

# Punitive Discovery:

## The Key to Unlocking a Defendant's Financial Information



by Carey Accera

*Breault v. Friedli* is the definitive case in Tennessee on the discovery of a defendant's financial condition for purposes of the punitive damages' phase of a trial. See *Breault v. Friedli*, 610 S.W.2d 134 (Tenn. Ct. App. 1980), cert. denied. In *Breault*, the court held, "If it appears from discovery on the merits that a factual basis for punitive damages exists, then the plaintiff is permitted to discover the defendant's financial condition." *Id.* at 139. So why are so many courts reluctant to grant access to a defendant's financials? This article examines the law on punitive discovery and provides practice tips for presenting an argument for discovery of a defendant's financial information.

### THE BASICS

In Tennessee, where punitive damages have been alleged, the trial occurs in two phases if requested by the defendant. *Hodges v. Toof*, 833 S.W.2d 896, 901 (Tenn. 1992). In phase one, the factfinder determines liability for and the amount of compensatory damages, and liability for punitive damages. *Id.* Evidence of a defendant's financial condition is typically not admissible in this phase. *Id.* In phase two, the factfinder determines the amount of punitive damages to award by considering evidence of the factors enumerated in *Hodges*, including a defendant's "financial affairs, condition, and net worth." *Id.*

In the first phase, a plaintiff must prove by clear and convincing evidence that Defendants acted fraudulently, intentionally, recklessly, or maliciously to support a claim for punitive damages. *Id.* at 901. An easy way to remember this standard is with the acronym "F.I.R.M." The Tennessee Pattern Jury Instructions define fraudulent, intentional, reckless, and malicious conduct as:

**Fraudulent:** A person (or company) acts fraudulently when: (1) the person (or company) intentionally either misrepresents an existing material fact or causes a false impression of an existing material fact to mislead or to obtain an unfair or undue advantage; and (2) another person suffers injury or loss because of reasonable reliance upon that representation.

**Intentional:** A person (or company) acts intentionally when it is the person's (or company's) purpose or desire to do a wrongful act or to cause the result.

**Reckless:** A person (or company) acts recklessly when the person (or company) is aware of, but consciously disregards a substantial and unjustifiable risk of injury or damage to another. Disregarding the risk must be a gross deviation from the standard of care that an ordinary person

(or company) would use under all the circumstances.

**Malicious:** A person acts maliciously when the person is motivated by ill will, hatred or personal spite.

T.P.I. – Civil 14.55 Punitive Damages (12th Ed. 2012). To prove by clear and convincing evidence means the evidence leaves "no serious or substantial doubt about the correctness of the conclusions drawn." *Flax v. DaimlerChrysler Corp.*, 272 S.W.3d 521, 531 (Tenn. 2008)(quoting *Hodges*, 833 S.W.3d at 901). "Clear and convincing evidence should demonstrate that the truth of the facts asserted is 'highly probable' as opposed to merely 'more probable than not.'" *In re C.W.W.*, 37 S.W.3d 467, 474 (Tenn. Ct. App. 2000).

Where a factfinder finds by clear and convincing evidence that a defendant acted fraudulently, intentionally, recklessly, or maliciously, the second phase of trial should begin "immediately" to determine the amount of punitive damages to be awarded. *Culbreath v. First Tennessee Bank Nat. Ass'n*, 44 S.W.3d 518, 527 (Tenn. 2001)(citing *Hodges*, 833 S.W.3d at 901). In determining the amount of punitive damages, "the factfinder **shall** consider" the following factors:

- The financial affairs, condition and net worth of the defendant;
- The nature and reprehensibility of wrongdoing;
- The defendant's awareness of amount of harm caused and motivation in causing harm;
- Duration of misconduct and whether the defendant attempted to conceal conduct;
- Expense a plaintiff has borne in attempting to recover losses;
- Whether the defendant profited greatly from the activity and whether the punitive award should be in excess of the profit to deter similar future behavior;
- Any prior punitive damages award against the defendant based upon same wrongful act;
- Whether the defendant took remedial action or attempted to make amends upon learning of misconduct by offering a prompt and fair settlement for actual harm; and
- Any other relevant circumstances shown by the evidence.

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*Hodges*, 833 S.W.2d at 901-902 (emphasis added). The trier of fact should further be instructed that the purpose of punitive damages is “not to compensate the plaintiff but to punish the wrongdoer and to deter the wrongdoer and others from committing similar wrongs in the future.” *Id.* at 900.

Where a jury awards punitive damages to a plaintiff, the trial court “must review the jury’s award of punitive damages and ‘clearly set forth the reasons for decreasing or approving all punitive awards in findings of fact and conclusions of law demonstrating a consideration of all factors on which the jury is instructed.’” *Culbreath v. First Tennessee Bank Nat. Ass’n*, 44 S.W.3d 518, 528 (Tenn. 2001)(quoting *Hodges*, 833 S.W.2d at 901-02). To clearly demonstrate its consideration of the punitive factors delineated in *Hodges*, the trial court’s findings of fact and conclusions of law should explicitly refer to the *Hodges* factors relevant to the case and any other factors supporting the award of punitive damages. *Id.* at 529. “In the absence of sufficient findings of fact and conclusions of law as to each of the relevant *Hodges* criteria, an appellate court cannot adequately review the trial court’s award of punitive damages.” *Id.* In its review, the trial court is not required to re-weigh the evidence. *McLemore ex rel. McLemore v. Elizabethtown Medical Investors, Ltd. Partnership*, 389 S.W.3d 764, 781 (Tenn. Ct. App. 2012). Rather, the trial court must simply determine if there was clear and convincing evidence to support the fact-finder’s award of punitive damages. *Id.*

Should the trial court approve the award of punitive damages, the appellate courts must then review the award *de novo* applying the three (3) guideposts articulated by the U.S. Supreme Court in *BMW of North America, Inc. v. Gore* to determine whether the punitive award violates the defendant’s due process rights under the Fourteenth Amendment of the United States Constitution. *BMW of North America, Inc. v. Gore*, 517 U.S. 559 (1996); *Goff v. Elmo Greer and Sons Const. Co. Inc.*, 297 S.W.3d 175, 190 (Tenn. 2009). Those guideposts are: (1) the reprehensibility of the defendant’s conduct, (2) the ratio between the punitive damage award and the actual harm suffered by the plaintiff, and (3) a comparison of the punitive damage award to civil or criminal penalties that could be imposed for similar conduct. *Gore*, 517 U.S. at 575-583.

The U.S. Supreme Court has determined that “the first and most important guidepost” is the reprehensibility of the defendant’s conduct. *Id.* at 575; *Flax v. DiamlerChrysler Corp.*, 272 S.W.3d 521, 537-538 (Tenn. 2008). Reviewing courts “should examine the gravity of the defendant’s conduct and the harshness of the award of punitive damages” because “some wrongs are more blameworthy than others.” *Gore*, 517 U.S. at 575. When determining the extent of the reprehensible conduct of a defendant, the court is to consider (1) whether the harm was physical instead of economic, (2) whether the tortious conduct showed an indifference or reckless disregard

of the health or safety of others, (3) whether the target of the conduct was financially vulnerable, (4) whether the conduct involved repeated actions or was an isolated event, and (5) whether the harm was the result of intentional malice, trickery, or deceit instead of a mere accident. *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 417 (2003).

The second guidepost - the ratio between the punitive and compensatory damages - although still important, is less significant than the first guidepost. Historically, punitive awards that exceeded a single-digit ratio were thought to violate a defendant’s due process rights. *Campbell*, 538 U.S. at 425. However, in recognition of the U.S. Supreme Court’s express rejection of the notion “that the constitutional line is marked by a simple mathematical formula,” Tennessee appellate courts have regularly approved punitive awards in excess of a 1:9 ratio in cases. *Gore*, 517 U.S. at 582. For example, in *McLemore*, a case against a nursing home where short-staffing resulted in bedsores to but not the death of the patient, the Tennessee Court of Appeals upheld a punitive award that was 18.8 times the compensatory damages, finding that the defendant’s conduct was “highly reprehensible” in admitting a completely dependent resident when the nursing home was short-staffed. *McLemore*, 389 S.W.3d at 787. In *Coffee v. Fayette Tubular Products*, the Tennessee Supreme Court approved a punitive award that was 16.7 times the compensatory award where the plaintiff was fired after attempting to enforce her worker’s compensation rights. *Coffee v. Fayette Tubular Products*, 929 S.W.2d 326, 331 (Tenn. 1996). In *Wilson v. Americare Systems, Inc.*, the Court of Appeals had “no difficulty finding that Americare’s conduct was highly reprehensible” when an elderly resident of an assisted living facility died “in part because of understaffing.” *Wilson v. Americare Systems, Inc.*, No. M2013-00690-COA-RM-CV, 2014 WL 791936 at \*1 (Tenn. Ct. App. Feb. 25, 2014), *on remand from* 397 S.W.3d 552 (Tenn. 2013). The court approved a punitive award 16.7 times the compensatory award. *Id.* at \*7.

Like many courts across the country, the Tennessee Supreme Court has determined that the third guidepost - comparison of the punitive award to civil or criminal penalties for similar conduct - is the least relevant guidepost when deciding whether the punitive award violates a defendant’s due process rights. *Flax*, 272 S.W.3d at 540. This guidepost has frustrated appellate courts, who have found the guidepost either too speculative to apply or the civil or criminal penalties too small to adequately punish the defendants. *Id.* (citing *In re EXXON VALDEZ*, 490 F.3d 1066, 1094 (9th Cir. 2007) and *Willow Inn, Inc. v. Pub. Serv. But. Inc. Co.*, 399 F.3d 224, 237-38 (3d Cir. 2005)). Despite its difficulty in application, generally if a defendant’s conduct could have resulted in the loss of its business license, courts have found the factor satisfied to support a large punitive award. *Id.* When analyzing the third guidepost in *McLemore ex rel. McLemore v. Elizabethton Medical Investors Ltd. Partnership*, the Tennessee Court of Appeals



concluded that the guidepost was satisfied, where the nursing home defendant's license could have been revoked by the state upon a finding that its understaffing was detrimental to the plaintiff's welfare, because the court assumed that monetary impact of the loss of such a license, although not part of the record, would have been significantly higher than the potential statutory penalties. *McLemore*, 389 S.W.3d at 789.

As the foregoing shows, there are multiple factors that trial courts and appellate courts must consider when deciding whether or not to approve an award of punitive damages. To develop the best record for the courts to consider, it is incumbent on the plaintiff's attorney to obtain evidence of the defendant's financial condition, which is the first factor enumerated in *Hodges*. With this evidence in his or her arsenal, the lawyer should be able to present the facts necessary to obtain a significant punitive award and support it on appeal.

## WHEN TO REQUEST EVIDENCE OF A DEFENDANT'S FINANCIAL CONDITION

The Tennessee Supreme Court in *Hodges* and *Culbreath* expressly directs the parties to begin the punitive phase of a trial "immediately" following the compensatory phase. *Culbreath*, 44 S.W.3d at 527; *Hodges*, 833 S.W.2d at 901. For the parties to comply with this instruction, evidence of the *Hodges* factors

applicable to the punitive phase should be exchanged by the parties well in advance of trial. A plaintiff will be permitted to discover a defendant's financial condition before trial, "[i]f it appears from the discovery on the merits that a factual basis for punitive damages exists." *Breault*, 610 S.W.2d at 139. A plaintiff does not need to prove the case for punitive damages or even show a substantial likelihood of recovery. *Id.* "The plaintiff must only show that some factual basis for punitive damages exists." *Id.*

In support of its holding that a defendant's financial condition is discoverable in advance of trial, the *Breault* court reasoned that, because discovery of a defendant's wealth relates to a plaintiff's claim for punitive damages, the discovery is relevant under Tenn. R. Civ. Pro. 26.02(1). *Breault*, 610 S.W.2d at 136. The court further held that the U.S. and Tennessee Constitutional due process provisions and the provisions protecting against unreasonable searches and seizures "do[] not protect a defendant's financial condition from discovery." *Id.* at 137.

The *Breault* court expressly rejected the defendant's proposed approach that a plaintiff first obtain a special verdict that punitive damages should be awarded before discovery of a defendant's financial condition is allowed. *Id.* The court determined that this "split-trial procedure creates more prob-

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lems than it solves.” *Id.* at 138. If a plaintiff is not permitted to discover a defendant’s financial information until after the factfinder completes the first phase of trial, there “will inevitably be ... a delay between the first and second trials.” *Id.* As a result, it would be near impossible to retain the same jury for the both phases of the trial. *Id.* If the same jury does not hear both phases of trial, “there will be no fair basis for the [punitive] award.” *Id.* The court also reasoned that a split-trial procedure would diminish the likelihood of settlement. *Id.* Approving a South Carolina district court’s decision to permit pretrial discovery of a defendant’s net worth, the court wrote, “We wonder how the parties can make an intelligent effort to settle when one party is deprived of information on which damages are based.” *Id.* at 139.

Despite the express holding and reasoning of the *Breault* decision, defendants across the State continue to argue to postpone the discovery of financial information until the conclusion of the first phase of trial. To combat such errant arguments, the plaintiff’s lawyer must be able to accurately articulate the standards set forth in *Breault* to have any hope of obtaining a defendant’s financial information prior to trial. Also of help is the case of *Zielke v. Vision Hospitality Group, Inc.*, in which the district court acknowledged that, “The majority of courts have held that a plaintiff seeking punitive damages is entitled to discover information relating to the defendant’s financial condition *in advance of trial* ....” *Zielke v. Vision Hospitality Group, Inc.*, 1:14-CV-362-SKL, 2015 WL 9876950 at \*3 (E.D. Tenn. Nov. 3, 2015) (quoting *Westbrook v. Charlie Sciarra & Produce Co.*, No. 07-2657-Ma/P, 2008 WL 839745 (W.D. Tenn. Mar. 27, 2008)). The *Zielke* court determined there was no compelling reason to justify delaying the production of defendant’s financial information beyond the discovery cut-off, even where the plaintiff had only alleged and not presented any factual basis for punitive damages. *Id.* In Tennessee, of course, a factual basis for punitive damages would need to be established before a defendant’s financial information is ordered to be produced. *Breault v. Friedli*, 610 S.W.2d 134 (Tenn. Ct. App. 1980).

So, as a practice pointer, if the case involves claims for punitive damages, the attorney should request evidence of a defendant’s financial condition at the outset of the litigation, if for no other reason than to ensure the request is not later forgotten. The attorney may also decide to wait until the factual basis for a punitive award is developed in the record. To ensure the best chance of success, the plaintiff’s attorney should not argue for the discovery of a defendant’s financial condition until at least some evidence of the fraudulent, intentional, reckless, or malicious conduct is established in the plaintiff’s case, no matter how strong or weak. “[T]he plaintiff attorney who meets the factual basis test will be able to obtain discovery in time for trial preparation and/or settlement negotiations.” *Id.* at 140.

## WHAT IS A FACTUAL BASIS FOR PUNITIVE DAMAGES

The simple answer is: facts that show a defendants’ fraudulent, reckless, intentional, or malicious caused or contributed to a plaintiff’s injury. Obviously, this involves a case-by-case assessment. In the seminal case of *Hodges v. Toof*, 833 S.W.2d 896 (Tenn. 1992), the punitive conduct at issue was the retaliatory discharge of a 19-year employee with a good work history following his service on a jury for three months. *Id.* at 898. Because the *Hodges* decision “substantially change[d] Tennessee law governing the availability of punitive damages,” the Supreme Court remanded the case back to the trial court for the jury to be charged on the appropriate standard for awarding punitive damages. *Id.* at 902.

The punitive conduct under consideration in *Breault v. Friedli* was alleged fraudulent and negligent misrepresentations made by the defendants in the sale of a liquor store business. *Breault v. Friedli*, 610 S.W.2d 134 (Tenn. Ct. App. 1980). Following its discussion of the standard for discovering a defendant’s financial condition, the court remanded the case back to the trial court for the plaintiff to present his factual basis for punitive damages. *Id.* at 140.

Chronic short-staffing of eldercare facilities in Tennessee has routinely been considered reckless conduct sufficient to support an award of punitive damages against both the facilities and their corporate owners and managers. For example, in *Smartt v. NHC McMinnville, LLC*, the Court of Appeals upheld a jury’s award of punitive damages against a nursing home where the plaintiffs proved the facility knew it was inadequately staffed, knew the lack of staff could result in harm to the residents, and knew that less staffing would lead to higher profits. *Smartt v. NHC McMinnville, LLC*, No. M2007-02026-COA-R3-CV, 2009 WL 482475 at \*27 (Tenn. Ct. App. Feb. 24, 2009), *perm. app. denied*. The court reversed the trial court’s grant of directed verdict on the issue of punitive damages against the nursing home’s parent corporation and subsidiary staffing company, finding that “[a] reasonable jury could return a finding of recklessness if it believed that NHC and National controlled staffing levels at the Facility with the knowledge that understaffing would adversely affect the residents.” *Id.* at \*28.

More recently, in *Wilson v. Americare Systems, Inc.*, on remand from the Tennessee Supreme Court on the issue of punitive damages, the Tennessee Court of Appeals upheld the jury’s award of \$5,015,000 in punitive damages. *Wilson v. Americare Systems, Inc.*, No. M2013-00690-COA-RM-CV, 2014 WL 791936 at \*1 (Tenn. Ct. App. Feb. 25, 2014), *on remand from* 397 S.W.3d 552 (Tenn. 2013). The court concluded that there was material, clear and convincing evidence of a management company’s reckless conduct of chronically understaffing an elder care facility to support the jury’s verdict. *Id.* at \*3-4. The



court also concluded that evidence of the facility's fraudulent documentation of the plaintiff's medications, due at least in part to chronic short-staffing, was material, clear and convincing, and supported the jury's award of punitive damages. *Id.* at \*4.

In *Flax v. DaimlerChrysler Corp.*, the Tennessee Supreme Court held that the jury's punitive verdict was supported by clear and convincing evidence of the defendant's recklessness. *Flax v. DaimlerChrysler Corp.*, 272 S.W.3d 521, 535 (Tenn. 2008). The plaintiff presented material evidence from which a jury could conclude that the defendant car manufacturer consciously disregarded known risks posed to drivers and passengers by a faulty seatback. *Id.* at 532-535.

In *Goff v. Elmo Greer & Sons Const. Co.*, the Tennessee Supreme Court upheld a jury's award of punitive damages against a construction company that buried waste tires on the plaintiff landowner's property, finding that the jury could have concluded that the defendant acted recklessly or intentionally. *Goff v. Elmo Greer & Sons Const. Co.*, 297 S.W.3d 175, 188 (Tenn. 2009). The jury determined that the defendant was "guilty of egregious, intentional or reckless acts" after a geologist testified that the buried tires could not have been accidentally covered and must have been intentionally buried, considering their

size. *Id.* The jury also considered evidence of the defendant's violations of state and federal regulations and the strong public policy reasons against burying tire waste. *Id.*

Considering the broad range of facts that can give rise to punitive damages, an attorney should consider the facts of his or her case to determine whether the defendant engaged in any fraudulent, intentional, reckless, or malicious conduct that caused the plaintiff's injury. Remember, to discover evidence of a defendant's financial condition, a plaintiff need not prove his or her case for punitive damages. One merely needs to show a factual basis exists from which punitive damages may be awarded. *Breault*, 610 S.W.2d at 139. If there is *any* evidence of fraudulent, intentional, reckless, or malicious conduct, the attorney should develop a record of it, whether through the testimony of the plaintiff and witnesses, a detailed inspection of medical records for fraudulent entries, or proof of a defendant's history of regulatory violations, just to name a few. Once a factual basis for punitive damages has been established, *Breault* requires disclosure of a defendant's financial affairs, condition, and net worth.

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## WHAT TO REQUEST

To lend further credibility to a request for a defendant's financial information, the plaintiff's attorney should craft narrowly-tailored, reasonable discovery requests that are temporal in scope. As the Tennessee Court of Appeals acknowledged in *Breault*, "Evidence concerning the financial condition of the defendant is essential in determining the amount of punitive damages." *Breault*, 610 S.W.2d at 136. As to the extent of the discovery permitted, the court held that "the plaintiffs should be permitted to discover the net worth of the defendants and the income of each defendant for the last three years." *Breault v. Friedli*, 610 S.W.2d at 140. *Westbrook v. Charlie Sciara & Produce Co., Inc.*, gives further guidance as to the types of documents a plaintiff may obtain regarding a defendant's financial condition. In *Westbrook*, the district court, analyzing and applying Tennessee law, ordered the discovery of "monthly statements for all checking, savings, and investment accounts, . . . federal tax returns, . . . financial reports, profit and loss statements, and balance sheets." *Westbrook v. Charlie Sciara & Produce Co.*, 70 Fed. R. Serv. 3d 261, 2008 WL 839745, at \*1, \*4 (W.D. Tenn. Mar. 27, 2008). Likewise, in *Zielke v. Vision Hospitality Group, Inc.*, the district court ordered production of defendant's "financial statements provided to a financial institution, its unaudited financial statements, and its federal and state tax returns." *Zielke v. Vision Hospitality Group, Inc.*, 1:14-CV-362-SKL, 2015 WL 9876950 (E.D. Tenn. Nov. 3, 2015).

Based on the foregoing, it would be entirely proper for an attorney who has established a factual basis for punitive damages to request at least the following from a defendant:

- Any and all documents reflecting defendant's current financial affairs, condition, and net worth.
- Any and all federal and state tax returns filed in the last three years, including any amendments.
- Monthly statements for each checking, savings, and investment account maintained by defendant for the last three years.
- Any and all financial statements for defendant for the last three years.
- Any and all profit and loss reports for defendant for the last three years.
- Any and all balance sheets for defendant for the last three years.

Each of these requests are narrowly-tailored and specifically targeted at discovering the financial affairs, financial condition, and net worth of a defendant, the very information that the *Hodges* court said the factfinder "shall consider." *Hodges*, 833 S.W.2d at 901.

## PROTECTIVE ORDER OR NOT

Should a defendant agree to produce, or a court order the production of, evidence of a defendant's financial condition, be careful not to agree to an overly broad protective order. While it is true that courts typically favor the disclosure of a defendant's financial condition pursuant to a protective order, the courts are equally clear that the terms of the protective order only apply to the discovery phase of the case. For example, the *Breault* court permitted any court-ordered financial information to be produced pursuant to a protective order limiting disclosure to the immediate parties and their counsel, but only "until such time as this action is brought to trial." *Breault*, 610 S.W.2d at 140. Once evidence of a defendant's financial condition is presented at a publicly held trial, the protections of the public's right to access under the First Amendment are implicated. *Ballard v. Herzke*, 924 S.W.2d 652, 661-62 (Tenn. 1996); *Level 3 Communications, LLC v. Limelight Networks, Inc.*, 611 F. Supp. 2d 572, 589 (E.D. Va. 2009). The "good cause" standard for issuance of a protective order regarding discovery is insufficient to permit a trial court to seal information once it becomes part of the judicial record. See *In re NHC—Nashville Fire Litigation*, 293 S.W.3d 547, 567 (Tenn. Ct. App. 2008) (ruling that "there must be a compelling reason to seal judicial records . . . , and that the burden for showing such a compelling reason is on the party who seeks to prevent public access to the public records.") Applying these principles, an attorney should only agree to a protective order governing the disclosure of a defendant's financial information in the discovery phase of a case. The issue of whether the defendant's financial documentation will remain protected at trial should be reserved for a determination to be made later by the trial court.

## CONCLUSION

Tennessee law supports access to a defendant's financial information in advance of trial where a plaintiff has presented a factual basis for punitive damages. With the assistance of proper discovery requests supported by well-articulated briefing and arguments of the principles outlined herein, discovery of a defendant's financial condition should be permitted.

## ABOUT THE AUTHOR

*Carey Acerra is a founding member of the Jehl Law Group, PLLC. Since her career as a lawyer began in 2004, Carey has successfully litigated cases on behalf of severely injured and deceased individuals in the Southeast, with a focus on the care of the elderly. Carey was featured in the New York Times earlier this year regarding her representation of a Memphis nursing home resident in a trial against the New York nursing home owners, which resulted in a \$30 million verdict, \$28 million of which was awarded in punitive damages. Carey attended undergrad at University of Memphis and obtained her law degree from its Cecil C. Humphrey School of Law.*

