efforts to obtain review of the two Questions Presented in their petition. WLF is especially interested in participating in these proceedings,

however, because of its dismay over the manner in which this lawsuit and similar suits against out-of-state defendants have been handled by the West Virginia courts. WLF believes that something has gone seriously wrong here. In WLF's view, it is important for the Court to step in and remind the West Virginia courts that adherence to the rule of law requires that at least minimal judicial review be afforded to all jury verdicts – particularly verdicts as large as the massive compensatory damages award in this case.

WLF has no direct interest, financial or otherwise, in the outcome of this case. It is filing due solely to its interest in ensuring further judicial review of the important issues raised by this case. Because of its lack of direct economic interests, WLF believes that it can assist the Court by providing a perspective that is distinct from that of any party.

For the foregoing reasons, the Washington Legal Foundation respectfully requests that it be allowed to participate in this case by filing the attached brief.

Respectfully submitted,

DANIEL J. POPEO
RICHARD A. SAMP
WASHINGTON LEGAL FOUNDATION
2009 Massachusetts Ave., NW
Washington, DC 20036
202-588-0302

Dated: October 22, 2007

QUESTION PRESENTED

1. Whether a jury's award of compensatory damages that is based on no record evidence of loss to the plaintiff violates the Due Process Clause of the Fourteenth Amendment.

2. Whether the Due Process Clause guarantees meaningful judicial review of a jury verdict to ensure that an award of damages is based on at least some record evidence.

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

Cases:

Page(s)

Constitutional Provisions:

Miscellaneous:

BRIEF OF WASHINGTON LEGAL FOUNDATION AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

INTERESTS OF *AMICUS CURIAE*

The interests of *amicus curiae* Washington Legal Foundation (WLF) are set forth fully in the motion accompanying this brief.[1] In brief, WLF is a non-profit public interest law and policy center with supporters in all 50 States. WLF devotes a substantial portion of its resources to defending free-enterprise, individual rights, and a limited and accountable government.

In particular, WLF regularly participates in tort reform efforts. WLF is concerned that economic development and consumer welfare not be impeded by improper and/or excessive damage awards in tort actions. To that end, WLF regularly participates in court proceedings touching upon the propriety and scope of damage awards. *See, e.g.*, *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408 (2003); *United States v. Bajakajian*, 524 U.S. 321 (1998); *BMW of North America v. Gore*, 517 U.S. 559 (1996).

WLF also has regularly supported efforts to expand the due process rights of litigants to seek appellate review of allegedly excessive or improper damage awards. *See, e.g.*, *Cooper Industries, Inc. v. Leatherman Tool Group, Inc.*, 532 U.S. 424 (2001); *Honda Motor Co. v. Oberg*, 512 U.S. 415 (1994).

---

[1] Pursuant to Supreme Court Rule 37.6, WLF states that no counsel for a party authored this brief in whole or in part; and that no person or entity, other than WLF and its counsel, contributed monetarily to the preparation and submission of this brief.

STATEMENT OF THE CASE

Petitioner Daniel Measurement Services, Inc. (DMS) seeks review of a West Virginia state court judgment awarding compensatory damages of $10.5 million for breach of a confidentiality agreement that DMS entered into with a West Virginia-based company, Respondent Eagle Research Corp. (Eagle). There is literally *no* evidence in the trial record to support that award. Moreover, the West Virginia courts provided no meaningful review of the jury's award. DMS seeks review of whether an award of $10.5 million in compensatory damages under those circumstances violates DMS's rights under the Due Process Clause of the Fourteenth Amendment.

This litigation arose from a dispute between DMS and Eagle regarding their joint efforts to develop a commercially viable system for electronically measuring and transmitting natural gas production data. If such a system could have been developed, the parties contemplated that DMS would purchase a large number of flow computers from Eagle.

The largely undisputed evidence showed that: (1) DMS put out a Request for Proposal (RFP) to six flow computer manufacturers (including Eagle) for the purchase of equipment that would meet specifications set forth in the RFP; (2) DMS selected Eagle as its potential vendor because Eagle was willing to strip down its equipment in an effort to reduce costs and thereby increase the potential that the data measurement system could be rendered commercially viable; (3) DMS purchased (pursuant to written contracts) a small number of computers from Eagle for use as prototype equipment in developing the system; (4) two months after DMS and Eagle had begun development work, DMS entered into a written confidentiality agreement with Eagle whereby each party agreed not to share

confidential information obtained from the other party with anyone other than representatives of the party or its affiliates; and (5) DMS never entered into a written contract for the purchase of computers from Eagle (other than the prototype models mentioned above).

A major component of the system DMS hoped to develop was a communications system that would allow DMS to provide customers with secure, round-the-clock access to their proprietary gas flow measurements. DMS turned to another vendor, Luminant Worldwide Corp., to develop from scratch the software for the communications system. While multiple segments of the DMS project ran into an assortment of development problems, it was problems encountered by Luminant in developing cost-efficient software that played a major role in DMS's ultimate decision to abandon the entire project in 2000. DMS informed Eagle of its cancellation decision in October 2000 and sent a check for $138,000 to Eagle to cover all outstanding invoices (in addition to the more than $1 million that DMS had already paid Eagle), and Eagle cashed the check.

Eagle filed suit for breach of contract, taking the position that although no written contract was ever executed, the parties had entered into an oral contract for DMS to buy 3,000 flow computers from Eagle. DMS denied that any such oral contract existed and noted that DMS had not built any of the computers that were the subject of the supposed contract. The jury sided with Eagle on the oral contract issue and awarded Eagle $4 million in compensatory damages (an amount later reduced to $2 million by the trial judge). Those breach-of-contract damages are not at issue in this petition.

Eagle's lawsuit (filed in April 2003 in the Circuit Court of Putnam County, West Virginia), in addition to alleging

breach of oral contract, also alleged misappropriation of its trade secrets. The latter allegation was based on Eagle's claim that DMS had supplied trade secrets to Fisher Controls, an affiliate of DMS that manufactures flow computers.[2]

During the course of pre-trial proceedings, Eagle was forced to abandon its trade secrets claim. Eagle's own electrical engineering expert admitted under oath that Eagle's alleged trade secrets were not secrets and that there was no evidence of any trade secret violations. After dismissing its trade secret claims with prejudice, Eagle amended its complaint to allege that DMS breached the confidentiality agreement by passing information to Fisher Controls.[3]

At trial, Eagle introduced *absolutely no evidence* that it had suffered damages based on DMS's alleged breach of the confidentiality agreement. The judge instructed the jury as follows regarding damages for any such breach:

> If you find by a preponderance of the evidence that the defendant, DMS, breached the confidentiality agreement entered into by Eagle Research and DMS, then you may award damages in an amount of money which fairly compensates Eagle Research to the extent possible, for reasonable ascertainable losses caused proximately by the breach.

---

[2] DMS and Fisher Controls have a common corporate parent.

[3] Eagle never presented any direct evidence that such a transfer of information ever took place, and DMS denied having done so. In any event, the confidentiality agreement included a provision that permitted DMS to share confidential information with "affiliates," a term that undoubtedly included Fisher Controls.

Pet. App. at 44a. Eagle agreed that that instruction was a correct statement of the law. *Id.* at 7a, 42a.

The jury subsequently returned a verdict awarding $10.5 million in damages for breach of the confidentiality agreement. Ruling from the bench at a June 21, 2006 post-trial hearing, the trial judge denied DMS's motion to set aside that award, although he admitted, "I'm concerned with it." *Id.* at 12a-13a. The judge stated that his concern was based on the fact that the jury might have awarded damages based on Eagle's request that DMS be made to disgorge any profits earned from the alleged breach of the confidentiality agreement, even though the court had instructed that damages could only be based on *losses to Eagle* caused by the breach. *Id.*

On August 3, 2006, the court denied DMS's motion to reconsider that ruling, explaining that it was relying on the reasons stated at the June 21 hearing. *Id.* at 21a. That same day the court entered judgment for Eagle in the amount of $14.8 million, with $10.5 million of that amount representing damages for breach of the confidentiality agreement. *Id.* at 1a-5a, 22a-26a.

DMS petitioned the West Virginia Supreme Court of Appeals for leave to appeal. DMS argued explicitly that the $10.5 million damages award violated its due process rights under the U.S. Constitution. On May 22, 2007, the West Virginia Supreme Court of Appeals issued an order denying the petition by a 3-2 vote, without explanation.

REASONS FOR GRANTING THE PETITION

This petition raises issues of exceptional importance. The West Virginia courts have awarded $10.5 million for breach of a confidentiality agreement between the parties, despite the

absence of *any* record evidence to support that award. Indeed, Eagle does not make any claim to have introduced evidence at trial to support a claim that it was injured by the alleged breach of the confidentiality agreement. The Due Process Clause prohibits such arbitrary deprivations of property.

WLF recognizes that this Court is not in a position to correct every constitutionally excessive state court judgment, which are bound to occur with some frequency within even the best-managed court systems. But it is the failure of the West Virginia Supreme Court of Appeals to provide any meaningful review of the jury's verdict in this case that makes the case particularly worthy of this Court's attention. The trial judge expressed serious reservations about the $10.5 million damages award, but nonetheless upheld the award in an oral ruling from the bench without ever explaining what evidence he believed supported Eagle's claim that it had been damaged by the alleged breach of the confidentiality agreement. Pet. App. at 12a-13a.[4] West Virginia does not have an intermediate appellate court and thus does not permit any appeals of right in civil actions. Accordingly, the West Virginia Supreme Court

---

[4] Prior to trial, the judge explained his rationale for leaving all evidentiary issues in the hands of the jury. In explaining his unwillingness to grant summary judgment to DMS on the confidentiality agreement issue, the judge stated:

> [I]n the field of civil law, the only time I've ever been reversed in 14 years is when I grant summary judgment. There's one thing I have learned in the State of West Virginia the hard way, this ain't Texas, this ain't Kansas, this is West Virginia, and we don't give summary judgment. Every time I do, I get reversed. Not every time literally, but that's where it is. Our system favors taking it to a jury.

Pet. App. 47a.

of Appeals's denial of the petition for appeal meant that no appellate judge ever examined the propriety of the massive damages award and that the only review by any judge was the trial judge's cursory oral ruling from the bench that expressed serious concerns about the award and that provided no explanation of what evidence he believed justified the award. Review by this Court is warranted to determine whether such judicial abdication of supervision over jury awards violates a defendant's rights under the Due Process Clause.

Review is also warranted because of mounting evidence that the judicial system in West Virginia state courts is seriously askew. The American Tort Reform Foundation (ATRF), a nonprofit organization based in Washington, D.C., annually undertakes a study of judicial systems across the country to determine how well they do in protecting the rights of both plaintiffs and defendants in civil litigation. For several years running, ATRF has named the West Virginia state court system the "No. 1 Judicial Hellhole" in the United States. ATRF reports that there is a long history of alliances and close personal connections among personal injury lawyers, the state's attorney general, and local judges – with the result that out-of-state corporations sued in West Virginia often times have great difficulty in getting equal justice. There is substantial evidence to support the trial judge's view that the West Virginia Supreme Court of Appeals frowns on virtually all judicial review of factual determinations by a jury. Multi-million dollar judgments entered by West Virginia trial courts following jury verdicts routinely go unreviewed by the West Virginia Supreme Court of Appeals. By granting review in this case, the Court can make an important statement regarding the responsibility of state courts to take seriously the need to review jury verdicts to ensure that they are supported by evidence and are not constitutionally excessive.

I. REVIEW IS WARRANTED TO DETERMINE THE EXTENT TO WHICH THE DUE PROCESS CLAUSE REQUIRES JUDICIAL SUPERVISION OVER JURY AWARDS

The Due Process Clause of the Fourteenth Amendment has long been understood to include a substantive component that prohibits the States from depriving individuals of life, liberty, or property where the deprivation is "grossly disproportional to the gravity of a defendant's offense." *United States v. Bajakajian*, 524 U.S. 321, 334 (1998). *See also TXO Prod. Corp. v. Alliance Resources Corp.*, 509 U.S. 443, 453-54 (1993) ("[T]he Due Process Clause of the Fourteenth Amendment imposes substantive limits beyond which penalties may not go.") (internal citations omitted). That substantive limitation on government deprivations of private property has regularly been applied by the Court to impose limitations on the size of damage awards, particularly punitive damages awards, imposed by state and federal courts. *See, e.g.*, *BMW of North America v. Gore*, 517 U.S. 559, 562 (1996); *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 416 (2003).

Applying the "grossly disproportional" standard, the constitutional impropriety of the $10.5 million compensatory damages award in this case is readily apparent. Any objective review of the record in this case can lead to only one conclusion: there is *absolutely no evidence* in the record from which the jury could rationally have concluded that Eagle was injured by DMS's alleged breach of the confidentiality agreement. Accordingly, *any* award of damages to "compensate" Eagle for such injuries – and certainly an award of $10.5 million – would be grossly disporportional to DMS's offense and thus a violation of DMS's due process rights.

But this Court has also recognized that due process rights extend well beyond a simple boilerplate right not to be subject to grossly excessive damages awards. Due process also requires that court systems provide meaningful review of jury awards to ensure that protections against excessive damages awards are actually being enforced. Thus, in *Honda Motor Co. v. Oberg*, 512 U.S. 415 (1994), the Court held that the Due Process Clause requires judicial review of the amount of punitive damages awarded by a jury to ensure that the award is not constitutionally excessive. *Oberg* involved an Oregon constitutional provision that prohibited judicial review of the size of punitive damages awards unless there was no evidence to support an award in any amount. The Court struck down that Oregon provision, ruling that the provision violated a defendant's due process rights because Oregon, "unlike the common law, provide[d] no assurance that those whose conduct is sanctionable by punitive damages are not subjected to punitive damages of arbitrary amounts." *Id.* at 429. In the course of reviewing the history of common law protections against arbitrary damages awards, the Court noted that the common law did not distinguish between compensatory damages and punitive damages and provided protection against grossly excessive damages of either kind. *Id.* at 422 n.2 ("there is no suggestion that different standards of judicial review were applied for punitive and compensatory damages before the 20th century"). Accordingly, *Oberg* stands for the proposition that the Due Process Clause requires West Virginia to provide some meaningful degree of judicial review to the jury's award in this case, to determine whether the award is grossly excessive in comparison to the evidence of harm caused to Eagle by DMS's conduct. Review is warranted to determine whether West Virginia met its constitutional obligation, and to provide guidance to other courts regarding the extent of such obligations.

Because of the importance of rights protected by the Constitution, the Court has regularly required exacting review of allegations that those rights are being violated. Indeed, in many instances, the Court has required appellate courts to undertake *de novo* review of lower court decisions rejecting an assertion of constitutional rights. As the Court has explained:

> The requirement of independent appellate review . . . is a rule of federal constitutional law. . . . It reflects a deeply held conviction that judges – and particularly Members of this Court – must exercise such review in order to preserve the precious liberties established and ordained by the Constitution. . . . Judges, as expositors of the Constitution, must independently decide whether the evidence in the record is sufficient to cross the constitutional threshold.

Bose Corp. v. Consumers Union of the U.S., Inc., 466 U.S. 485, 510-11 (1984).

Thus, in *Bose,* the Court held that *de novo* review of whether speech claimed to be protected by the First Amendment was motivated by actual malice was essential to protect the "precious liberties established and ordained by the Constitution." *Id.* at 511. The Court so held, even though the issue of whether a speaker is motivated by actual malice is largely fact-based and thus an issue whose determination might normally be left in the hands of the trier of fact. The court explained that largely factual issues may cross over into the legal realm, warranting careful, independent appellate review, especially where "the stakes – in terms of impact on future cases and future conduct – are too great to entrust them finally to the trier of fact." *Id.* at 501. As a matter of federal constitutional law, minimal restrictions on jury discretion and

cursory appellate review are insufficient to safeguard constitutional rights. *See id.* at 506-07 ("We have therefore rejected the contention that a jury finding . . . is insulated from review so long as the jury was properly instructed and there is some evidence to support its findings, holding that substantive constitutional limitations apply.")

See also McNary v. Haitian Refugee Center, Inc., 498 U.S. 479, 493 (1991) (constitutional violations are reviewed *de novo*); *Ornelas v. United States*, 517 U.S. 690, 697 (1996) (*de novo* standard of review must be applied in reviewing a probable cause or reasonable suspicion determination in the case of a warrantless search in violation of the Fourth Amendment); *Bajakajian*, 524 U.S. at 337 (whether a forfeiture penalty is grossly excessive and thus violates the Eighth Amendment's Excessive Fines Clause is reviewed *de novo*).

Citing many of the foregoing precedents, the Court in *Cooper Industries, Inc. v. Leatherman Tool Group, Inc.*, 532 U.S. 424, 436 (2001), determined that appellate courts should apply a *de novo* standard of review when passing on trial courts' determinations of the constitutionality of punitive damages awards. The Court found support for that determination in its *Haslip* decision, stating that "'appellate review makes certain that the punitive damages are reasonable in their amount and rational in light of their purpose to punish what has occurred and to deter its repetition.'" *Id.* at 436 n.9 (quoting *Pacific Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1, 20-21 (1991)).

WLF does not mean to suggest that due process challenges to the size of *compensatory* damages awards should necessarily be subject to *de novo* review. WLF recognizes that a jury's determination of compensatory damages is in some senses more fact-based than a determination of punitive

damages. *See, e.g.*, *Cooper Industries*, 532 U.S. at 437. Accordingly, there may be valid reasons for providing a somewhat more deferential standard of review when considering due process challenges to the size of compensatory damages awards. Nonetheless, all the decisions cited above serve to highlight the importance of meaningful judicial review of *any* jury finding that could pose a threat to constitutional rights. Certainly, the virtually non-existent judicial review provided in this case by the West Virginia courts would not appear to comply with due process rights. Review by this Court is warranted to correct that error and to provide federal and state courts with guidance regarding what level of judicial review is required by the Constitution.

II. REVIEW IS WARRANTED BECAUSE THERE IS SUBSTANTIAL BASIS FOR CONCERN THAT WEST VIRGINIA COURTS ARE SYSTEMATICALLY DENYING DUE PROCESS RIGHTS

Unfortunately, DMS's difficulties in obtaining meaningful judicial review of its due process claims do not appear to be unique within West Virginia. The State's courts have developed a reputation in recent years for denying equal justice to out-of-state defendants and for being overly solicitous to the concerns of the plaintiffs' bar. Review is warranted to provide the Court with an opportunity to make a strong statement regarding the responsibility of state courts to take seriously the need to review jury verdicts to ensure that they are supported by evidence and are not constitutionally excessive.

The American Tort Reform Foundation (ATRF), a nonprofit organization based in Washington, D.C., annually undertakes a study of judicial systems across the country to determine how well they do in protecting the rights of both plaintiffs and defendants in civil litigation. For several years

running, ATRF has named the West Virginia state court system the "No. 1 Judicial Hellhole" in the United States.[5] ATRF, *Judicial Hellholes 2006* (hereinafter "*JH2006*"), available at www.atra.org/reports/hellholes/report.pdf.

Among the report's findings: "The state has a history of alliances and close personal connections among personal injury lawyers, the state's attorney general, and local judges." *Id*. at iv. Among local procedural rules that plaintiffs' lawyers find particularly attractive is one that "allow[s] them to group together thousands of individual claims" (often asbestos claims) against a single corporate defendant, thereby allowing them to impose "enormous pressure on defendants to settle." *Id.* at 11 (citing *State ex rel. Mobil Corp. v. Gaughan*, 211 W. Va. 106, *cert. denied*, 537 U.S. 944 (2002)). Although the West Virginia legislature on occasion has adopted reform measures designed to improve the legal climate in the State, the West Virginia Supreme Court of Appeals has issued decisions that have effectively thwarted those measures. For example, the report noted that after the legislature sought to reduce forum shopping by adopting a law (similar to laws in effect in a number of other States) that denies jurisdiction to nonresident plaintiffs whose cause of action arises outside the State, the West Virginia Supreme Court of Appeals struck down the law on the grounds that it discriminated against out-of-state residents under the Privileges and Immunities Clause of the U.S. Constitution. *Id.* at 13 (citing *Morris v. Crown Equipment Corp.*, 219 W. Va. 347, *cert. denied*, 127 S. Ct. 835 (2006)).

---

[5] The ATRF has been criticized on occasion by the plaintiffs' bar for being biased in favor of the interests of the defense bar. Regardless whether those criticisms are valid, the can be no claim that the ATRF is biased against specific jurisdictions. No one has suggested, for example, that the ATRF would single out West Virginia for special criticism for any reason other than its belief that West Virginia is the most plaintiff-friendly jurisdiction in the country.

Far from encouraging trial courts within the State to review jury verdicts to ensure that the amount awarded is within constitutional limitations, the West Virginia Supreme Court of Appeals actively discourages such efforts. The trial judge's pre-trial admission – that he virtually never grants summary judgment because the Supreme Court of Appeals regularly reverses him when he grants a summary judgment and in virtually no other circumstances, Pet. App. 47a – is eminently understandable in light of the Supreme Court of Appeals's track record of regularly reversing trial courts that grant summary judgment based on findings that the plaintiffs failed to submit sufficient evidence to support their claims. *See, e.g., Estate of Fout-Iser v. Hahn*, 649 S.E. 2d 246 (W. Va. 2007) (grant of summary judgment reversed in medical malpractice case, even though (as the dissent pointed out) the plaintiff's expert witness had testified that the moving party's actions had not caused the plaintiff's injuries).

The Supreme Court of Appeals recently dramatically expanded the potential liability of pharmaceutical manufacturers[6] by doing away with the learned intermediary doctrine, pursuant to which manufacturers of prescription drugs often are absolved from liability for failing to provide specific health warnings to consumers of their drugs, if the drugs were prescribed by the consumer's doctor and the warnings were provided to that doctor. *West Virginia ex rel. Johnson & Johnson v. Karl*, 647 S.E.2d 899 (W. Va. 2007). The learned intermediary rule has been adopted by virtually every other state that has considered the rule. Given the difficulty that drug companies have in identifying precisely who their patients are,

[6] None of the major or mid-sized American pharmaceuticals manufacturers have a principal place of business in West Virginia.

the *Karl* decision opens up a whole new avenue for large West Virginia judgments against out-of-state defendants.[7]

Because West Virginia is one of only a handful of States that have not created an intermediate appellate court, the potential that jury awards will escape meaningful appellate review is significantly higher in West Virginia than elsewhere. Indeed, this case is not an aberration – the West Virginia Supreme Court of Appeals regularly denies review in appeals from large trial court judgments. For example, in a recent case arising from a dispute over non-payment of a $12,000 disability insurance claim, the court declined to review a $5 million compensatory damages judgment entered against the defendant insurer. *Kocher v. Oxford Life Ins. Co.*, 216 W. Va. 56 (2004).[8] The court has not yet agreed to review a recent $270 million punitive damages award for breach of a natural gas royalty contract. *Estate of Tawney v. Columbia Natural Resources LLC*, No. 03-C-10E, 2007 WL 91220 (Cir. Ct., Roane County, Jan. 27, 2007).[9]

---

[7] This Court has explained the need to protect out-of-state companies from local prejudice as a principal reason for requiring meaningful judicial review of large damages awards. *Oberg*, 512 U.S. at 432.

[8] The court reviewed and ultimately overturned a $34 million punitive damages judgment in the same case, finding that the trial judge erred in instructing the jury that it was *required* to award punitive damages to the plaintiff. The court remanded the case for a new trial on punitive damages. *Id.*

[9] The punitive damages award is particularly surprising given that the meaning of the royalty agreement had been in considerable, good-faith dispute for some time until the Supreme Court of Appeals last year answered several certified questions regarding its meaning. *Estate of Tawney v. Columbia Natural Resources, LLC*, 219 W. Va. 266 (2006).

WLF respectfully submits that West Virginia's widespread reputation for denying equal justice to large, out-of-state defendants provides an additional reason for granting the petition. Review is warranted to provide the Court with an opportunity to make a strong statement regarding the responsibility of state courts to take seriously the need to review jury verdicts to ensure that they are supported by evidence and are not constitutionally excessive.

CONCLUSION

Amicus curiae Washington Legal Foundation respectfully requests that the Court grant the petition for a writ of certiorari.

Respectfully submitted,

Daniel J. Popeo
Richard A. Samp
(Counsel of Record)
Washington Legal Foundation
2009 Massachusetts Ave., NW
Washington, DC 20036
(202) 588-0302

Dated: October 22, 2007