IN THE SUPREME COURT OF GUAM

MICHAEL JE PARK,
Plaintiff-Appellant/Cross-Appellee,

vs.

MOBIL OIL GUAM, INC.,
Defendant-Appellee/Cross-Appellant.

Supreme Court Case No.: CVA03-001
Superior Court Case No.: CV0844-00

OPINION

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Appeal from the Superior Court of Guam
Argued and submitted on November 6, 2003
Hagåtña, Guam

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BEFORE: F. PHILIP CARBULLIDO, Chief Justice; FRANCES M. TYDINGCO-GATEWOOD, Associate Justice; PETER C. SIGUENZA, Jr., *Justice Pro Tempore*

CARBULLIDO, CJ.:

[1] This case arises from a civil action for fraud and breach of contract filed by Plaintiff-Appellant and Cross-Appellee Michael Je Park against Defendant-Appellee and Cross-Appellant Mobil Oil Guam, Inc., wherein the jury awarded Park $50,000 in compensatory damages and $2.8 million in punitive damages. Park appeals from the trial court's Amended Judgment awarding Park $150,000 in punitive damages despite the jury's $2.8 million punitive damages award. Mobil cross-appeals from the Amended Judgment, challenging the award of punitive damages. This case presents two issues of first impression. First, we consider whether Mobil, a corporation, may be held directly liable for punitive damages based on the wrongful conduct of its employees, and if so, whether there is substantial evidence to support the jury's award of punitive damages. Second, assuming an award of punitive damages may be assessed against Mobil, we consider whether the trial court erred in reducing the award of punitive damages from $2.8 million to $150,000. In adopting section 909 of the Restatement (Second) Torts (1979), and applying it to the facts of this case, we hold that substantial evidence exists to support the jury's award of punitive damages against Mobil. We further hold that in light of the jury's award of $50,000 in compensatory damages, the punitive damages award of $2.8 million is unconstitutional and therefore, the trial court's reduction of the punitive damages award to $150,000 was proper. Accordingly, we affirm the trial court's Amended Judgment.

I.

[2] In 1996, as part of a franchise agreement to sell Mobil Oil petroleum products, Michael Je Park subleased a portion of his Barrigada Heights property to Mobil Oil Guam, Inc. In turn, Mobil constructed the underground storage tanks, canopy and gasoline dispensing units on the leased portion of the property. Mobil later subleased the same property to Park. During this time period, Park decided to construct a three-story building on the property, consisting of an office space, a mini-mart and his personal residence. The total cost of the construction was approximately $3 million. Park paid $2 million from his personal money and borrowed a little over $1 million from Mobil to finance the construction. Park gave Mobil a leasehold mortgage to secure repayment of the note. In September of 1996, Park began operating a Mobil service station on the property ("the service station").

[3] The service station is built on sloped, elevated land. Upon delivering fuel to the service station, Mobil's drivers would park the delivery tanker on the sloped ground. At an incline, Mobil drivers would transfer the fuel from the delivery tank to the service station's underground storage tank. Parking at an incline caused the fuel in the delivery tank to be unevenly distributed, and some fuel would travel to the lowered portion of the inclined tank.

[4] Fuel is transferred from the delivery tank to the underground tank by the flow of gravity. However, because the drainage valve is not located at the lowered end of the delivery tank, parking the tanker at an incline caused some fuel to remain in the tank, despite the appearance that the tank had been completely drained. Moreover, although the delivery tanks are equipped with a viewing glass through which the contents of the tank may be inspected, the fuel which had moved to the lowered end of the tank escaped view. This meant that, at least for some of Park's deliveries, although gravity flow and the viewing glass indicated that the delivery tank had been completely drained and delivered to the service station's underground tank, there was in reality anywhere from forty to sixty gallons of purchased fuel which remained in the tank, unbeknownst to Park for three and a half years.

[5] In March of 2000, a Mobil driver informed Park of the problems caused by the slope at the service station, and specifically informed Park that he was not receiving all the fuel that he had in fact paid for. Without prior warning to the Mobil driver, after the next fuel delivery, Park requested that the tanker be driven to a flat surface, and subsequently drained an additional sixty gallons of fuel from the tank, despite the apparent completed transfer of all the fuel from the delivery tank to the underground tank at the service station.

[6] At some time prior to Park's discovery of the slope problem, Park was unable to make several payments to Mobil on his loan and was approximately $84,000 behind in his loan payments.

[7] On May 23, 2000, Park filed suit against Mobil, claiming, *inter alia*, fraud and breach of contract. Mobil in turn filed its Answer and Counterclaim for Foreclosure of a Mortgage on Park's service station. Mobil's motion for judgment of foreclosure was subsequently granted by the court on May 6, 2002, and the jury trial on the fraud and breach of contract claims commenced on the same day.

[8] The jury returned a verdict in Park's favor on both causes of action, awarding Park $50,000 in compensatory damages and $2.8 million in punitive damages. Mobil filed a motion for judgment notwithstanding the verdict, contending, first, that there was no substantial evidence to support the jury finding of fraud against Mobil and thus the award of punitive damages should be vacated, and second, that the jury award of punitive damages exceeded constitutional limits. The trial court reduced the amount of punitive damages from $2.8 million to $150,000, but allowed the jury finding of fraud to stand.

[9] The trial court entered its Amended Judgment on January 13, 2003, from which Park's appeal and Mobil's cross-appeal arise.

II.

[10] This court has jurisdiction to hear this appeal and cross-appeal from a final judgment pursuant sections 3107(b) and 3108(a) of Title 7 of the Guam Code Annotated (1994).

[11] We review the jury's verdict to determine whether it is supported by substantial evidence or it is against the clear weight of the evidence. *O'Mara v. Hechanova*, 2001 Guam 13, ¶ 6. "Substantial evidence is such relevant evidence which reasonable minds might accept as adequate to support a conclusion even if it is possible to draw two inconsistent conclusions from the evidence." *Id.* (quoting *Leon Guerrero v. DLB Const. Co.*, 1999 Guam 9, ¶ 21). A trial court's ruling on a motion for judgment notwithstanding the verdict is reviewed *de novo*. *Leon Guerrero*, 1999 Guam 9 at ¶11.

III.

A. Mobil's Cross-Appeal[1]

[12] The jury found Mobil liable for breach of contract and fraud and awarded compensatory and punitive damages to Park. The sole issue raised by Mobil is whether, under the law of corporate liability for punitive damages, the jury's award of punitive damages is supported by substantial evidence.

1. Corporate Liability for Punitive Damages

[13] The United States Supreme Court has recognized that in our judicial system, compensatory and punitive damages each serve a different purpose. *See Cooper Indus., Inc. v. Leatherman Tool Group, Inc.*, 532 U.S. 424, 432, 121 S. Ct. 1678, 1683 (2001); *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 416, 123 S. Ct. 1513, 1519 (2003). "Compensatory damages are 'intended to redress the concrete loss that the plaintiff has suffered by reason of the defendant's wrongful conduct.' By contrast, punitive damages serve a broader function; they are aimed at deterrence and retribution." *Campbell*, 538 U.S. at 416, 123 S. Ct. at 1519 (citation omitted); *see Pac. Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1, 19, 111 S. Ct. 1032, 1044 (1991) ("[P]unitive damages are imposed for purposes of retribution and deterrence"); *BMW v. Gore*, 517 U.S. 559, 568, 116 S. Ct. 1589, 1595 (1996) ("Punitive damages may properly be imposed to further a State's legitimate interests in punishing unlawful conduct and deterring its repetition"); *Fajardo v. Liberty House*, 2000 Guam 4, ¶ 18 (recognizing that punitive damages are for punishment and deterrence).

[14] Moreover, Guam's remedies code also authorizes, under certain circumstances, the assessment of punitive damages in order to deter unlawful conduct and punish a defendant. Title 20 GCA § 2120 (1992). Specifically, section 2120 provides:

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[1] Generally, the issues raised on appeal are addressed before the issues raised on cross-appeal. Although each party's arguments are rooted in the punitive damages issue, Park specifically appeals from the trial court's reduction of the punitive damages award of $2.8 million to $150,000, while Mobil cross-appeals from the jury's award of punitive damages in its entirety. Based on the issues presented, logic dictates that we address the propriety of the punitive damages award before we reach the issue of the trial court's reduction of the punitive damages award. To this end, discussion of the cross-appeal precedes discussion of the appeal.

> In an action for the breach of an obligation not arising from contract, where the defendant has been guilty of oppression, fraud, or malice, express or implied, the plaintiff, in addition to the actual damages, may recover damages for the sake of example and by way of punishing the defendant.

Id. While section 2120 authorizes the assessment of punitive damages against a defendant, it alone does resolve the issue before us today, that is, under what circumstances may a corporation be held liable for punitive damages based on the conduct of its employees.

[15] In determining whether there is substantial evidence to support an award of punitive damages, there must be a legal basis for assessing such damages against a corporation for the acts of its employees. In *Fajardo*, 2000 Guam 4, we addressed the issue of whether an employer's insurer must indemnify the employer for punitive damages properly assessed upon the employer, for the acts of its employees, based on the theory of vicarious liability. The propriety of holding a corporation *directly* liable for punitive damages was not before the court in *Fajardo*.

[16] It has been recognized that "[d]erivative or vicarious liability of an employer for the intentional misconduct of an employee is to be distinguished, of course, from an employer's direct liability." *Doe v. Forrest*, 853 A.2d 48, 71 n.7 (Vt. 2004). To be clear, "[v]icarious liability is a form of strict liability without fault. A master may be held liable for a servant's torts regardless of whether the master's own conduct is tortious." *Kerl v. Dennis Rasmussen, Inc.*, 682 N.W. 2d 328, 334 (Wis. 2004). Stated another way:

> Although a plaintiff who suffers a single injury may plead both vicarious and direct liability claims against a party who is asserted to be a master . . . vicarious liability is a separate and distinct theory of liability, and should not be confused with any direct liability that may flow from the master's own fault in bringing about the plaintiff's harm. Vicarious liability is imputed liability. It may be imposed upon an innocent party for the torts of another because of the nature of the agency relationship – specifically the element of control or right of control – justifies it.

Id.

[17] Thus, the issue of whether and under what circumstances punitive damages may be assessed against a corporation based on direct liability principles is one of first impression for this court. Where the defendant is a corporate entity, other courts have struggled to craft a rule of liability for punitive damages "which best tailors the scope of the employer's responsibility for employee misconduct - the primary reason for assessing punitive damages at all; namely, the effective deterrence of violations of substantive tort law." Philip Corboy, *Vicarious Liability for Punitive Damages: The Effort to Constitutionalize Tort Reform*, 2 SETON HALL CONST. L.J. 5, 16 (1991). As a result, in determining a corporation's liability for punitive damages resulting from the wrongful acts of its employees, either as imputed liability or direct liability, most courts apply one of two rules: the scope of employment rule or the complicity rule. In search of a rule of corporate liability for punitive damages, we examine the competing legal principles underlying the scope of employment and complicity rules.

[18] Regarded as the more liberal of the two, the scope of employment rule holds a corporation liable for the acts committed by its employees where the employees act within the scope of their employment. *See Mobile & O.R. Co. v. Seals*, 13 So. 917, 919 (Ala. 1893) (holding that a low level employee "is fully authorized to act for the company, within the range of his employment, as the president is within the limits of his office."); *Stroud v. Denny's Rest., Inc.*, 532 P.2d 790 (Or. 1975). Under this rule, corporate participation, whether by authorization or ratification, is not a requisite to liability.[2] The rationale behind this rule is that liability should be "grounded in the deterrent function of punitive damages. The punishment role of punitive damages as well as the potential unfairness of condemning an innocent employer are largely viewed as irrelevant, trumped by the overriding necessity of maximizing incentives for safety." Corboy, *supra*, at 16.

[19] The second rule of corporate liability for punitive damages is the complicity rule, which holds a corporation liable for the acts committed by its employees only where employees who possess a requisite level of authority in the corporation participate in or affirm the misconduct.

[2] We find it appropriate to note that the court in *Fajardo v. Liberty House*, 2000 Guam 4, to some extent, erroneously merged the doctrine of respondeat superior (or scope of employment) with the corporate complicity rule, which, as will be discussed, requires some form of corporate participation, including authorization or ratification, in order to a hold a corporation liable for punitive damages. *See id.* at ¶ 10 (stating that "the doctrine of respondeat superior will not hold the principal vicariously liable to the third party unless the principal had authorized or ratified the conduct."); *cf. Jannotta v. Subway Sandwich Shops, Inc.*, 125 F.3d 503, 513 (7th Cir. 1997) (stating that under the corporate complicity rule, punitive damages cannot be assessed against a corporation for acts of its agents under the theory of respondeat superior; "it must be shown, rather, that 'the responsible employee was acting in managerial capacity' or that his acts 'were authorized or ratified by the corporation.'") (quoting *West v. Western Cas. & Sur. Co.*, 846 F.2d 387, 399 (7th Cir. 1988)). Notwithstanding the confusion which may have been created by paragraph 10 of the *Fajardo* opinion, we agree with the court's ultimate holding that "some authorization or ratification by the employer is necessary before he is vicariously liable for a punitive damages award." *Fajardo*, 2000 Guam 4 at ¶ 12.

Linda K. Hollander, *Tort Law - New Mexico Holds Corporations Liable for Punitive Damages Based Upon Actions of Managerial Agents*: Albuquerque Concrete Coring Co. v. Pan Am World Services, Inc., 26 N.M. L. REV. 617, 619 (1996). The rationale behind this rule is that an innocent party, including a corporation, should not be liable for punitive damages arising from a third party's actions. *Id.* The complicity rule requires some corporate participation in the wrongful act, beyond the mere status as an employer, before punitive damages can be assessed against the corporation. *Id.* A majority of states have adopted some version of the complicity rule, which comes in two forms: the "whole executive power rule" and the "Restatement rule." *Id.*; *see Jannotta v. Subway Sandwich Shops, Inc.*, 125 F.3d 503, 513-14 (7th Cir. 1997); *CEH, Inc. v. F/V Seafarer,* 70 F.3d 694, 703 (1st Cir. 1995); *Williams v. City of New York*, 508 F.2d 356, 361 (2d Cir. 1974).

[20] Under the whole executive power rule, a corporation may be held liable for punitive damages where its highest ranking executive officers authorize, ratify, or otherwise participate in the misconduct. *Lake Shore & Mich. So. Ry. v. Prentice*, 147 U.S. 101, 114-15, 13 S. Ct. 261, 265-66 (1893). Unlike the complicity rule, the whole executive power rule focuses only on the participation of officers at the very top of the corporate ladder, namely, the chief executive officer or in his or her absence, the vice-president. *Id.* The rationale behind the whole executive power rule is that only those holding the whole executive power represent the intent and participation of the corporation itself. *Id.* Thus, if the purpose of punitive damages is to punish the wrongdoer, only actions of highest ranking corporate officers can give rise to corporate liability for punitive damages. *Id.*; *cf. Albuquerque Concrete Coring Co. v. Pan Am World Svcs.*, 879 P.2d 772, 778 (N.M. 1994) (rejecting the whole executive power rule in light of the modern business world in favor of the "managerial capacity" rule).

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[21] The second and more common form of the complicity rule finds its source in section 909 of the Second Restatement of Torts ("the Restatement rule").[3] Under the Restatement rule, punitive damages are premised on the corporation's participation in the misconduct. *See* RESTATEMENT (SECOND) TORTS § 909; *Egan v. Mutual of Omaha*, 620 P.2d 141 (Cal. 1979). The Restatement rule thus holds a corporation liable for punitive damages only if: the corporation authorizes, ratifies, or approves employee misconduct; the corporation recklessly employs or retains an unfit employee; the misconduct is committed by managerial employees acting within the scope of employment; or the principal or managerial agent of the corporation ratifies or approves the misconduct. *See* RESTATEMENT (SECOND) TORTS § 909; *Egan*, 620 P.2d at 151. This second form of the complicity rule "shifts the emphasis from effective deterrence to fair punishment," by seeking to protect innocent third parties, while encouraging the responsible delegation of corporate authority. Corboy, *supra*, at 24.

2. Punitive Damages Under section 2120 of Title 20 GCA

[22] The court is persuaded by precedent and policy to adopt the corporate complicity rule, pending exploration of any statutory limitations on this rule. As stated previously, section 2120 of Title 20 GCA narrows the circumstances in which punitive damages may be available. Under section 2120, for breach of an obligation not arising from contract, punitive damages may be assessed against "a defendant," only if the defendant is guilty of oppression, fraud or malice. This language is identical to the pre-1980 version of California Civil Code section 3294 and therefore, cases construing the prior version of section 3294 lend guidance to our consideration of whether punitive damages may be assessed against Mobil under the facts of this case.

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[3] The Restatement (Second) Torts § 909 reads in its entirety:

> Punitive damages can properly be awarded against a master or other principal because of an act by an agent if, but only if,
>
> (a) the principal or a managerial agent authorized the doing of the act, or
>
> (b) the agent was unfit and the principal or a managerial agent was reckless in employing or retaining him, or
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> (c) the agent was employed in a managerial capacity and was acting within the scope of employment, or
>
> (d) the principal or a managing agent of the principal ratified or approved the act.

[23] In 1979, the California Supreme Court in *Egan*, addressed the issue of whether, and in what circumstances, punitive damages may be assessed against a corporation. *Egan*, 620 P.2d 141. There, the plaintiff sued Mutual for breach of an insurance contract due to the acts of its claims manager and claims adjuster, who failed to investigate the claim before denying coverage. *Id*. at 146. The *Egan* court began its analysis with a citation to section 3294, recognizing that it cannot usurp the legislature's determination that punitive damages are recoverable in cases of oppression, fraud or malice. *Id*. Mutual argued that punitive damages cannot be assessed against the corporate entity because the employees were not involved in "high-level policy making" and thus were not "managerial employees" under the Restatement rule. *Id*. at 147-48. Observing that California follows the Restatement rule, the court opined:

> In a broad sense, it is correct to state that California follows the Restatement rule regarding assessment of punitive damages against a principal: "Punitive damages can properly be awarded against a master or other principal because of an act by an agent if, but only if, (a) the principal authorized the doing and the manner of the act, or (b) the agent was unfit and the principal was reckless in employing him, or (c) the agent was employed in a managerial capacity and was acting in the scope of employment, or (d) the principal or a managerial agent of the principal ratified or approved the act."

Id. (quoting Rest.2d Torts (Tent. Draft No. 19, 1973) § 909).

[24] Interpreting the Restatement rule, the court rejected Mutual's argument that the employees must occupy a certain level in the corporate hierarchy to be considered "managerial employees." Choosing to focus its inquiry on the discretion of the employee, the court held:

> The determination whether employees act in a managerial capacity, however, does not necessarily hinge on their "level" in the corporate hierarchy. Rather, *the critical inquiry is the degree of discretion the employees possess in making decisions that will ultimately determine corporate policy*. When employees dispose of insureds' claims with little if any supervision, they possess sufficient discretion for the law to impute their actions concerning those claims to the corporation.

Id. at 148 (emphasis added).

[25] Thus, applying the above standard to the acts of the claims manager and claims adjuster, the court found that the employees "exercised broad discretion in the disposition of plaintiff's claim," and thus, this authority was sufficient to justify imposing punitive damages against Mutual. *Id*. Moreover, the court pointed to the claims manager's testimony that he was a "managerial employee" and that he had "ultimate supervisory and decisional authority regarding the disposition of all claims." *Id.* In light of this, the court held that he had "policy-making authority" and is thus a "managerial employee." *Id.* However, unlike the claims manager, the claims adjuster testified that he acted only "with directions from above." *Id.* Notwithstanding this testimony, the court found that he "exercised broad discretion" in dealing with plaintiff's claim. *Id.* The court held that "the authority exercised by both employees "necessarily results in the ad hoc formulation of policy" and thus punitive damages were properly assessed against Mutual. *Id.*

[26] From the *Egan* case, we extract several principles. First, punitive damages may be assessed against a defendant, for breach of an obligation not arising from contract, where the defendant is found liable for oppression, fraud or malice. *Id.* at 146 (discussing section 3294 of the California Civil Code, which is identical to section 2120 of Title 20 GCA). Second, where the defendant is a corporation, we turn to the Restatement rule, which delineates four instances upon which punitive damages may be assessed against a corporation. *Id.* at 148. Finally, under the Restatement rule, a "managerial agent" is an employee who exercises substantial discretionary authority which results in the ad hoc formulation of policy over an aspect of the corporation's business. *Id.*

[27] Because section 2120 of Title 20 GCA is identical to the California statute as it existed at the time of *Egan*, we expressly adopt the Restatement (Second) Torts § 909 as the rule of corporate liability for punitive damages in this jurisdiction. In so doing, we reject the whole executive power rule because we recognize that "[i]n the modern world of multinational corporations, corporate control must be delegated to managing agents who may not possess the requisite upper-level executive authority traditionally considered necessary to trigger imposition of corporate liability for punitive damages." *Albuquerque Concrete Coring Co. v. Pan Am World Svcs.*, 879 P.2d 772, 778 (N.M. 1994). We agree with court's observation in *Albuquerque Concrete*, that the Restatement rule "retain[s] the philosophy that corporations should not be liable for punitive damages absent corporate culpability," but "tends to deter the employment of unfit persons for important positions" and "encourage their supervision." *Id.* There, the court's holding changed New Mexico's long standing whole executive power rule, which held only the actions of executives with plenary "whole executive power" as equal to that of the corporation for punitive damages purposes. *Id.*

[28] We similarly reject the scope of employment rule, which holds a corporation liable for all acts of employees falling within the scope of employment. Such doctrine, now rejected by most states, requires no corporate participation and thus undermines the policy behind punitive damages that an innocent wrongdoer should not be punished.

[29] While Mobil urges this court to adopt the definition of managerial agent found in a later California Supreme Court case, *White v. Ultramar, Inc.*, 981 P.2d 944 (Cal. 1999), we note that subsequent to the *Egan* decision, and likely as a result of such decision, California Civil Code section 3294 was amended in several respects.[4] The amendments "codif[ied] and refine[d] further the requirements for employer punitive damages liability." *White*, 981 P.2d at 950. The *White* case, decided after the amendment to section 3294, involved a claim for wrongful termination in retaliation for testifying at an unemployment hearing. *Id.* at 947-48. Punitive damages were assessed against the corporation for the wrongful act of its zone manager in firing the plaintiff. *Id.* On appeal, the corporation argued that the zone manager was not a "managerial agent" under the California provision. *Id.* at 949. The court in *White* found that the supervision of eight stores and

[4] The current version of Cal. Civ. Code § 3294 reads, in relevant part:

> (a) In an action for the breach of an obligation not arising from contract, where it is proven by clear and convincing evidence that the defendant has been guilty of oppression, fraud, or malice, the plaintiff, in addition to the actual damages, may recover damages for the sake of example and by way of punishing the defendant.
>
> (b) An employer shall not be liable for damages pursuant to subdivision (a), based upon acts of an employee of the employer, unless the employer had advance knowledge of the unfitness of the employee and employed him or her with a conscious disregard of the rights or safety of others or authorized or ratified the wrongful conduct for which the damages are awarded or was personally guilty of oppression, fraud, or malice. With respect to a corporate employer, the advance knowledge and conscious disregard, authorization, ratification or act of oppression, fraud, or malice must be on the part of an officer, director, or managing agent of the corporation.
>
> (c) As used in this section, the following definitions shall apply:
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> (1) "Malice" means conduct which is intended by the defendant to cause injury to the plaintiff or despicable conduct which is carried on by the defendant with a willful and conscious disregard of the rights or safety of others.
>
> (2) "Oppression" means despicable conduct that subjects a person to cruel and unjust hardship in conscious disregard of that person's rights.
>
> (3) "Fraud" means an intentional misrepresentation, deceit, or concealment of a material fact known to the defendant with the intention on the part of the defendant of thereby depriving a person of property or legal rights or otherwise causing injury. . . .

sixty-five employees was a "significant aspect" of the corporation's business. *Id.* at 954. Most, if not all of the responsibility of running these stores were delegated to her. *See id.* In sum, the zone manager exercised substantial discretionary authority over "vital aspects" of the corporation's business. *Id.* Affirming the award of punitive damages against the corporation, the court held that the zone manager "exercised substantial discretionary authority over decisions that ultimately determined corporate policy in a most crucial aspect of [the corporation's] business." *Id.*

[30] A review of both *Egan* and *White* reveals that each case requires that the employee possess a certain degree of discretion and authority to ultimately determine corporate policy, before the employee can qualify as a "managerial agent" (under the Restatement) or "managing agent" (under the section 3294 of the California code). However, under *White*, the definition of a managing agent appears narrower than that found in *Egan*. *Egan* focuses on whether the employee had substantial discretionary authority to make decisions with respect to the plaintiff and whether this exercise of discretionary authority ultimately determines corporate policy. *See Egan*, 620 P.2d at 148 ("We are satisfied that *with respect to plaintiff's claim herein*, the authority vested in McEachen and Segal was sufficient to justify the imposition of punitive damages against Mutual. The record demonstrates they exercised broad discretion *in the disposition of plaintiff's claim*.") (emphases added). The critical inquiry under *Egan* is: what is the degree of discretionary authority that the employee possesses in making decisions that will ultimately determine corporate policy? *See id.*; *White*, 981 P.2d at 954 (Mosk, J., concurring).

[31] Under *White*, the employee must exercise "substantial" independent authority over "significant aspects" of a corporation's business in corporate decision-making and the employee's decisions must ultimately determine corporate policy. The focus is neither on the plaintiff nor on the act which gave rise to the cause of action, but on the corporation itself. The inquiry under *White* is: what is the degree of discretionary authority that the employee possesses in making decisions that will ultimately determine corporate policy over significant aspects of the corporation's business?

[32] Indeed, Justice Mosk, who authored the *Egan* opinion, filed a concurring opinion in *White*, explaining and applying what he understood to be "the correct test" under the California provision, and observing that the facts can and should be guided by the principles laid out in *Egan*. *Id.* The rule under *Egan* is that "a corporation may be liable for punitive damages based on the wrongful conduct of an employee who exercises substantial discretionary authority over decisions that ultimately determine corporate policy over an aspect of the corporation's business." *Id.* at 955. Addressing the facts in *White*, Justice Mosk conceded that the employee in question was not a high level manager or final policy maker for the corporation, but a local supervisor for a corporation that owned and operated a chain of stores located throughout the state. *Id.* at 956. However, observing the employee's actions with respect to the particular plaintiff, Justice Mosk determined, under the *Egan* test, that the employee engaged in a "local practice" of retaliating against the plaintiff-employee for testifying at an unemployment hearing. *Id.* Thus, in discharging the employee, the zone manager's authority "necessarily resulted in the ad hoc formulation of policy that adversely affected plaintiff." *Id.* at 958.

[33] Notably, the majority in *White* thoroughly examined the legislative intent in enacting the amended statute. It noted, "we believe that in amending section 3294, the Legislature intended . . . to limit corporate punitive damage liability to those employees who exercise substantial independent authority and judgment over decisions that ultimately determine corporate policy." *Id.* at 951. Because our legislature has not similarly adopted amendments to section 2120 of Title 20 GCA, we reject the California Supreme Court's most recent articulation of the definition of a managerial agent found in *White*.

[34] By contrast, section 2120 is identical to the pre-1980 version of the California provision which was in effect in *Egan*. Therefore, we adopt the *Egan* definition of managerial agent as the term is used in the Restatement rule, and hold that a managerial agent under the Restatement is an employee who exercises substantial discretionary authority which results in the ad hoc formulation of policy over an aspect of the corporation's business. *Egan*, 620 P.2d at 148.

3. Mobil's Liability for Punitive Damages Based on the Restatement Rule as articulated in Egan

a. Managerial Agent

[35] We review the trial record for substantial evidence that Joseph Pereda, Mobil's Cabras Terminal Manager, is a "managerial agent" of Mobil for purposes of assessing punitive damages against Mobil. Stated another way, we must determine whether Joseph Pereda is an employee who exercises substantial discretionary authority which results in the ad hoc formulation of policy over an aspect of the corporation's business. *Egan*, 620 P.2d at 148.

[36] Mobil is a Guam corporation. It has a General Manager and five different departments. Transcript ("Tr.") vol. IV, p. 9 (Jury Trial, May 9, 2002). The Operations department is headed by Noel Enriquez. *Id*. Within the Operations department is the Cabras terminal. Plaintiff-Appellant's Excerpts of Record "ER," Exhibit 1 (Exhibit 54 of Plaintiff's Trial Exhibits). The Terminal Manager at Cabras terminal is Joseph Pereda. *Id*. The evidence is undisputed that only the General Manager and the five department heads have the authority to create "business policy." Tr. vol. IV, p. 9 (Jury Trial, May 9, 2002). It is also undisputed that Pereda, as Terminal Manager, does not create business policy, nor does he hire or fire employees, give pay raises, demotions or suspensions. Tr. vol. IV, pp. 7, 9, 86 (Jury Trial, May 9, 2002). Pereda, however, has "overall charge" of "everything that goes on inside [the] terminal." Tr. vol. IV, pp. 20, 88 (Jury Trial, May 9, 2002). He oversees the terminal on a day-to-day basis and exercises discretionary and supervisory authority over approximately twenty-five employees, with little supervision to no supervision by Noel Enriquez, who visits the terminal approximately once a month. Tr. vol. IV, pp. 18-21, 23, 27-28, 88 (Jury Trial, May 9, 2002). Noel Enriquez testified that he delegates important matters to Pereda and did so with respect to the facts which gave rise to the causes of action in this case. Tr. vol. IV, pp. 27-28.

[37] Second, in exercise of his discretionary authority, Pereda authorized his employees to take the fuel which remained in the delivery tanks after a delivery to Park's service station, without Park's knowledge, and without issuing the appropriate credit to Park. Tr. vol. II, pp. 63-64, 69, 121-23, 128-31, 137-43 (Jury Trial, May 7, 2002).

[38] Finally, the procedures authorized by Pereda resulted in the ad hoc formulation of corporate policy over an aspect of Mobil's business. This is because "corporate policy forming a basis for imposition of punitive damages does not require a showing of a formal adoption of the policy by resolution or formal direction by a managing official, but may be established as a de facto policy upon a showing of uniform course of conduct by lower level employees." *See Egan*, 620 P.2d at 155 (Clark, J., concurring and dissenting). The procedures authorized by Pereda occurred on a regular basis and "all the drivers" were aware of and participated in the wrongful acts. Tr. vol. II, pp. 130-31 (Jury Trial, May 7, 2002).

[39] Accordingly, there exists substantial evidence that Joseph Pereda, Mobil's Terminal Manager, had substantial discretionary authority over an aspect of Mobil's business and therefore, we hold that Pereda is a managerial agent within the meaning of the Restatement rule.

b. Authorization

[40] In light of our finding that Pereda is a mangerial agent of Mobil, we review the trial record for substantial evidence that Pereda authorized the wrongful conduct of the drivers.

[41] Bruce Taitano, a Mobil driver, testified that he informed Pereda that there was fuel which remained in the delivery tank as a result of the slope at Park's station and that Park was not getting the full amount he ordered. Tr. vol. II, p. 122 (Jury Trial, May 7, 2002). Pereda was aware since 1996 that the sloped land at Park's service station resulted in undelivered fuel. Tr. vol. II, p. 139. (Jury Trial, May 7, 2002). Bruce Taitano, as well as other drivers, testified that all the drivers knew about the undelivered fuel and the drivers would contact Pereda for permission to take the fuel for personal use. Tr. vol. II, pp. 63-64, 69, 121-23, 128-31 (Jury Trial, May 7, 2002). Pereda authorized the drivers to take the undelivered fuel. Tr. vol II, pp. 63-64, 121-23, 128-31, 194-95 (Jury Trial, May 7, 2002).

[42] Mobil directs this court to evidence that Pereda only gave the drivers permission to take "residual fuel," which is a few gallons of undelivered fuel that ordinarily settles at the bottom of the delivery tank after each delivery, and did not authorize the drivers to take "backhaul," which is a quantifiable amount of undelivered fuel which, under Mobil's policy, must be credited to the customer. Tr. vol. II, pp. 199-201 (Jury Trial, May 7, 2002); vol. III, pp. 33-34, 39-41 (Jury Trial, May 8, 2002); vol. IV, pp. 40-41 (Jury Trial, May 9, 2002). However, while the drivers testified that they knew they were not supposed to take "backhaul" for personal use, they did not consider undelivered fuel which returned after a delivery to Park's service station to be "backhaul," but instead regarded the fuel as "excess gas," which they took only with Pereda's permission. Tr. vol. II, pp. 137-43 (Jury Trial, May 7, 2002).

[43] Regardless of whether the undelivered fuel is referred to by drivers as excess gas or backhaul or residual gas, according to the testimony by the accounting representative at Mobil, sixty gallons of undelivered fuel is a quantifiable amount which constitutes "backhaul" and must be credited to the customer who purchased the fuel. Tr. vol. IV, p. 130 (Jury Trial, May 9, 2002). However, the drivers did not earmark the sixty gallons as "backhaul," and thus Park was not credited. Tr. vol. II, pp. 137-43 (Jury Trial, May 7, 2002). This is because "it was an attitude of not wanting to honor that it's backhaul. It's basically so minute that it's how we ended up getting permission just to take it." Tr. vol. II, p. 139 (Jury Trial, May 7, 2002). The jury could also infer that Pereda knew that the drivers were not giving Park credit for the sixty gallons; had the drivers appropriately credited Park, the undelivered fuel would have to be stored or topped off to be resold later, and under these circumstances, could not be taken by the drivers for their personal use.

[44] In sum, there exists substantial evidence that Pereda authorized the wrongful conduct of the drivers.

[45] Because the trial record reveals substantial evidence to support the jury finding that a managerial agent of Mobil authorized the fraud committed upon Park, we hold that the trial court's denial of Mobil's motion for judgment notwithstanding the verdict with respect to the jury's award of punitive damages was not in error.[5]

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[5] While we affirm the trial court's denial of Mobil's motion for judgment notwithstanding the verdict with respect to the jury's finding of fraud, we reject Park's argument that Mobil's policies authorizing the resale of undelivered fuel amounts to fraud. Rather, according to Mobil's policies, the resale of undelivered fuel occurred after the drivers reported the undelivered fuel, so that the customer who paid for the fuel was properly credited. *See* Tr. vol II, pp. 73, 134, 199-201 (Jury Trial, May 7, 2002); vol. III, p. 33 (Jury Trial, May 8, 2002); vol. IV, pp. 105, 107, 114-16, 130 (Jury Trial, May 9, 2002); vol. V, pp. 9-10 (Jury Trial, May 10, 2002); Defendant-Appellee and Cross-Appellant's Supplemental Excerpts of Record, pp. 64 (Memorandum to All T/T Drivers from M.D. Anderson dated September 14,

B. Park's Appeal

[46] Park appeals from the trial court's reduction of the jury's award of punitive damages from $2.8 million to $150,000.

[47] Where the constitutionality of a punitive damage award is challenged on the ground that the amount of punitive damages is excessive under the standards set forth in *BMW v. Gore*, 517 U.S. 559, 568, 116 S. Ct. 1589 (1996), appellate courts must conduct a *de novo* review of the trial court's application of the *Gore* standards to the jury's award. *See State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 123 S. Ct. 1513, 1520 (2003) (quoting *Cooper Indus., Inc. v. Leatherman Tool Group, Inc.*, 532 U.S. 424, 431, 121 S. Ct. 1678 (2001)).

[48] In 1996, the United States Supreme Court in *Gore* struck down a $2 million punitive damages award against an automobile maker for repainting new, but damaged cars, without disclosing such fact to its customers. *Gore*, 517 U.S. at 563, 116 S. Ct. at 1593. In that case, plaintiff paid more than $40,000 for a "new" car, but later discovered that BMW had repainted the car, presumably due to acid rain damage which occurred during shipping. The plaintiff sued on behalf of himself and all other similarly situated BMW owners. *Id.*, 116 S. Ct. at 1593. The jury awarded the plaintiff $4,000 in compensatory damages and $4 million in punitive damages. *Id.* at 565, 116 S. Ct. at 15931593-94. The Alabama Supreme Court reduced the punitive damages to $2 million. *Id.* at 567, 116 S. Ct. at 1595. On appeal to the United States Supreme Court, the Court held that under the facts of the case, the award of $2 million in punitive damages, which constitutes a 500 to 1 ratio (punitive damages to compensatory damages), was a violation of substantive due process. "Elementary notions of fairness enshrined in our constitutional jurisprudence dictate that a person receive fair notice not only of the conduct that will subject him to punishment, but also of the severity of the penalty that a State may impose." *Id.* at 575, 116 S. Ct. at 1598.

1995, Defendant's Trial Exhibit F), 67 (Work Instructional Manual, "Tank Truck Discharge at Delivery Point," Defendant's Trial Exhibit G), 85 (Safe Practice and Procedures Guidelines, Defendant's Trial Exhibit I), 88 (Drivers Meeting Attendance Sheet and Agenda - June 11, 1998, Defendant's Trial Exhibit J), 90 (Drivers Meeting Attendance Sheet and Agenda - November 6, 1998, Defendant's Trial Exhibit L). Thus, to the extent the policies are followed, because a customer would be properly credited, we see no reason why Mobil's actions in reselling the undelivered fuel are fraudulent.

[49] The *Gore* Court declined to fix a bright line mathematical rule, but articulated three guideposts for trial courts to use in determining whether a punitive damages award is "grossly excessive" and thus violative of due process: (1) the degree of reprehensibility of the defendant's misconduct; (2) the disparity between the actual or potential harm suffered by the plaintiff and the punitive damages award; and (3) the difference between the punitive damages awarded by the jury and the civil penalties authorized or imposed in comparable cases. *Id.* at 575, 116 S. Ct. at 1598-99.

[50] The Supreme Court recently elaborated upon the *Gore* principles governing punitive damages in *State Farm Mut. Ins. Co. v. Campbell*, 538 U.S. 408, 123 S. Ct. 1513 (2003). There, the plaintiff Campbell sued his insurer, State Farm. Campbell had killed one person and permanently disabled another in an auto accident. *Id.* at 412, 123 S. Ct. at 1517. State Farm refused to settle the claims, despite the fact that its investigators knew that Campbell was at fault and had recommended settlement. *Id*. at 413, 123 S. Ct. at 1517-18. State Farm promised Campbell that it would cover him in the event of an excess liability judgment and further promised him that his assets would be safe. *Id.*, 123 S. Ct. at 1518. Campbell lost at trial and State Farm reneged on its promise to pay the judgment. *Id.*, 123 S. Ct. at 1518. State Farm suggested to Campbell, instead, that he put up a "for sale" sign at his house. *Id.*, 123 S. Ct. at 1518. Campbell sued State Farm for bad faith, fraud and intentional infliction of emotional distress. *Id.* at 414, 123 S. Ct. at 1518. At trial against State Farm, the jury awarded Campbell $1 million in compensatory damages and $145 million in punitive damages. *Id.* at 415, 123 S. Ct. at 1519. The trial court reduced the punitive damages to $25 million. *Id.*, 123 S. Ct. at 1519. The Utah Supreme Court reinstated the $145 million punitive damages award, finding the defendant's conduct reprehensible. *Id.*, 123 S. Ct. at 1519. On appeal to the United States Supreme Court, the *Campbell* Court reversed the Utah court, finding that the punitive damages award violated due process. *Id.* at 412, 123 S. Ct. at 1517. In applying the *Gore* criteria to the facts of the case, the *Campbell* court further refined each guidepost. An analysis of each *Gore* guidepost, as clarified by *Campbell*, follows.

1. The Degree of Reprehensibility of the Defendant's Misconduct

[51] The degree of reprehensibility of the defendant's conduct is the "most important indicium of the reasonableness of a punitive damages award." *Campbell*, 538 U.S. at 419, 123 S. Ct. at 1521 (quoting *Gore*, 517 U.S. at 575, 116 S. Ct. at 1599) (brackets omitted). *Campbell* further instructs, "it should be presumed that a plaintiff has been made whole for his injuries by compensatory damages, so punitive damages should only be awarded if the defendant's culpability, after having paid compensatory damages, is so reprehensible as to warrant the imposition of further sanctions to achieve punishment or deterrence." 538 U.S. at 419, 123 S. Ct. at 1521. In assessing the reprehensibility of a defendant's conduct, courts must consider the following factors: (1) "the harm caused was physical as opposed to economic"; (2) "the tortious conduct evinced an indifference to or a reckless disregard of the health or safety of others"; (3) "the target of the conduct had financial vulnerability"; (4) "the conduct involved repeated actions or was an isolated incident"; and (5) "the harm resulted from intentional malice, trickery, or deceit, or mere accident." *Id.* at 419, 123 S. Ct. at 1521. Any one of the above five factors "weighing in favor of a plaintiff may not be sufficient to sustain a punitive damages award; and the absence of all of them renders any award suspect." *Id.* at 419, 123 S. Ct. at 1521.

[52] Applying the first factor, it is clear that the harm suffered by Park was economic harm as opposed to physical harm. *See id.* at 419, 123 S. Ct. at 1521. Relatedly, applying the second factor, the fraud committed upon Park did not evince an indifference to or a reckless disregard for the health or safety of others. *See id.*, 123 S. Ct. at 1515-16. *Cf. Campbell v. State Farm Mut. Auto. Ins. Co.*, 98 P.3d 409, 418 (Utah 2004) (on remand) ("[C]onduct which causes $1 million of emotional distress and humiliation is markedly more egregious than conduct which results in $1 million of economic harm."), *cert. denied*, — U.S. —, 125 S. Ct. 114 (Oct. 4, 2004).

[53] The third factor, which requires that we determine whether Park was financially vulnerable, is more difficult to assess based on the record before us. *See Campbell*, 538 U.S. at 419, 123 S. Ct. at 1521. In *Campbell*, the court found that the plaintiff, who suffered from a stroke and Parkinson's disease, was "financially vulnerable." 538 U.S. at 434, 123 S. Ct. at 1529. State Farm promised the plaintiff that his assets would be safe from an excess liability judgment, but when he sought payment arrangements, he was told to sell his house instead. *Id.* at 419, 123 S. Ct. at 1521. By contrast, Park possesses a degree in business, and further, has ownership interest in 98% of Wushin Corporation, which manages the mini-mart and the service station. While Park was behind in his loan payments to Mobil, which ultimately led to the foreclosure of his property, such delinquency cannot be equated with financial vulnerability.[6] *See id.* at 434, 123 S. Ct. at 1529 (discussing how plaintiff, who was a stroke victim and suffered from Parkinson's disease, was financially vulnerable).

[54] The fourth factor requires us to determine whether the wrongful conduct involved repeated actions or was an isolated incident. *Id.* at 419, 123 S. Ct. at 1521. Although the wrongful acts committed against Park spanned several years and therefore may be considered "repeated actions," the Supreme Court cases refer to the frequency of *past* similar conduct of the defendant in question, similar to a repeat offender status in a criminal case. Citing prior Supreme Court cases, the *Campbell* court stated, "[a]lthough our holdings that a recidivist may be punished more severely than a first offender recognize that repeated misconduct is more reprehensible than an individual instance of malfeasance, in the context of civil actions courts must ensure the conduct in question replicates the prior transgressions." 538 U.S. at 423, 116 S. Ct. at 1523. Further, the Court recognized its prior holding that "courts should look to the existence and frequency of similar past conduct." *Id.*, 116 S. Ct. at 1523 (citing *TXO Prod. Corp. v. Alliance Res. Corp.*, 509 U.S. 443, 462 n.28, 113 S. Ct. 2711, 2722 n.28 (1993) (internal quotation marks and citation omitted)). The trial court found that this was an isolated incident because of the nature of the sloped land at Park's service station. This court agrees and finds that the wrongful conduct which occurred, according to the evidence, was an isolated incident.

[55] The fifth factor looks to whether the harm resulted from "intentional malice, trickery, or deceit, or mere accident." *Campbell*, 538 U.S. at 419, 123 S. Ct. at 1521. The degree of reprehensibility here is evident in the jury's finding of fraud on the part of Mobil, which constitutes deceit.

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[6] Moreover, it cannot reasonably be argued that Park's financial woes were a result of Mobil's wrongful conduct. While Park was delinquent in his loan payments by approximately $84,000, this amount significantly exceeds the $50,000 of actual damages caused by Mobil.

[56] It must be emphasized that "exemplary damages imposed on a defendant should reflect "the enormity of his offense. . . . This principle reflects the accepted view that some wrongs are more blameworthy than others." *Gore*, 517 U.S. at 575, 116 S.Ct. at 1599 (quotation marks, citations and footnote omitted). While an application of the above five factors shows that Mobil engaged in reprehensible conduct sufficient to support an award of punitive damages to *some* extent, we hold that, based the first *Gore* guidepost, "a more modest punishment for this reprehensible conduct could have satisfied the [] legitimate objectives" of punishing wrongdoing and deterring future misconduct by Mobil and others. *Campbell*, 538 U.S. at 419, 123 S. Ct. at 1521; *see Inter Med. Supplies Ltd. v. EBI Med. Sys., Inc.*, 975 F.Supp. 681, 700-01 (D.N.J. 1997) ("[I]t would be a mistake to equate the purely economic harm . . . with the harm to an unsuspecting public . . . . At bottom, this case . . . is about the collapse of a contractual relationship [which] usually concern private rights, not public rights. . . . In light of their limited purpose, punitive damages ought to play a much more circumscribed role in enforcing private rights.") (citation omitted).

2. The Disparity Between the Actual or Potential Harm Suffered by the Plaintiff and the Punitive Damages Award

[57] In assessing the constitutionality of a punitive damages award, under the second *Gore* guidepost, we look to the ratio between the compensatory and punitive damages. In the face of a jury verdict which represents a 145 to 1 ratio between punitive and compensatory damages, the *Campbell* court stated:

> Turning to the second *Gore* guidepost, we have been reluctant to identify concrete constitutional limits on the ratio between harm, or potential harm, to the plaintiff and the punitive damages award. *Gore*, supra, at 582, 116 S. Ct. 1589 ("[W]e have consistently rejected the notion that the constitutional line is marked by a simple mathematical formula, even one that compares actual *and potential* damages to the punitive award"); *TXO, supra,* at 458, 113 S. Ct. 2711. We decline again to impose a bright-line ratio which a punitive damages award cannot exceed. Our jurisprudence and the principles it has now established demonstrate, however, that, in practice, *few awards exceeding a single-digit ratio between punitive and compensatory damages, to a significant degree, will satisfy due process. In Haslip, in upholding a punitive damages award, we concluded that an award of more than four times the amount of compensatory damages might be close to the line of constitutional impropriety.* 499 U.S., at 23-24, 111 S. Ct. 1032. *We cited that 4-to-1 ratio again in Gore.* 517 U.S., at 581, 116 S. Ct. 1589. The Court further referenced a long legislative history, dating back over 700 years and going forward to today, providing for sanctions of double, treble, or quadruple damages to deter and punish. *Id.,* at 581, and n. 33, 116 S. Ct. 1589. *While these ratios are not binding,*

> *they are instructive*. They demonstrate what should be obvious: Single-digit multipliers are more likely to comport with due process, while still achieving the State's goals of deterrence and retribution, than awards with ratios in range of 500 to 1, *id.*, at 582, 116 S. Ct. 1589, or, in this case, of 145 to 1.

Campbell, 538 U.S. at 424-25, 123 S. Ct. at 1524 (emphases added).

[58] The *Campbell* court further carved out an exception to the general rule that "few awards exceeding a single-digit ratio between punitive and compensatory damages, to a significant degree, will satisfy due process." *Id*. It held that "because there are no rigid benchmarks that a punitive damages award may not surpass, ratios *greater than we have previously upheld* may comport with due process" only under three circumstances: (1) where "the injury is hard to detect"; (2) where "a particularly egregious act has resulted in only a small amount of economic damages"; or (3) where "the monetary value of noneconomic harm might have been difficult to determine." *Id.* at 425, 123 S. Ct. at 1524 (quoting *Gore*, 517 U.S. at 582, 116 S. Ct. at 1602) (emphases added) .

[59] Applying the above proportionality requirements to the facts of this case, we find that the $2.8 million punitive damages award does not comport with due process. More specifically, compared to the $50,000 award of compensatory damages, the punitive damages award is 56 times the amount of actual harm. This results in a ratio of punitive to compensatory damages which equals 56 to 1. Such disproportionality is not allowed under the facts of this case. That is, the three exceptions expressed by *Gore* and reiterated in *Campbell* which would allow for a greater ratio than 4 to 1, do not apply to the facts of this case. In particular, Park's injury was not hard to detect. Apparently, Pereda and the Mobil drivers were fully aware of the "injury" to Park. Moreover, the extent of the economic injury resulting from Mobil's failure to credit Park was known, mathematically determined and presented to the jury. Further, Mobil's conduct was not "a particularly egregious act" which "resulted in only a small amount of economic damages." *Id*. Rather, Park suffered purely economic damages in the amount of $50,000, for which he was fully compensated.

[60] Accordingly, applying the second *Gore* guidepost, we hold that disparity between the punitive damages award and the actual harm, which amounts to a ration of 56 to 1, fails to satisfy due process.

3. The Difference Between the Punitive Damages Awardedby the Jury and the Civil Penalties Authorized or Imposed in Comparable Cases.

[61] The final *Gore* guidepost requires that we consider the "civil penalties authorized or imposed in comparable cases." *Gore*, 517 U.S at 575. 116 S. Ct. at 1598-99. Park directs the court's attention to Guam's Deceptive Trade Practices Act, wherein "charging or attempting to charge a consumer for goods or services not provided" gives rise to a *maximum* penalty of $5,000 *per violation*. *See* Title 5 GCA § 32201(b)(10) (1996); Title 5 GCA § 32127 (1996). Further, Park argues that because the sale of fuel involves interstate and foreign commerce, the Federal Trade Commission's prohibition of unfair and deceptive trade practices, 15 U.S.C. § 45(m)(1)(A), provides yet another comparable civil penalty. Park argues that under the federal statute, each violation is subject to a $10,000 maximum penalty for each violation. In sum, Park argues that these maximum fines should therefore be multiplied by 443, the number of "violations" committed by Mobil, which would equal approximately $2.2 million under the local statute and $4.43 million under the federal statute. Park concludes that the $2.8million punitive damages amount awarded by the jury falls within a range of comparable civil penalties, and thus, the jury award does not violate due process.[7]

[62] In *Johansen v. Combustion Eng'g, Inc*., 170 F.3d 1320 (11th Cir. 1999), the Eleventh Circuit disagreed with an argument similarly raised by the plaintiff and chose not to rely solely on the maximum civil penalty in making its comparison to the punitive damages under the third *Gore* prong. In *Johansen*, the Eleventh Circuit explained that as a matter of due process, "it cannot be presumed that the defendant had notice that the state's interest in the specific conduct at issue in the case is represented by the *maximum* fine provided by the statute." *Id.* at 1337 (emphasis added).

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[7] The third guidepost also requires us, in the alternative, to consider penalties actually imposed in comparable cases. *In re Exxon Valdez*, 270 F.3d 1215, 1245-46 (9th Cir. 2001) (vacating punitive award in light of *Gore*; in evaluating penalties for comparable conduct, looking not only to maximum statutory penalties, but to the fine actually imposed for violating the statutory mandate). We note that neither Park nor Mobil have provided this court with any actual comparable cases and we have found none.

Rather, "constitutionally adequate notice of potential punitive damage liability in a particular case depends upon whether th[e] defendant had reason to believe that his specific conduct could result in a particular damage award." *Id.* This is because "[t]he point at which an award falls within the available range should bear some relation to the egregiousness of the case." *Iannone v. Frederic R. Harris, Inc.*, 941 F.Supp. 403, 415 (S.D.N.Y. 1996) (finding that an award which represented more than eighty percent of the maximum civil penalty available under the law was unreasonably high in relation to the egregiousness of defendant's conduct).

[63] Assuming *arguendo* that the local and federal statutes prohibit Mobil's actions in this case, we find that while the aggregate maximum civil penalties are arguably comparable to the $2.8 million punitive damages award, the jury's award of $2.8 million is unreasonably high and bears no "relation to the egregiousness of the case." *Id.* Thus, we agree with the trial court's holding that the $2.8 million punitive damages award violates due process. This conclusion is underscored by the Supreme Court's directive that "the *most important indicium* of the reasonableness of a punitive damages award is the degree of reprehensibility of the defendant's conduct." *Campbell*, 538 U.S. at 419, 123 S. Ct. at 1521 (quoting *Gore*, 517 U.S. at 575, 116 S. Ct. at 1599) (brackets omitted, emphasis added). As we have previously stated, our application of the five factors to determine the degree of reprehensibility indicates that "a more modest punishment for this reprehensible conduct could have satisfied the [] legitimate objectives of punishing wrongdoing and deterring future misconduct by Mobil and others." *Campbell*, 538 U.S. at 419, 123 S. Ct. at 1521.

[64] Accordingly, applying the three guideposts articulated in *Gore* and refined by *Campbell*, we hold that the trial court's grant of the judgment notwithstanding the verdict, which reduced the amount of punitive damages in this case to $150,000, was proper.

IV.

[65] We hold that substantial evidence exists to support the jury's finding that a managerial agent of Mobil authorized the fraud inflicted upon Park and thus, we uphold the award of punitive damages against the corporate entity of Mobil Oil Guam, Inc. We further hold, in the face of the jury's award of $50,000 in compensatory damages, that the punitive damages award of $2.8 million is unconstitutional under the principles articulated in *Gore*, and therefore, the trial court properly reduced the punitive damages award to $150,000. Accordingly, we **AFFIRM** the trial court's Amended Judgment.