

DANA CLAUSEN
v.
ICICLE SEAFOODS, INC.

Washington, Superior Court for King County, March 2, 2010
Case No. 08-2-03333-3

DAMAGES — 124. Maintenance, Cure and Wages — 172. Attorneys’ Fees — 1832. Measure.

To determine any cap on the ratio of punitive damages to compensatory damages for a shipowner’s failure to pay maintenance and cure, the amount of attorney’s fees awarded to the seaman are included in compensatory damages.

DAMAGES — 124. Maintenance, Cure and Wages — 1832. Measure.

The 1:1 cap on the ratio of punitive damages to compensatory damages used by the Supreme Court in the *Exxon Valdez* case, 2008 AMC 1521, is not fixed when extraordinary circumstances justify departure. Here, where compensatory damages of \$465,525 (including attorney’s fees) were awarded for wrongful failure to pay maintenance and cure to a seaman, the factors used to analyze the amount of punitive damages justify an award of \$1.3 million, which produces a 1:2.79 ratio. The seaman was particularly vulnerable and the shipowner’s denial of medical care and maintenance and cure was egregious.

James Jacobsen (Beard Stacey Trueb and Jacobsen) and Larry Curtis *for Clausen*

Philip W. Sanford (Holmes, Weddle and Barcott) *for Icicle Seafoods*

HOLLIS HILL, J.:

I. Introduction

The defendant has filed a Rule 59(h) motion asking the Court to eliminate or reduce the punitive damage award for its willful and wanton actions in denying Mr. Clausen the maintenance and cure to which the jury found he was entitled. The Court has carefully considered the briefs, affidavits, and arguments of the parties. For the following reasons the Court denies the defendant’s motion.

II. Applicable Law

As Mr. Clausen's claims arise under the maritime law, federal law controls the outcome of this motion.

Under maritime law, the defendant has an affirmative duty to provide its employee with medical care. *The Iroquois*, 194 U.S. 240, 2009 AMC 834 (1903). "The duty to provide proper medical treatment and attendance for seamen falling ill or suffering injury in the service of the ship has been imposed upon the shipowners by all maritime nations." 194 U.S. at 241-242, 2009 AMC at 835. The employer is the "legal guardian in the sense that it is a part of his duty to look out for the safety and care of his seamen, whether they make a distinct request for it or not." 194 U.S. at 247, 2009 AMC at 840.

Admiralty courts have been liberal in interpreting this duty "for the benefit and protection of seamen who are its wards." We noted in *Aguilar v. Standard Oil Co.*, that the shipowner's liability for maintenance and cure was among "the most pervasive" of all and that it was not to be defeated by restrictive distinctions nor "narrowly confined." When there are ambiguities or doubts, they are resolved in favor of the seaman. [citations omitted].

Vaughan v. Atkinson, 369 U.S. 527, 532, 1962 AMC 1131, 1135 (1962).

The defendant was under the most stringent legal obligation to take detailed and affirmative action to *ensure* that Mr. Clausen received his maintenance and cure. Willful and wanton violation of this stringent legal duty is uniquely culpable conduct.

The defendant claims that the *Exxon* case provided a universal cap of a 1:1 ratio between punitive damages and compensatory damages in all maritime cases. The Court disagrees. In *Atlantic Soundings v. Townsend*, 557 U.S. at ___, 129 S.Ct. 2561, 2574, 2009 AMC 1521, 1537 n.11 (2009), the Supreme Court stated that it was not applying a recovery cap as it did in the *Exxon Valdez* case. Specifically, the Court stated:

Nor have petitioners argued that the size of punitive damages awards in maintenance and cure cases necessitates a recovery cap, which the Court has elsewhere imposed. See *Exxon Shipping Co. v. Baker*, 554 U.S. ___, 128 S.Ct. 2605, 2008 AMC 1521, [slip op] at 42 (2008)(imposing a punitive-to-compensatory ratio of 1:1). We do not decide these issues.

Thus, *Atlantic Soundings* specifically did not impose a 1:1 limit as implied by the defendant.

Moreover, a careful examination of the *Exxon* case also teaches that the Supreme Court did not establish a bright line rule for all maritime cases. In *Exxon Shipping Co. v. Baker*, 554 U.S. ___, 128 S.Ct. 2605, 2008 AMC 1521 (2008), the Supreme Court stated that it imposed a cap of 1:1 in “such maritime cases” which did not involve “exceptional blameworthiness” or “behavior driven primarily by desire for gain” and that was “profitless for the tortfeasor” and that was the result of “reckless” rather than “intentional” behavior. 128 S.Ct. at 2633-2634, 2008 AMC at 1548-49. Moreover, the Court stated that in cases with substantial damages, \$507,000,000 in the *Exxon* case, a 1:1 ratio can reach the outer limit of due process. 128 S.Ct. at 2634, 2008 AMC at 1549. Thus, *Exxon* imposed a 1:1 ratio under those particular facts, and it did not establish a 1:1 limit for all maritime cases.

The 1:1 cap applied in the *Exxon* case has also been projected as the appropriate cap in non-maritime cases where the compensatory award, like it was in *Exxon*, is particularly large. *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 425 (2003)(“When compensatory damages are substantial, then a lesser ratio, perhaps only equal to compensatory damages, can reach the outermost limit of the due process guarantee.”).

In assessing the punitive damage award in this particular case, the most important indicium of the reasonableness of a punitive damages award is the degree of reprehensibility of the defendant’s conduct.” *BMW of North America, Inc. v. Gore*, 517 U.S. 559, 575 (1996). The Supreme Court’s jurisprudence provides a detailed list of the markers employed for judging the reprehensibility of the defendant’s conduct. By these standards, the instant defendant’s

conduct reaches the zenith of reprehensibility, thus supporting a substantial punitive damage award. The Court will consider all of the relevant markers below.

The defendant argues that neither the award of unpaid maintenance and cure nor the award of attorney's fees are compensatory damages and therefore cannot be compared to the punitive award.¹ The defendant fails to cite any case on point to support its argument. To the contrary, the Court concludes that the attorney's fees are compensatory damages, as are the awards for maintenance and cure. In discussing attorney's fees in *Vaughan v. Atkinson*, 369 U.S. 527, 531, 1962 AMC 1131, 1134 (1962), the Supreme Court stated that the seaman "was forced to hire a lawyer to get what was plainly owed to him," and that "it is difficult to imagine a clearer case of damages suffered for failure to pay maintenance than this one." Thus, the Supreme Court stated that the attorney's fees were awarded as damages for failure to pay maintenance. In *Fleischmann Distilling Corp. v. Maier Brewing Co.*, 386 U.S. 714, 718 (1967), the Supreme Court stated even more explicitly that *Vaughn v. Atkinson* attorney fees are awarded as compensatory damages.

Limited exceptions to the American rule have, of course, developed. They have been sanctioned by this Court when overriding considerations of justice seemed to compel such a result. In appropriate circumstances, we have held, an admiralty plaintiff may be awarded counsel fees *as an item of compensatory damages* (not as a separate cost to be taxed). *Vaughan v. Atkinson*, 369 U.S. 527, 1962 AMC 1131 (1962). [Emphasis supplied].

Thus, the Supreme Court itself holds that *Vaughan v. Atkinson* attorney's fees are "compensatory damages".

1. In its award of sanctions for defendant's failure to disclose its misdeeds, this Court was extremely lenient, both in terms of the sum awarded and it directing payment to the Clerk of the Court, rather than as compensation to Plaintiff. This was based on a finding that the jury's award of punitive damages was an indication that Plaintiff was not harmed in the verdict by the withholding. Should the punitive damages award be reduced, this Court's assessment of appropriate sanctions should be revisited.

Specifically addressing a maintenance and cure case, the Fifth Circuit Court of Appeals also held that *Vaughan v. Atkinson* attorney's fees are compensatory damages, not punitive damages. *Guevara v. Maritime Overseas Corporation*, 1995 AMC 2409, 2418-20, 59 F.3d 1496, 1501-03 (5 Cir. 1995), *rev 'd on other grounds*, *Atlantic Soundings v. Townsend*, 557 U.S. ___, 129 S.Ct. 256, 2009 AMC 1521 (2009).

In other "bad faith" cases, akin to this case, courts have characterized awards of attorney's fees as compensatory damages and include the fees as compensatory damages to be compared against the punitive award. *Action Marine, Inc. v. Continental Carbon Inc.*, 481 F.3d 1302, 1321 (11 Cir. 2007)(applying Georgia law, holding that \$1.3 million in attorney's fees is a compensatory award and should be compared against the punitive damage award); *Leeper-Johnson v. Prudential Ins. Co. of America*, 2009 WL 1318692, 23 (Cal. Ct. App. 2009)(court awarded attorney's fees included in compensatory damages which are compared against the punitive award). Applying these cases, the attorney's fees will be characterized as compensatory damages.

Adding together the unpaid maintenance and cure and attorney's fees award, the amount of compensatory damages is \$465,525. The punitive damages are \$1.3 million. The resulting ratio is 1:2.79. The question before the Court is whether this ratio passes legal muster.

III. Facts Relating To The Defendant's Conduct

The Supreme Court has provided clear instructions for trial courts to determine whether a particular punitive damage award is appropriate. In *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 419-421 (2003) the court identified markers of reprehensibility as follows: (1) Indifference to or reckless disregard for the health of others; (2) the target of the conduct was financially vulnerable; (3) the conduct involved repeated actions and was not isolated; (4) the harm was a result of intentional malice, trickery, or deceit, and was not an accident. *Id.* Furthermore, deliberate false statements, acts of affirmative misconduct, and concealment of evidence of improper motive demonstrates the most reprehensible conduct. *BMW of North*

America, Inc. v. Gore, 517 U.S. 559, 575-580 (1996). “[M]alicious behavior” “carried on for the purpose of increasing the tortfeasor’s financial gain” is “some of the most egregious conduct”. *Exxon*, 128 S.Ct. at 2631-32, 2008 AMC at 1548. The reviewing court must also consider the potential damage if the defendant had succeeded in its scheme, as well as the size of the award that is required to deter the defendant from similar conduct in the future. *TXO Production Corp. v. Alliance Resources Corp.*, 509 U.S. 443, 460 (1993).

Each issue will be addressed below.

(1) Indifference to or Reckless Disregard For the Health of Others.

The defendant demonstrated intentional indifference to Mr. Clausen’s health. The defendant paid the Seattle Panel of Consultants’ Dr. Richard Meeks to review Mr. Clausen’s medical records. Its hand-picked doctor advised the defendant that Mr. Clausen needed epidural spinal injections and was a back surgery candidate. Upon review of the report, Chris Kline, a corporate officer, considered the report “not good for Icicle.” (Trial Exhibits 198 & 199 & Trial Testimony of Mr. Gremmert). Although advised by its doctor that the injections were medically necessary and related to Mr. Clausen’s work injury, the defendant refused to pay for the injections as well as the surgery. The defendant persisted in this behavior despite repeated requests to authorize and pay for Mr. Clausen’s necessary medical care. These actions demonstrate an intentional disregard for Mr. Clausen’s health.

When the defendant obtained Dr. Meeks’ opinion that Mr. Clausen was not at maximum medical cure, could benefit from epidural steroid injections, and was a surgical candidate, it did not provide a copy of the report to Mr. Clausen, the nurse case manager, or any of Mr. Clausen’s treating physicians, leaving Plaintiff misled as to his medical condition. Instead, the defendant kept the report secret because it was “not good for Icicle”. The implication is that Mr. Clausen’s necessary medical care was going to cost the defendant money. These actions amount to intentional disregard for Mr.

Clausen's health, and evidence a plan to trade Mr. Clausen's health for corporate profits.

Significant to this conclusion is that the defendant was under a legal obligation to *ensure* that Mr. Clausen received proper medical care for his shipboard injury. Thus, the defendant was under a strict and heightened duty to be concerned with Mr. Clausen's care which it intentionally and repeatedly repudiated.

(2) Mr. Clausen Was Financially Vulnerable.

Mr. Clausen's back injury rendered him unable to do any of the work for which he was qualified. Mr. Gremmert admitted that he knew this during the spring of 2006. (See also Exhibit 11, Dec. of Jacobsen). Also, the defendant paid only 520.00 a day in maintenance—clearly not enough money for safe and secure lodging with heat, cooling, shower, toilet and electricity, plus three meals a day. Mr. Clausen was reduced to living in a broken down recreational vehicle with no heat, air conditioning, toilet, or running water. Eventually, the roof leaked and could not be repaired. Mr. Clausen was practically homeless, and therefore quintessentially financially vulnerable.

Ms. Moore testified at trial that during this time she knew or suspected that Mr. Clausen had only an old RV for shelter. Mr. Gremmert testified that it is possible to live on \$20.00 in a safe and clean environment and still eat three meals a day. The defendant knew that Mr. Clausen was financially vulnerable and that is why it wanted him to take the "bait" so that he could get "a" by hacking off of his medical care.

The manner in which the defendant sought to use Mr. Clausen's financial vulnerability against him is particularly reprehensible in light of the legal duty the defendant owed Mr. Clausen to ensure he received the medical care he needed.

(3) The Defendant Repeatedly Violated Mr. Clausen's Right To Maintenance And Cure.

Defendant repeatedly violated Mr. Clausen's right to maintenance and cure. Based upon the jury's award of unpaid maintenance and

cure, Mr. Clausen's right to these benefits extended for a considerable time past the date when the defendant quit paying. Plaintiff's Trial Exhibits 59 to 123 are the 64 letters that Mr. Curtis sent to the defendant enclosing medical records and bills and asking for payment of cure.

(4) The Failure To Pay Maintenance and Cure Was the Result of Intentional Malice, Trickery and Deceit, And It Was Not A Mistake.

The decision to deny Mr. Clausen maintenance and cure was made by Ms. Laurenda Moore and it was an intentional decision, not a mistake. The claims adjuster's file demonstrates that the decision was carried out with both trickery and deceit.

In a letter dated June 20, 2006, Dr. Richard E. Marks told the defendant that Mr. Clausen had not reached maximum medical care, that he needed epidural steroid injections, and that he was a surgical candidate. (Panel of Consultants Report, Exhibit 1 to the Declaration of James P. Jacobsen). The defendant refused to pay for this treatment. Instead, defendant sued Mr. Clausen in federal court.

The adjuster's file demonstrates a conspiracy within the defendant's corporate management to deny Mr. Clausen his medical care.

- On May 25, 2006, the defendant reported to the insurance company: "We feel that settlement in this range would be preferable to taking any chances with the outcome of a functional capacity exam and future medical treatment"

- On June 5, 2006, in telephone notes that the insurance company had authorized a settlement offer an,⁻¹ that, "We should move on this before guy gets away from us—He agreed will talk to Leauri—Good."

- On June 9, 2006, in telephone notes the adjuster says: "—We Hv Reviewed the email from the nurse case mgr. Review earlier med recs—Looks like medical situation is wide open again after we thought it was almost finished—He agrees—Maybe he will take bait & my to back down his medical treatment in order to get S\$ by 'closing' file."

- On June 28, 2006, in the telephone notes it states: “—Read med recs review Rpt—Not good for Icicle—We should really try and corral this guy—May end up with a back surgery” (Exhibits 4 and 2, Dec. of Jacobsen in support of Opposition to Motion to Amend Judgment).

Mr. Gremmert testified that the back surgery was expected to cost between forty and seventy-five thousand dollars. Thus, beginning in the summer of 2006 the defendant engaged in an elaborate scheme to force Mr. Clausen to settle his claim in order to avoid paying for an expensive back surgery—a surgery which its own doctor concluded would be therapeutic.

The evidence at trial also established that Lori Gregoire, the nurse assigned by the defendant to monitor Mr. Clausen’s medical care, believed that Dr. Brennan, Mr. Clausen’s treating physician, was incorrect when he said Mr. Clausen had reached maximum medical cure. This was the same conclusion reached by Dr. Richard Meeks, defendant’s hand-picked doctor. And Mr. Gremmert testified at trial that he accepted the fact that Mr. Clausen had not reached maximum medical cure as stated by Dr. Brennan.

Nevertheless, concealing Dr. Richard Meeks’ opinion and that of Nurse Lori Gregoire, Mr. Gremmert was still relying upon Dr. Brennan’s statement that Mr. Clausen had reached maximum medical cure to support the defendant’s denial of maintenance and cure. (Exhibit 13, December 5, 2006 Facsimile from Kurt Gremmert to Larry Curtis, and Exhibit 14, letter dated December 12, 2006, Dec. of Jacobsen). These facts demonstrate the use of deceit, false statement and trickery, because the opinions of Dr. Meeks and Nurse Gregoire were withheld from Mr. Clausen, but the discredited opinion of Dr. Brennan was still being used to deny him maintenance and cure.

(5) The Defendant Employed Deliberate False Statements.

One example of the many false statements defendant made in denying Mr. Clausen maintenance and cure is contained in its federal court Complaint. On or about September 18, 2007, the defendant sued Mr. Clausen in the United States District Court in order to

terminate his rights to maintenance and cure. The defendant's Complaint made deliberate false statements. Under the facts section, the defendant's Complaint stated:

Throughout this matter Mr. Clausen has impeded his employer's right and obligation to investigate Mr. Clausen's ongoing entitlement to maintenance and cure by way of example and without limitation, failing to keep Icicle Seafoods, Inc. apprised of his medical status, failing to provide Icicle Seafoods, Inc. with copies of medical records, failing to adequately allow Icicle Seafoods, Inc. access to the treating physicians, failing to seek authorization for medical treatment, [and] failing to apprise Icicle Seafoods, Inc. of medical bills[.]

(Complaint 4.2, Exhibit 15, Dec. of Jacobsen). The adjuster's file demonstrates that each one of these allegations was false. The progress reports and billing records from Nurse Lori Gregoire, show that for every step of the way, she talked with Mr. Clausen and his doctors, reviewed his medical records, and reported all of this information in detail to the claims adjuster. (Nurse Lori Gregoire's records. Exhibits 6 to 10, Dec. of Jacobsen). When the defendant filed its federal lawsuit, these records were still a secret in the claims adjuster's file. Trial Exhibit 202 was a letter dated June 29, 2006 from Mr. Curtis to Mr. Gremmert which contained numerous medical records, medical bills, a summary of medical bills that remained unpaid, and fifteen releases signed by Mr. Clausen so that the defendant could obtain his medical records directly from the providers. Mr. Gremmert admitted on cross examination that none of these releases for medical records were ever used. The law suit was filed two and one-half months after receipt of the releases.

Thus, the Complaint that the defendant filed in the U.S. District Court contained patently false and misleading statements.

These false statements were particularly egregious because the defendant owed Mr. Clausen a fiduciary duty to ensure that he received the medical care to which he was due.

(6) Defendant's Misconduct Was Motivated By Profit.

Mr. Gremmert's telephone notes of the conversations with Mr. Chris Kline, the defendant's corporate officer, demonstrate that the

defendant was trying to “corral” Mr. Clausen and get him to take the “bait” of some small settlement “to back down his medical treatment in order to get \$\$”. The motive was to enhance the defendant’s profit margin. According to *Exxon*, willful and wanton conduct in the pursuit of profit is “the most egregious conduct”.

(7) The Potential Harm If The Defendant Had Fully Succeeded In Its Plan Is Severe.

On June 9, 2006, Nurse Lori Gregoire reported to the defendant that, “Mr. Clausen reports increased pain to his hips and flare up on Saturday, described as a “lightning bolt” that lasted about ten minutes to his left hip. Dr. Brennan deferred any work release and recommended referral to a neurosurgeon, Dr. Tsaza.” (Exhibit 5, Dec. of Jacobsen). Mr. Gremmert’s notes from that same day state, “—We Hv Reviewed the email from the nurse case mgr. Review earlier med revs[.]—Looks like medical situation is wide open again after we thought it was almost finished[.]—He agrees[.]—Maybe he will take bait & my to back down his medical treatment in order to get \$\$ by “closing” file.” (Exhibit 2, Dec. of Jacobsen). As of June 9, 2006 it is therefore undisputed that the defendant knew that Mr. Clausen was suffering from “lightning bolt” pain and that his treating physician wanted Mr. Clausen to see a neurosurgeon for further treatment. Despite this knowledge, the defendant planned to offer Mr. Clausen “bait” of a small settlement to forego his medical treatment.

Later that summer, Mr. Clausen continued to suffer from excruciating pain. In Dr. Isaza’s record from the Baton Rouge Orthopedic Clinic, dated August 17, 2006, is the following chart note.

Patient advised to go to er if medicine is not helping his pain. His friend “frailly” is aware of this—she states patient has threatened to kill himself and we advised her to go to ER—

(Exhibit 16). Nurse Gregoire reported this emergency room visit to the defendant. (Progress Report No. 6, page 2, Exhibit 6).

The defendant knew that Mr. Clausen was suffering from excruciating pain so intense that it was reported to his doctor that he contemplated suicide. Nevertheless, shortly after this chart note and

the report from Nurse Gregoire, the defendant refused to pay any further maintenance and cure.

After the defendant refused to pay for his medical care, Mr. Clausen was able to borrow money to obtain some of the care which was required. If the defendant had fully succeeded in its plan, and Mr. Clausen had been unable to borrow money for his medical treatment and prescription medications, Mr. Clausen would have been left suffering excruciating unremitting pain — pain so bad that he contemplated death as an alternative.

Moreover, the defendant quit paying maintenance in September, 2006, and only gave him a token amount in 2007. Mr. Clausen was living in his broken down RV in squalid conditions. Only because he borrowed money was he was able to put a modest roof over his head.

The potential harm, if the defendant's decision to deny Mr. Clausen his maintenance and cure had been fully successful, was hardship, pain, and devastation of his life.

(8) The Size of the Award That is Required to Deter the Defendant From Similar Conduct in the Future.

The jury in this case made a finding that the defendant's conduct was willful and wanton. Nevertheless, the defendant argues here that it should be subject to no punitive damages. The defendant needs substantial deterrence not to repeat what it did to Mr. Clausen.

First, that the defendant has opportunity to treat other workers in the same way it treated Mr. Clausen. The defendant admitted that it employs hundreds of seamen.

The defendant's opening statement claimed that the defendant had done nothing wrong. The defendant tried to blame its actions on Mr. Clausen. The defendant's closing statement made the same arguments. Mr. Gremmert and Ms. Moore claimed that they did nothing wrong. Both were unrepentant.

When this case came to trial the defendant knew that if it lost the case, it faced the prospect of an award of attorney's fees, costs, and punitive damages. During the entire time that it was willfully and wantonly denying Mr. Clausen maintenance and cure, and intention-

ally betraying its stringent duty to provide him proper cure, defendant's managers knew that it was exposed to damages and attorney's fees. Nevertheless, the defendant denied Mr. Clausen his due. The punitive damages must be too painful to make such conduct profitable. The jury's modest award to Mr. Clausen for general damages under the Jones Act and the substantial comparative fault finding demonstrates that this jury in this case was careful and thoughtful. The jury did not go "wild" assessing Jones Act damages against the defendant. The jury's considered judgment was that it would require \$1.3 million to adequately punish and deter the defendant. Considering the stringent legal duty the defendant breached, the intentional and cynical manner in which Mr. Clausen was treated, and what the defendant put Mr. Clausen through—\$1.3 million is an appropriate award.

(9) Punitive Damages Are Properly Awarded In Cases Involving Economic Harm.

The defendant claims that Mr. Clausen, because he cannot recover punitive damages, was not awarded physical damages for wrongful denial of maintenance and cure under the general maritime law. This argument is foreclosed by Supreme Court precedent.

To be sure, infliction of economic injury, especially when done intentionally through affirmative acts of misconduct, or when the target is financially vulnerable, can warrant a substantial penalty. [citation omitted].

BMW of North America, Inc. v. Gore, 517 U.S. 559, 576 (1996). Here the defendant's repeated acts were intentional and Mr. Clausen was a quintessentially financially vulnerable victim. Thus, this case warrants a "substantial penalty." *Id.*

The jury was entitled to take into consideration the conditions under which the defendant caused Mr. Clausen to live. The jury did not have to award him separate damages under the general maritime law in order for it to abhor what the defendant did to him. The Jury found the defendant's conduct abhorrent, which is why it awarded \$1.3 million in punitive damages. Moreover, under the Special Verdict Form, the jury was required to award compensatory damages

under the Jones Act before it reached the general maritime law. The jury may have thought that the general maritime law compensatory damages duplicated the Jones Act damages and therefore declined to award any more.

The Supreme Court's markers of reprehensibility apply whether or not there is physical injury. And that analysis, applied to this case, fully supports the \$1.3 million punitive award.

(10) The Ratio Of Compensatory Damages To Punitive Damages is Well Within Federal Limits.

The nub of defendant's argument is that the punitive damage award is too high based upon the compensatory damages awarded in this case. "The precise award in any case, of course, must be based upon the facts and circumstances of the defendant's conduct and the harm to the plaintiff" *State Farm Mat. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 425 (2003).

The application of the Supreme Court's punitive damage jurisprudence to this case establishes that under the "facts and circumstances" of this case the award is fully justified. Objective application of the Supreme Court's markers places the defendant's conduct at the zenith of reprehensibility. The defendant preyed upon a man incapable of work living in a broken down old RV. The defendant did it intentionally, repeatedly, over a period of years, and the purpose of its malicious actions was corporate profit. Moreover, while doing this, the defendant was subject to a stringent legal duty to do just the opposite—to carefully care for Mr. Clausen. Thus, a large punitive damage award is fully supported by the law.

The question then becomes what is a large award? That is determined by the reprehensibility of the conduct and the size of the compensatory award. The Supreme Court has many cases which discuss the ratio of punitive to compensatory damages.

TXO Production Corp., 509 U.S. at 453, the Supreme Court affirmed a punitive damage award that was 526 times as great as the compensatory damages in action for slander of title. In affirming the award, the Supreme Court observed that it "is appropriate to consider the magnitude of the *potential harm* that the defendant's

conduct would have caused to its intended victim if the wrongful plan had succeeded, as well as the possible harm to other victims that might have resulted if similar future behavior were not deterred.’’ *Id.* at 460. The Court then held that it did not consider the dramatic disparity between the actual damages and the punitive award controlling in a case of this character. Here, there is no drastic disparity between the harm and the potential harm and the punitive award. The ratio is less than three and fully supported by the case law and defendant’s reprehensible conduct.

Many courts have upheld damage ratios higher than the one in this case. E.g. *Action Marine, Inc v. Continental Carbon Inc.*, 481 F.3d 1302, 1321 (11 Cir. 2007)(ratio of 1:9 appropriate where the defendant’s actions particularly reprehensible); *Southern Union Co. v. Irvin*, 563 F.3d 788, 790 - 794 (9 Cir. 2009)(1:3.1 upheld); *Jones v. United Parcel Service, Inc.*, 658 F.Supp.2d 1308 (D.Kan. 2009)(1:3.1 ratio in wrongful discharge case upheld); *Everhart v. O’Charley’s Inc.*, 683 S.E.2d 728, 741 (N.C. Ct. App. 2009)(1:25 ratio upheld where compensatory low and defendant’s conduct reprehensible); *Jolley v. Energen Resources Corp.*, 198 P.3d 376, 385-86 (N.M. App. 2008)(1:6.76 ratio is upheld when the conduct was particularly reprehensible).

This award is not out of line, does not unfairly punish the defendant, and is fully supported by the evidence before the jury and the controlling case law.

IV. Conclusion

The defendant’s Rule 59(h) motion is hereby denied.

