No. _____

In The
Supreme Court of the United States

STEVEN M. BETSINGER,

Petitioner,

vs.

D.R. HORTON, INC., A NEVADA CORPORATION;
DHI MORTGAGE COMPANY, LTD.,
A TEXAS LIMITED PARTNERSHIP F/K/A
CH MORTGAGE COMPANY I, LTD.,
A NEVADA LIMITED PARTNERSHIP,

Respondents.

On Petition For A Writ Of Certiorari To The State Supreme Court For The State Of Nevada

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

The Fifth Amendment to the United States Constitution provides that "[n]o person shall . . . be deprived of life, liberty, or property, without due process of law." Likewise, the Fourteenth Amendment to the United State Constitution states "nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." Article I sec. 3 of the Constitution of the State of Nevada provides that "[t]he right of trial by Jury shall be secured to all and remain inviolate forever. . . ."

The concept of separation-of-powers or checks-and-balances constraints is found in the U.S. Constitution's delineated powers between the legislative, judicial, and executive branches, as prescribed in Articles I, II, and III. Separation-of-powers principles are intended, in part, to protect each branch of government from incursion by the others. Moreover, pursuant to Article 3, Section 1 of the Nevada Constitution, "[t]he powers of the Government of the State of Nevada shall be divided into three separate departments, the Legislative, the Executive, and the Judicial; and no persons charged with the exercise of powers properly belonging to one of these departments shall exercise any functions appertaining to either of the others. . . ."

In 1989, the Nevada Legislature enacted Nevada Revised Statute 42.005, which provides in part, "[i]f

QUESTIONS PRESENTED – Continued

punitive damages are claimed pursuant to this section, the trier of fact shall make a finding of whether such damages will be assessed. If such damages are to be assessed, a subsequent proceeding must be conducted before the same trier of fact to determine the amount of such damages to be assessed. The trier of fact shall make a finding of the amount to be assessed according to the provisions of this section." The Nevada Supreme Court, in interpreting and applying this provision in the appeal below, held the statute was clear and unambiguous and required an application of the same-trier-of-fact requirement even in matters, like the one below, when a matter has been reversed and remanded on the sole issue of punitive damages. The Court made this finding in spite of clear legislative history that revealed such a circumstance was never contemplated by the Nevada Legislature in enacting the provision, and case law from other jurisdictions, including California, holding otherwise in interpreting identical provisions in those jurisdictions.

Nevada Revised Statute 42.005(1) also provides that "[e]xcept as otherwise provided in this section or by specific statute, an award of exemplary or punitive damages made pursuant to this section may not exceed: (a) Three times the amount of compensatory damages awarded to the plaintiff if the amount of compensatory damages is $100,000 or more; or (b) Three hundred thousand dollars if the amount of

QUESTIONS PRESENTED – Continued

compensatory damages awarded to the plaintiff is less than $100,000." The Nevada Supreme Court, despite the request to determine the constitutionality of this provision, declined to do so. The questions presented are:

1. Did the Nevada Supreme Court violate Petitioner's due process rights and right to jury trial when it applied NRS 42.005(3)'s same-trier-of-fact requirement to an appeal involving a remand on the sole issue of punitive damages?

2. Does NRS 42.005(1)'s damages limitation violate Petitioner's right to a jury trial under the Nevada Constitution and the Separation of Powers Clauses found in the U.S. and Nevada Constitutions?

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Steven M. Betsinger respectfully submits this petition for a writ of certiorari.

OPINIONS BELOW

The initial opinion in this matter by the Nevada Supreme Court is available in the Pacific Reporter at 232 P.3d 433. The opinion of the Nevada Supreme Court that forms the basis of this Writ and was filed on October 16, 2014 is available in the Pacific Reporter as 335 P.3d 1230. The Nevada Supreme Court's Order denying rehearing (App. 599) is unreported.

JURISDICTION

The Nevada Supreme Court issued its authored opinion on October 16, 2014 and filed its Order Denying Rehearing on December 16, 2014. Remittitur was filed by the Court on January 12, 2015. The time for filing a Petition for Writ of Certiorari seeking review of a judgment of a lower state court runs ninety (90) days from the date of the denial of rehearing. Supreme Court Rule 13(3). This Court has jurisdiction under 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Appendix reproduces the United States Constitution's due process clauses. U.S. Const., amend. V, amend. XIV, § 1. The Appendix also reproduces the due process, right to jury trial, and separation of powers clauses of the Nevada Constitution. Nev. Const., art. 1, § 3, 8, cls. 5, art. 3 § 1.

STATEMENT OF THE CASE

This litigation arises out of a failed sale of residential real property between Petitioner Steven M. Betsinger ("Betsinger") and D.R. Horton, Inc. ("D.R. Horton") and D.R. Horton's in-house lending company, DHI Mortgage Company LTD. ("DHI"). (*See* App. at 19). In or around January 2003, Betsinger contracted to buy a D.R. Horton built home in Las Vegas and sought a loan from DHI. (*See* App. at 19).

Thereafter, DHI engaged in a "bait and switch" endeavor, where DHI originally suggested "primary residence" rate of 4.625% and then told Betsinger on the day of closing escrow that DHI could only offer him a much higher rate of 6.5% under the guise that the home he was purchasing could not qualify as his "primary residence." (*See* App. at 19).

Alleging that DHI and its employees engaged in fraudulent activities and/or deceptive trade practices with respect to the purchase and sale transaction, Betsinger brought suit against various Defendants on

April 26, 2005. (*See* App. at 19). Trial commenced in August 2007, after which a jury returned a verdict in favor of Betsinger and as against all of the various defendants, awarding Betsinger compensatory damages of $10,727.00, with $5,190.00 due from D.R. Horton and $5,537.00 due from DHI; consequential damages (for emotional distress, mental anguish, embarrassment, and loss of peace of mind) of $48,000.00 (*See* App. at 3). Thereafter, the punitive damages portion of the trial commenced, and on September 10, 2007, the jury returned a Special Verdict for Punitive Damages in favor of Betsinger in the amount of $1,542,500.00. (*See* App. at 21).

After the Defendants appealed the first jury verdict, on May 27, 2010, the Nevada Supreme Court issued a published decision in *Betsinger v. D.R. Horton, Inc.*, 126 Nev. ___, 232 P.3d 433 (2010) ("*Betsinger I*"), in which it concluded a plaintiff need only prove a deceptive trade practice by a preponderance of the evidence, and left undisturbed the jury's finding that all Appellants were liable for deceptive trade practices. (*See* App. at 24). The Court also reversed the jury's award of $43,000.00 in emotional distress damages because Betsinger failed to present evidence of physical manifestation of injury to support the same. (*See* App. at 24). As such, the matter was remanded to the trial court for the punitive damages phase of the trial because the Nevada Supreme Court could not be sure what the punitive damages award against DHI would have been, given

the reduction in the compensatory damages award. (*See* App. at 26).

Upon remand, a jury was impaneled on February 23, 2011 and the punitive damages phase of the case was retried before a different jury. (*See* App. at 4-5). Closing arguments commenced March 1, 2011 and on March 2, 2011, the jury returned a verdict in favor of Betsinger with respect to punitive damages in the amount of $675,000.00. (*See* App. at 5). The trial court reduced the punitive damages award to $300,000.00, pursuant to Nevada Revised Statute ("NRS") 42.005(1)(b) on May 19, 2011. (*See* App. at 5).

After Betsinger filed his post-trial Motion for Attorney's Fees and Costs, the trial court awarded Betsinger attorney's fees in the amount of $50,087.00 and costs in the amount of $2,552.24, from the second trial on July 27, 2011. (*See* App. at 13-16). Judgment was entered in favor of Betsinger and against D.R. Horton in the amount of $5,190.00 plus interest, and against DHI in the amount of $5,537.00. (*See* App. at 5).

Following the filing of various additional post-trial motions, the trial court entered the Eighth Amended Order and Judgment on Jury Verdict on February 6, 2013. (*See* App. at 13-16). The trial court included the original award of attorney's fees and costs awarded to Betsinger in the first trial (and affirmed by the Nevada Supreme Court), finding D.R. Horton, and DHI liable, *jointly and severally* for attorney's fees and costs, in the amounts of

$69,510.00 and $23,068.90, respectively. (*See* App. at 13-16). Judgment was also entered in favor of Plaintiff and against DHI for punitive damages in the amount of $300,000.00, as well as attorney's fees in the amount of $50,087.00 and costs in the amount of $2,552.24, as a result of the second trial on punitive damages. (*See* App. at 13-16). D.R. Horton and DHI appealed for a second time and Betsinger cross-appealed. (*See* App. at 5).

The gravaman of D.R. Horton and DHI's appeal was the allegation that the scope of the second trial somehow was *not* to determine what amount of punitive damages Betsinger was entitled to based on the reduction of the compensatory damages pursuant to the Nevada Supreme Court's May 27, 2010 opinion. (*See* App. at 5-6). Specifically, DHI argued that as a result of the Nevada Supreme Court's decision to remand for further proceedings as to punitive damages only, it was denied a statutory right to have the "same jury" determine both liability and the amount of punitive damages. (*See* App. at 6-7). DHI claimed this supposed right was contained in NRS 42.005(3). (*See* App. at 6-7). By making such an argument, D.R. Horton and DHI advanced the notion that a re-trial of every aspect of the case was ordered, including a re-trial of whether DHI committed fraud. (*See* App. at 7).

Betsinger argued that the Nevada Supreme Court *affirmed* the finding of fraud against DHI, thereby precluding DHI from re-trying the fraud cause of action at the second trial. (*See* App. at 8).

Indeed, Betsinger argued that no part of the Nevada Supreme Court's decision reversed the jury's finding of fraud and deceptive trade practices against DHI. (*See* App. at 8). The trial court agreed, and the scope of the second trial was limited to the jury assessing the amount of punitive damages, which is exactly what the second jury did. (*See* App. at 5). Betsinger also argued all of the issues D.R. Horton and DHI advanced in the second appeal were already weighed and decided by the Nevada Supreme Court in affirming the finding of fraud and deceptive trade practices, leaving only the issue of the amount of punitive damages to be decided by the jury in light of the reduction of compensatory damages by the Nevada Supreme Court's May 27, 2010 opinion. (*See* App. at 5, 7-9).

The thrust of Betsinger's cross-appeal concerned the reduction of the punitive damages award from $675,000.00 to $300,000.00 pursuant to Nevada Revised Statute ("NRS") 42.005, which the trial court did following the second trial. Betsinger argued the reduction and operative statute violated his due process rights. Betsinger submitted the deterrent effect of punitive damages is lost if a fraudulent party is limited to a penalty of $300,000.00, which this Court recognized in *State Farm Mutual Automobile Insurance Co. v. Campbell*, 537 U.S. 1102, 123 S.Ct. 953 (2003).

On October 16, 2014, the Nevada Supreme Court issued a second published opinion in *D.R. Horton, Inc. v. Betsinger*, 130 Nev. ___, 335 P.3d 1230 (2014),

in which it found that NRS 42.005(3) "requires the same fact-finder to determine whether liability exists for punitive damages and, if so, the amount of damages." (*See* App. at 6). Further, the Nevada Supreme Court found, where as here, a second trial occurs where "the fact-finder is tasked only with making a determination regarding punitive damages, NRS 42.005(3) unambiguously requires that fact-finder to first determine whether punitive damages are warranted . . . before determining the amount of punitive damages to be awarded." (*See* App. at 9). Thus, Nevada's highest Court concluded that the trial court erred in applying its remand instruction in *Betsinger I*, thereby depriving DHI of its rights under NRS 42.005(3). (*See* App. at 9). Betsinger sought a rehearing on November 4, 2014, which was denied on December 16, 2014. (*See* App. at 28-29).

Betsinger brings forth the instant Petition asserting that the Nevada Supreme Court misapplied NRS 42.005(3)'s same-trier-of-fact requirement in the second appeal. Specifically, Betsinger asserts that the Nevada Supreme Court's interpretation of NRS 42.005(3) violates constitutional rights guaranteed by both the U.S. and Nevada Constitutions, and conflicts with Courts in other States interpreting identical statutes. This being the case, the Nevada Supreme Court in interpreting the statute in the manner in which it did, engaged in a procedural construct that denied Betsinger his due process rights.

Betsinger further asserts that NRS 42.005 Violates Betsinger's Right to a Jury Trial, under the

Nevada Constitution and the separation of powers doctrine therein because it improperly replaces the jury's verdict with an arbitrarily-imposed legislative determination of a proper damages award.

LEGAL ARGUMENT

A. The Nevada Supreme Court Violated Betsinger's Due Process Rights in Applying NRS 42.005(3)'s Same-Trier-of-Fact Requirement.

The Fifth Amendment to the United States Constitution provides that "[n]o person shall . . . be deprived of life, liberty, or property, without due process of law." Likewise, the Fourteenth Amendment to the United State Constitution states "nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." In addition, Article I sec. 3 of the Constitution of the State of Nevada provides that "[t]he right of trial by Jury shall be secured to all and remain inviolate forever. . . ."

This Court long ago held that the due process clause protects "the individual against arbitrary action of government." *See Kentucky Dept. of Corrections v. Thompson*, 490 U.S. 454, 459-460, 109 S.Ct. 1904, 1904 (1989) (citing *Wolff v. McDonnell*, 418 U.S. 539, 558, 94 S.Ct. 2963, 2975, 41 L.Ed.2d 935 (1974)). A State violates the due process clause when it "offends some principle of justice so rooted in traditions

and conscience of our people as to be ranked as fundamental. *Snyder v. Com. of Mass.*, 291 U.S. 97, 105, 54 S.Ct. 330, 332 (1934) (internal citations omitted), overruled in part by *Malloy v. Hogan*, 378 U.S. 1, 84 S.Ct. 1489 (1964). This Court examines "procedural due process questions in two steps: the first asks whether there exists a liberty or property interest which has been interfered with by the State." *Kentucky Dept. of Corrections v. Thompson*, 490 U.S. at 460 (citing *Board of Regents of State Colleges v. Roth*, 408 U.S. 564, 571, 92 S.Ct. 2701, 2706, 33 L.Ed.2d 548 (1972)). "[T]he second examines whether the procedures attendant upon that deprivation were constitutionally sufficient." *Id.* (Citing *Hewitt v. Helms*, 459 U.S. 460, 472, 103 S.Ct. 864, 871 (1983)).

1. NRS 42.005(3) Is Not Plain and Clear As The Nevada Supreme Court Found.

In applying NRS 42.005(3)'s[1] same-trier-of-fact requirement to this appeal (i.e., on remand), the

[1] The subject statute, NRS 42.005(3) provides:

> If punitive damages are claimed pursuant to this section, the trier of fact shall make a finding of whether such damages will be assessed. If such damages are to be assessed, a subsequent proceeding must be conducted before the same trier of fact to determine the amount of such damages to be assessed. The trier of fact shall make a finding of the amount to be assessed according to the provisions of this section. The findings required by this section, if made by a jury, must be made by special verdict along with any other

(Continued on following page)

Nevada Supreme Court stated "[i]n interpreting this statute de novo, we will not look beyond the plain language when it is clear on its face." (*See* App. at 7). The Court also found "[b]ecause this language is plain and clear, we decline to delve into legislative history." (*See* App. at 8).

However, in interpreting and applying NRS 42.005 to this appeal, the Nevada Supreme Court specifically acknowledged "[n]othing in the statute purports to govern the procedure on remand. . . ." (*See* App. at 8). Nevertheless, the Court found the language clear and unambiguous and applied the statute's requirement to a circumstance (a remand proceeding) the statute, by the Court's *own* acknowledgment, does not address.

Significantly, there is nothing in NRS 42.005 requiring the Nevada Supreme Court or any other Court to apply the same-trier-of-fact requirement when, as here, a matter has been reversed and remanded on the sole issue of punitive damages. This being the case, the Nevada Supreme Court's finding to the contrary, and application of this requirement here, was in fact a misapplication of the law, and violated Betsinger's due process rights.

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required findings. The jury must not be instructed, or otherwise advised, of the limitations on the amount of an award of punitive damages prescribed in subsection 1.

2. The Nevada Supreme Court Should Have Considered Relevant Legislative History of NRS 42.005.

Betsinger acknowledges that "[w]hen the language of a statute is unambiguous, the Nevada Supreme Court should generally not look beyond the statute itself when determining its meaning." *See Pankopf v. Petersen*, 124 Nev. 43, 46, 175 P.3d 910, 912 (2008). However, when as here, "the Legislature has addressed a matter with imperfect clarity, it becomes [the] court's responsibility to discern the law." *Id.* (citing *Baron v. District Court*, 95 Nev. 646, 648, 600 P.2d 1192, 1193-1194 (1979)). In so doing, "[the] court will resolve any doubt as to the Legislature's intent in favor of what is reasonable." *Pankopf*, 124 Nev. at 46, 175 P.3d at 912 (citing *General Motors v. Jackson*, 111 Nev. 1026, 1029, 900 P.2d 345, 348 (1995)). The Nevada Supreme Court failed to abide by its own procedure and binding authority by failing to engage in an analysis to glean the legislative intent regarding NRS 42.005(3)'s same-trier-of-fact requirement.

As NRS 42.005 does not specifically address its applicability in circumstances such as those present here, it was incumbent upon Nevada's highest Court to look at the legislative history of NRS 42.005 and to determine how the legislature intended to apply the same-trier-of-fact requirement when a matter has been reversed and remanded on the sole issue of punitive damages. As noted, the Court declined to delve into the legislative history of NRS 42.005.

Had the Court reviewed the relevant legislative history of NRS 42.005 it would have found that the legislature did *not* contemplate the applicability of the same-trier-of-fact requirement in a remand situation. As this particular factual and procedural scenario is clearly outside the purview of NRS 42.005, the Nevada Supreme Court should have resolved this issue in favor of what is reasonable. The Court merely concluded the legislature clearly and unambiguously intended the same-trier-of-fact requirement to apply to circumstances such as these, without regard to the intent behind the provision.

Indeed, had the Court looked to the legislative history of NRS 42.005, it would have found that section (3)'s bifurcation requirement was based on a concern that a jury would rely too heavily on the financial wealth of the defendant who had been found to have engaged in conduct warranting punitive damages. (*See* excerpts of legislative history, pgs. 9, 40, 91-92; App. at 35-47). As such, it was intended to provide a "cooling off period" for the jury, thereby, in the eyes of the legislature, precluding excessive awards, not preventing them altogether. There is nothing in the history indicating or otherwise suggesting that the bifurcation requirement was intended to provide a defendant with a second chance to challenge a finding that it should be punished in the first instance upon remand. Such is not a fair reading of NRS 42.005(3). Moreover, this "second chance" deprives a litigant such as Betsinger of his due

process rights, forcing him to re-litigate issues already resolved by a competent jury.

3. The Nevada Supreme Court's Interpretation of NRS 42.005(3)'s Same-Trier-of-Fact Requirement Conflicts With Other Jurisdictions' Review of Similar Requirements.

DHI argued, and the Nevada Supreme Court agreed, that as a result of the Court's decision to remand for further proceedings as to punitive damages only, it was denied a statutory right to have the same jury determine both liability and the amount of punitive damages. DHI claimed this supposed right is contained in NRS 42.005(3). By agreeing with DHI, the Nevada Supreme Court allowed DHI to improperly argue (for a third time) that it should not be liable to Betsinger for punitive damages. This interpretation, in addition to violating Betsinger's due process rights by forcing him to continually litigate his entitlement to punitive damages (which two juries have already awarded) for the fraud perpetrated upon him, is contrary to other jurisdictions, and logic.

In arguing this section created a statutory right to a "single jury," neither DHI nor the Nevada Supreme Court cited a single authority in support of the claimed position. In fact there is substantial authority which holds that after an appeal, having separate juries make liability and damages determinations does not deprive a litigant of any substantive rights.

Torres v. Automobile Club of Southern California, 15 Cal.4th 771, 937 P.2d 290, 63 Cal.Rptr.2d 859 (1997) is one example. The Supreme Court of California was asked to interpret a statute requiring that "[e]vidence of profit and financial condition shall be presented to the same trier of fact that found for the plaintiff and found one or more Appellants guilty of malice, oppression, or fraud." *Id.* at 778. The Auto Club argued the provision meant that issues of liability, compensatory damages, and punitive damages must always be decided by the same trier of fact, and may never be decided by different juries.[2] *Id*.

In rejecting this argument, the *Torres* Court noted the legislature did not clearly express an intent to "upset settled law regarding the power of appellate courts to affirm the liability and compensatory damage aspects of a judgment while ordering a retrial limited to punitive damages." *Id.* at 780-781. (*See also Brewer v. Second Baptist Church of Los Angeles*, 32 Cal.2d 791, 801, 197 P.2d 713, 720 (1948)) (recognizing that "appellate courts have power to order a retrial on a limited issue, if that issue can be separately tried without confusion or uncertainty as would amount to a denial of a fair trial"). More

[2] Prior to the Supreme Court deciding the case, the Court of Appeals ordered an entire new trial after reversing an award of non-economic damages. It did so, despite recognizing that a reversal of only a portion of a judgment ordinarily does not require a full retrial, and upholding the finding of liability and award of economic damages. *Id.* at 775.

important was the *Torres* Court's reaffirmation of case law in California finding "in the context of retrials, it generally is unnecessary for the same jury to determine liability and punitive damages in order to ensure a reasonable relation between actual and punitive damages." *Id*.

The Court found since the amount of general damages had been properly determined by the first jury, on retrial for punitive damages, "it is only necessary for the second jury to be advised of the amount of general damages already awarded in order that it may maintain a reasonable relation between such damages and the exemplary damages, if any, that it awards." *Id*. This is precisely the procedure the trial court followed here, which the Nevada Supreme Court improperly found violated NRS 42.005(3).

The rationale underpinning these decisions is that exemplary damages are separate and distinct from that of actual damages, because exemplary damages are assessed to punish the Appellant as opposed to compensating a party for any loss it has suffered. *Brewer*, *supra*, 32 Cal.2d at 801. These courts reason that upon retrial, a second jury can "maintain the reasonable relation between general and exemplary damages without having to determine for itself the amount of general damages." *Id.* at 802.

Other jurisdictions similarly hold that a retrial on the issue of punitive damages does not require the same jury to determine both types of damages. For example, the Missouri Supreme Court has stated:

"the mere fact that a new trial on damages would require the utilization of some evidence regarding liability or the degree of culpability is not a sufficient reason to require a new trial on all issues." *See McCrainey v. Kansas City Missouri School District*, 337 S.W.3d 746, 755-756 (2011) (citing *Burnett v. Griffith*, 769 S.W.2d 780, 791 (Mo.banc 1989)). Further, these courts explain that where there is "no error in the jury's finding of liability, the plaintiff should not have to risk his verdict where the only remaining issue was with regard to punitive damages." *McCrainey*, *supra*, 337 S.W.3d at 756. Thus, the *McCrainey* Court held that a trial court is "capable of determining what evidence from the prior trial is necessary to support a verdict on resubmission of the single issue of punitive damages." *Id*.

This rationale and procedure, followed by the trial court here was also consistent with the approach upheld by the Ninth Circuit Court of Appeals in *White v. Ford Motor Company*, 500 F.3d 963 (9th Cir. 2007). In *White*, the Plaintiff brought a wrongful death action against Ford Motor Company ("Ford"), which resulted in a jury verdict against Ford. The jury awarded compensatory damages as well as punitive damages to the Plaintiff. On Appeal, both damage awards were upheld, but the punitive damage award was later altered because the Court found the jury had punished Ford for out-of-state conduct. Thus, like here, the Court remanded for further proceedings on the issue of punitive damages, without addressing whether the amount was excessive. On remand the

same District Judge, who presided over the first trial, conducted a retrial limited to the amount of punitive damages before a new jury.

The lower court in *White* did not retry the entire matter, as DHI requested, and with which the Nevada Supreme Court agreed. Rather, the lower court in *White*, on remand, advised the new jury 1.) That the first jury had found for the Plaintiff and awarded compensatory damages; 2.) That Ford's liability for punitive damages had already been established by the first jury; and 3.) The only remaining question for the new jury was to determine the amount of punitive damages. *Id.* at 971.[3] This procedure, which was rejected outright by the Nevada Supreme Court, was properly employed by the trial court.

The key point that *White* establishes, and which is contrary to the Nevada Supreme Court's holding, is the fact that the appellate court upheld the lower court's decision regarding a determination of the amount of punitive damages, and not whether the first jury's award of the same was proper in the first instance.

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[3] Ultimately, the Ninth Circuit Court of Appeals remanded the case for yet a third trial, based on the fact that it found that the Court's decision not to inform the jury of the amount of compensatory damages awarded to the Plaintiff in the first trial was error, and an abuse of discretion. *Id.* at 977. Such was *not* the case here.

Likewise, the Nevada Supreme Court's finding that an entirely new trial is warranted because the same jury must determine both liability for punitive damages and the amount of the same is also unsupported by *White* and the other authorities cited herein. Indeed, the Court in *White* made it a point to note that "in a typical case, the same jury would award both compensatory and punitive damages. Here, because of this case's unique procedural history, the jury empaneled to award punitive damages was unfamiliar with the original jury's verdict and the amount of compensatory damages it awarded." *Id.* at 974. Significantly, *White* involved an application of *Nevada law* and thus the *White* Court was well aware of the statutory right the Nevada Supreme Court found was denied to DHI.

Here, the remedy for this circumstance (which was employed by the trial court) was to inform the new jury as to the amount of the compensatory damages awarded by the first jury so the second jury could consider the same in determining the amount of punitive damages, if any, to award.

Betsinger was not obligated to try the entire case again and allow a jury to consider whether punitive damages were warranted in the first instance during the second trial, and the Nevada Supreme Court violated his due process rights in ordering another trial and by requiring Betsinger to re-establish his entitlement to punitive damages, which had already been resolved and affirmed on two (2) separate occasions.

B. NRS 42.005 Violates Betsinger's Right to a Jury Trial, as It Improperly Replaces the Jury's Verdict With and Arbitrarily-Imposed Legislative Determination of a Proper Damages Award.

Betsinger asserts that NRS 42.005(1) is unconstitutional, because it improperly infringes upon his right to a jury trial, and it replaces a jury's verdict with an arbitrarily-imposed legislative determination.[4] Nevada's Constitution provides that "[t]he right of trial by Jury shall be secured to all and remain inviolate forever," Nev. Const., art. 1, § 3, and this constitutional right has historically been interpreted to allow for the setting aside of jury verdicts only in very limited circumstances.

One such circumstance is upon a motion for remittitur or addittur. Nevada allows jury verdicts to be modified by motions for remittitur or addittur, because, unlike the Seventh Amendment of the United States Constitution, the Nevada Constitution does not expressly prohibit re-examination of a jury determination. *See Drummond v. Mid-West Growers Coop. Corp.*, 91 Nev. 698, 709-710, 542 P.2d 198, 206 (1975). Therefore, "errors" committed by a jury, like an excessive or inadequate jury award, may be corrected by Nevada courts. *See id.* at 711, 542 P.2d at 207.

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[4] "Constitutional issues, such as one's right to a jury trial, present questions of law that [the Nevada Supreme Court] review[s] *de novo*." *Awada v. Shuffle Master, Inc.*, 123 Nev. 613, 618, 173 P.3d 707, 711 (2007).

However, the "correction" imposed by NRS 42.005(1) is in no way comparable to the corrections imposed by motions for remittitur or addittur. Whereas remittitur and addittur allow for re-examination of the evidence in the case to ensure a justified jury award, NRS 42.005(1) merely imposes a bright-line application of an arbitrary ceiling or floor on damages. *See id.* (explaining that on a motion for remittitur or addittur, the court "should first determine whether the damages are clearly inadequate and, if so, whether the case would be a proper one for granting a motion for a new trial limited to damages.") NRS 42.005(1) is nothing more than an arbitrary and capricious legislative correction of a jury's determination. Because NRS 42.005(1) requires a reduction of a punitive damages award regardless of the evidence presented or the justifiable basis for the award, the statutory cap imposed by NRS 42.005(1) is not analogous to remittitur and is not constitutional.

C. NRS 42.005(1) Violates the Separation of Powers Clause of the U.S. and Nevada Constitutions.

Pursuant to Article 3, Section 1 of the Nevada Constitution, "[t]he powers of the Government of the State of Nevada shall be divided into three separate departments, the Legislative, the Executive, and the Judicial; and no persons charged with the exercise of powers properly belonging to one of these departments shall exercise any functions appertaining to either of the others. . . ." This Court has defined a

"judicial function" as the "exercise of judicial authority to hear and determine questions in controversy that are proper to be examined in a court of justice." *Galloway v. Truesdell*, 83 Nev. 13, 20, 422 P.2d 237, 242 (1967). "Generally, 'quantities of damages are determined by the jury . . . ,'" *Albios v. Horizon Communities, Inc.,* 122 Nev. 409, 427, 132 P.3d 1022, 1034 (quoting *Shuette v. Beazer Homes Holdings Corp.*, 121 Nev. 837, 861, 124 P.3d 530, 547 (2005)), and it is one of the court's judicial functions to review and determine whether the jury's award of punitive damages is supported by substantial evidence and comports with due process. *See Bongiovi v. Sullivan,* 122 Nev. 556, 582, 138 P.3d 433, 451-452 (detailing new excessiveness/due process test for punitive damages awards which complies with federal standards); *Smith's Food & Drug Ctrs., Inc. v. Bellegarde*, 114 Nev. 602, 606, 958 P.2d 1208, 1211 (1998) (recognizing that courts will generally "not disturb an award of punitive damages unless the trial record lacks substantial evidence to support it"); *Ace Truck and Equipment Rentals, Inc. v. Kahn,* 103 Nev. 503, 509-510, 746 P.2d 132, 136-137 (1987) (detailing the pre-1989 test to prevent excessive punitive damages awards from violating due process); *Drummond, supra,* 91 Nev. at 709-711, 542 P.2d at 206-207 (discussing the ability to grant remittitur). Therefore, a statute which infringes upon both an issue within the jury's province and a judicial function violates the separation of powers clause in Article 3, Section 1 of the Nevada Constitution.

D. NRS 42.005(1) Conflicts With the Judicially-Created Due Process/Excessiveness Examination Required by *Bongiovi v. Sullivan*.

Since 1988, Nevada courts have been required to apply an excessiveness test to all jury awards of punitive damages to ensure the award comports with due process. *See Ace Truck, supra*, 103 Nev. at 509-510, 746 P.2d at 136-137. The statutory cap on punitive damages imposed by NRS 42.005(1) did not abrogate this judicial duty, as the importance of conducting the excessiveness test was recently re-emphasized in *Bongiovi, supra*. Since it is generally presumed that any punitive damages award which falls within the guidelines of a statutorily-imposed cap on damages complies with due process, *see Romano v. U-Haul Int'l*, 233 F.3d 655, 673 (1st Cir. 2000); *see also E.E.O.C. v. Wal-Mart Stores, Inc.*, 187 F.3d 1241, 1249 (10th Cir. 1999), Nevada courts conceivably do not even need to apply the excessiveness/due process test set forth in *Bongiovi* if a punitive damages award is within the guidelines imposed by NRS 42.005(1).

In fact, that is what the lower court did in this case – rather than consider the *Bongiovi* factors on a motion for remittitur filed by the Appellants, the lower court automatically applied the statutory cap and reduced the punitive damages judgment to the limitation set forth in NRS 42.005(1). Indeed, NRS 42.005(1) serves no purpose which cannot also be served by the *Bongiovi* test. Moreover, the purpose of awarding punitive damages is being thwarted by NRS 42.005(1).

Given this conflict between the judicial and legislative remedies for excessive punitive damages awards – and the fact that NRS 42.005(1) violates the separation of powers clause of the Nevada Constitution and Betsinger's right to a jury trial – the statute should be declared unconstitutional, and this case should be remanded for determination of excessiveness pursuant to the *Bongiovi* factors.

1. NRS 42.005(1) Serves No Purpose Which Is Not Already Being Addressed by *Bongiovi v. Sullivan*.

During the legislative hearings for Assembly Bill No. 307 – which was a bill to limit the award of punitive damages in certain actions and the precursor to NRS 42.005 – several reasons were proffered for the necessity of limitations on punitive damages awards. The three primary reasons were: (1) punitive damages awards were skyrocketing and out of control; (2) large punitive damages awards would discourage businesses from coming to Nevada; and (3) the awards were arbitrary, capricious, and unpredictable, because there were no guidelines for the fact-finder to follow. However, none of these proffered bases for the statutory cap were based entirely on fact at the time NRS 42.005(1) was enacted, and have certainly been satisfactorily addressed, at this time, by *Bongiovi, supra*.

a. Punitive Damages Awards Were Not Out of Control in 1989.

Michael Sloan, who testified during the 1989 legislative hearings for Assembly Bill No. 307 on behalf of the Gaming Industry Association, Circus Circus Enterprises, and the Nevada Resort Association, asserted that "[t]he amount of punitive damages and the number of punitive damages cases in the United States ha[d] skyrocketed in the past two decades." *See* Minutes of the Senate Committee on Judiciary & Assembly Committee on Judiciary, 65th Sess. at 2 (Nev. Mar. 29, 1989). However, according to a study conducted in 1988, on punitive damages in Clark County, "the number of court claims tried or settled at the time of trial in Clark County was 59. In those cases[,] punitive damages were asked in nine of the 59 cases[,] and of those nine cases, [only] four cases were [actually] awarded punitive damages." *Id.* at 34 (hearing on A.B. 307) (testimony of Bill Bradley, President of the Nevada Trial Lawyers' Association). Therefore, at the time the statutory cap on punitive damages was proposed, the number of punitive damages awards in Nevada, was certainly not "out of control."

b. Uncapped Punitive Damages Awards Would Not Prevent Socially- and Commercially-Responsible Corporations From Conducting Business in Nevada.

Another basis for NRS 42.005(1) advanced during the legislative hearings on Assembly Bill No. 307 was

that a statutory cap on punitive damages was necessary in order to encourage new businesses to come to Nevada and to enable existing businesses to continue hiring additional employees and building new casinos, factories, etc. *See id.* at 4 (testimony of Michael Sloan, on behalf of the Gaming Industry Association, Circus Circus Enterprises, and the Nevada Resort Association). However, no evidence was presented at the hearings which demonstrated that any corporation had been driven out of business by an assessment of punitive damages or that economic expansion was restricted by punitive damages awards. *See id.* at 19 (hearing on A.B. 307) (testimony of Lawrence Semenza, on behalf of the Nevada Trial Lawyers' Association).

In fact, this Court has already established that "[p]unitive damages are intended to punish, not to destroy." *See S.J. Amoroso Const. Co. v. Lazovich and Lazovich,* 107 Nev. 294, 299, 810 P.2d 775, 778 (reducing punitive damages award which equaled one-third of Appellant's net worth). Moreover, Delaware, California, and New York, which are generally thought of as havens for business, have rejected statutory caps on punitive damages. *See Senate Daily Journal*, at 17 (Nev. May 24, 1989) (hearing on A.B. 307) (testimony of Senator Joe Neal). Finally, opponents of the statutory cap have expressed concern that Nevada could become "the refuge for socially irresponsible corporations to wreak havoc on their employees and endanger the lives of the citizens of this state." *Id.* Therefore, NRS 42.005(1) may encourage new

businesses to come to Nevada, but they are not necessarily the kind of businesses that Nevada wants to promote.

c. In 1989, Fact-Finders Were Provided With Meaningful Guidance as to the Amount of Punitive Damages to Be Awarded to a Plaintiff.

The proponents of Assembly Bill No. 307 also asserted that when punitive damages are awarded without any meaningful guidance provided to the fact-finder, there is a propensity "for arbitrary, capricious[,] and wholly unpredictable enforcement of punitive damages." Minutes of the Senate Committee on Judiciary & Assembly Committee on Judiciary, 65th Sess. at 8 (Nev. Mar. 29, 1989) (testimony of Margo Piscevich, an attorney). Similarly, it was contended that while no criminal statute provides the judge or jury with unfettered discretion to determine the appropriate penalty in a given case, Nevada's punitive damages laws effectively impose a "civil fine without any guidelines to [the] judge or jury." *Id.* at 5 (hearing on A.B. 307) (testimony of Drake DeLanoy, attorney with Beckley, Singleton, DeLanoy, Jemison, and List).

However, 16 months before the legislative hearings on Assembly Bill No. 307, this Court decided *Ace Truck, supra,* which established guidelines for awarding punitive damages awards. *See* Minutes of Senate Committee on Judiciary & Assembly Committee on

Judiciary, 65th Sess. at 22-23 (Nev. Mar. 29, 1989) (hearing on A.B. 307) (testimony of Allan Earl). In opposing Assembly Bill No. 307, Senator Joe Neal specifically pointed out that there was considerable amount of control governing punitive damages awards in order to ensure that the awards comported with Appellants' due process rights – the trial judge already was required to review a jury's award, and the Nevada Supreme Court could also review the judgment. *See Senate Daily Journal*, at 17 (Nev. May 24, 1989) (emphasis added).

Clearly, guidelines and procedures for awarding punitive damages existed in 1989, and there was no need for NRS 42.005(1). However, even if the Legislature was convinced that the guidelines established in *Ace Truck* were deficient, Assembly Bill No. 307 and NRS 42.005(1) provide no additional guidance to the judge or the jury. The cap merely establishes an arbitrary monetary ceiling on the amount of the award. Because the jury cannot even be apprised as to the existence of the cap, *see* NRS 42.005(3), the statutory cap imposed by NRS 42.005(1) can in no way be viewed as providing guidance to the fact-finder when determining the amount of punitive damages to be awarded.

d. The Need to Control Runaway Punitive Damages Awards and the Need to Provide Guidance to the Jury Is Sufficiently Addressed by *Bongiovi v. Sullivan*.

Regardless of whether the guidelines in existence in 1989, were sufficient to ensure that an award of punitive damages comported with the parties' due process rights, it is clear that the new standard or test set forth in *BMW of North America, Inc. v. Gore*, 517 U.S. 559, 116 S.Ct. 1589 (1996), *Campbell*, *supra*, and *Bongiovi, supra*, provide more than sufficient, meaningful guidance to the fact-finder and supersede any need for NRS 42.005(1) to control rising punitive damages awards.

It is well established that "[t]he Due Process Clause of the Fourteenth Amendment prohibits a State from imposing a "'grossly excessive'" punishment on a tortfeasor. *Gore*, *supra*, 517 U.S. at 562 (quoting *TXO Production Corporation v. Alliance Resources Corporation,* 509 U.S. 443, 454, 113 S.Ct. 2711, 2718 (1993)). To that end, fairness and due process require "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." *Gore*, 517 U.S. at 574. When applying these principles to the arena of punitive damages, the United States Supreme Court determined that three "guideposts" should be used to evaluate whether a punitive damages award is grossly excessive and in violation of a Appellant's due

process rights. *See Campbell*, 538 U.S. at 418. Specifically, courts are required to examine the degree of reprehensibility of the Appellant's conduct, the relationship between compensatory and punitive damages, and the amount of civil and criminal penalties available for comparable misconduct. *See Gore*, 517 U.S. at 575, 581, 583.

The Nevada Supreme Court has recently adopted the federal standard for examining the excessiveness of a punitive damages award, and held that the test set forth in *Campbell* and *Gore* replaced the Nevada standard created in *Ace Truck*. *See Bongiovi, supra,* 122 Nev. at 583, 138 P.3d at 452. All punitive damages awarded in Nevada now comport with the Fourteenth Amendment of the United States Constitution and Article 1, Section 6 of the Nevada Constitution. Therefore, the legislative basis for the statutory cap imposed by NRS 42.005(1) – to prevent excessive punitive damages awards – has now been sufficiently addressed by both this Court and the Nevada Supreme Court.

A court which applies NRS 42.005(1) to a punitive damages award, like the lower court in this case, will only be considering one of the three *Bongiovi* due process factors – the ratio between compensatory and punitive damages. However, the United States Supreme Court has consistently rejected establishing a specific limitation on the ratio between punitive and compensatory damages or any other bright-line test. *See Campbell*, 528 U.S. at 425 ("We decline . . . to impose a bright-line ratio which a punitive damages

award cannot exceed."). Moreover, this Court has ruled that "[t]he precise award in any case . . . must be based upon the facts and circumstances of the Appellant's conduct and the harm to the plaintiff." *Id.* at 425.

2. NRS 42.005(1) Is Thwarting the Very Purpose of Awarding Punitive Damages.

It is a well-settled common law principle, and now, in many instances, a statutory mandate, that punitive damages may be awarded to punish a Appellant for wrongful behavior and to deter others from engaging in similar conduct.

Punitive damages are designed not to compensate the plaintiff for harm suffered but, instead, to punish and deter the Appellant's culpable conduct. "Punitive damages provide a means by which the community . . . can express community outrage or distaste for the misconduct of an oppressive, fraudulent or malicious Appellant and by which others may be deterred and warned that such conduct will not be tolerated."

See Bongiovi, 122 Nev. at 580-581, 138 P.3d at 450 (emphasis added) (quoting *Ace Truck*, 103 Nev. at 506, 746 P.2d at 134); *see also Campbell*, 538 U.S. at 416 (recognizing that punitive damages "are aimed at deterrence and retribution"); *Gore*, 517 U.S. at 568; *Coughlin v. Hilton Hotels Corp.*, 879 F. Supp. 1047, 1050 (D. Nev. 1995); *Ins. Co. of the West v. Gibson Tile Co.*, 122 Nev. 455, 463-464, 134 P.3d 698, 703 (2006);

Evans v. Dean Witter Reynolds, Inc., 116 Nev. 598, 611, 5 P.3d 1043, 1052 (2000); *Turnbow v. State, Dep't of Human Res., Welfare Div.*, 109 Nev. 493, 496, 853 P.2d 97, 99 (1993); *Siggelkow v. Phoenix Ins. Co.*, 109 Nev. 42, 44-45, 846 P.2d 303, 304-305 (1993); *Republic Ins. Co. v. Hires*, 107 Nev. 317, 320, 810 P.2d 790, 792 (1991); *Nev. Cement Co. v. Lemler*, 89 Nev. 447, 452, 514 P.2d 1180, 1183 (1973).

This principle is even expressly codified in NRS 42.005, which states that a plaintiff may recover punitive damages "for the sake of example and by way of punishing the Appellant." NRS 42.005(1). During the legislative hearings for Assembly Bill No. 307, the Nevada Trial Lawyers Association explained that "[a] corporation can kill, maim, fraud, defraud, or otherwise injure someone and . . . you cannot put a corporation in jail. The only weapon society ha[s] to deal with corporate misconduct . . . [i]s to seek court relief by means of punitive damages." Minutes of the Senate Committee on Judiciary & Assembly Committee on Judiciary, 65th Sess. at 27 (Nev. Mar. 29, 1989) (testimony of Peter Neumann, on behalf of the Nevada Trial Lawyers' Association) (emphasis added). Senator Joe Neal further explained that the statutory cap imposed by NRS 42.005(1) severely dilutes the purpose of awarding punitive damages and supplants the fact-finder's decision with an arbitrary judgment as to the amount of damages.

What Assembly Bill No. 307 attempts to do is to substitute the decision of a judge or jury with an arbitrary cap or three times compensatory damages,

which has nothing whatsoever to do with the purpose of punitive damages to punish and deter the Appellant. Three times compensatory damages may punish the mom and pop markets on the corners. It will not punish the large corporate conglomerates.

Senate Daily Journal, at 17 (Nev. May 24, 1989) (hearing on A.B. 307) (testimony of Senator Joe Neal) (emphasis added). Because *Bongiovi, supra*, sufficiently addresses excessive punitive damages awards while also preserving the purpose of such awards, NRS 42.005(1) should be declared unconstitutional and this case should be remanded for an examination of the punitive damages award pursuant to the *Bongiovi* factors.

E. In the Alternative, NRS 42.005(1) Should Be Modified to Allow Juries to Award Punitive Damages Which Effectively Punish the Tortfeasor and Deter Similar Conduct.

If this Court determines that NRS 42.005(1) is constitutional and does not conflict with *Bongiovi*, then the statutory cap on punitive damages should be modified so that all punitive damages awards: (1) are not excessive; (2) do not prohibit business development in Nevada; and (3) punish wrongdoers and deter similar behavior. One way to accomplish all three goals is to modify the statutory cap so that it either bears a relation to the Appellant's net worth or is adjusted for inflation every three years or so.

1. Nevada's Statutory Cap on Punitive Damages Should Be Based on the Appellant's Net Worth, and Not on Arbitrary Ratio to Compensatory Damages.

During the legislative hearings for Assembly Bill No. 307, opponents of the bill stressed the importance of maintaining the deterrent effect of punitive damages:

> "[W]hat type of deterrent effect do you want. Is it going to be like a mosquito on the back of an elephant? The elephant doesn't even feel the mosquito bite. Or, are you going to have to hit somebody hard enough alongside the head . . . to get their attention? To get them back to reality. To know what's wrong. To make those corrections."

Minutes of the Senate Committee on Judiciary & Assembly Committee on Judiciary, 65th Sess. at 17 (Nev. Mar. 29, 1989) (testimony of Lawrence Semenza, on behalf of Nevada Trial Lawyers' Association).

In response, proponent of the bill, Chairman Robert Sader, stated that "three times compensatory damages with a floor of $300,000 was a significant sum which would serve as significant punishment." *Id.* at 9 (Nev. Apr. 12, 1989) (hearing on A.B. 307). While a punitive damages award which equals three times compensatory damages would likely serve as sufficient punishment in a majority of cases in which punitive damages are awarded, especially in personal injury cases, such a multiplier of compensatory

damages is severely lacking in many fraud cases against large corporations, like this case. DHI Mortgage earned $236 million in revenue in 2006, and had $108.4 million in net profits; therefore, a limited award of $300,000 is only 0.276% of DHI Mortgage's net worth in 2006 – or a "drop in the bucket."

The only fair method by which to cap punitive damages in order to protect companies from being forced out of business while also punishing them for tortious and wrongful conduct, is to base an award of punitive damages on a percentage of an Appellant's net worth. In fact, three other states which have passed legislation to limit the amount of punitive damages awards have based the statutory cap on the Appellant's net worth. *See* Mont. Code Ann. Stat. § 27-1-220(3) (2003); Kan. Stat. Ann. § 60-3702(e) (1992); Miss. Code Ann. § 11-1-65(3)(a) (2004).

2. Nevada's Statutory Cap on Punitive Damages Should Be Periodically Adjusted for Inflation.

Another modification to NRS 42.005(1) which would make the arbitrary cap more fair would be to allow for periodic adjustments for inflation. Both Alabama and Arkansas allow for inflationary adjustments to their statutory caps on punitive damages. *See* Ala. Code § 6-11-21(f) (1999); *see also* Ark. Code Ann. § 16-55-208(e) (2003).

While Chairman Sader may have been correct that a punitive damages award of $300,000 was a

significant punishment in 1989, *see* Minutes of Assembly Committee on Judiciary, 65th Sess. at 9 (Nev. Apr. 12, 1989) (hearing on A.B. 307) (testimony of Chairman Robert Sader), such is not the case eighteen years later. For most corporate Appellants, a $300,000 damages award is a "drop in the bucket," especially for a large corporate Appellant like DHI Mortgage.

3. NRS 42.005(1) Should Be Modified to Allow for a Discretionary Judicial Exception for Intentional Fraud, Oppression, or Malice Which Shocks the Conscience of the Fact-Finder.

If this Court will not declare NRS 42.005(1) unconstitutional, then, in the alternative, this Court should create a discretionary exception for cases in which the Appellant's intentional fraud, oppression, or malice "shocks the conscience" of the court. Several states have already created exceptions for Appellants who acted with the specific intent to cause harm, *see* Fla. Stat. § 768.73(2)(c) (1999); Ark. Code Ann. § 16-55-208(b)(1) (2003); Ga. Code Ann. § 51-12-5.1(f) (1997); Ohio Rev. Code Ann. § 2315.21(D)(6) (2004); Okla. Stat. Ann. tit. 23, § 9.1(c) (2002), and Appellants whose conduct was motivated by financial gain. *See* Alaska Stat. § 09.17.020(g) (2003); Kan. Stat. Ann. § 60-3702(f) (1992).

Nevada does not have a legislatively-created exception for conduct motivated by financial gain or

intentional conduct which causes harm. Rather, Nevada has provided exceptions for actions involving products liability, insurance bad faith, discriminatory housing practices, injuries caused by toxic, radioactive, or hazardous material or waste, and defamation. NRS 42.005(2). The purposes for carving out these exceptions to NRS 42.005(1) also justify a judicially-created exception for conduct which "shocks the conscience" of the fact-finder.

> In the context of product liability cases, it has been explained that Nevada wants the jury to have the ability to come down unfettered to provide a manufacturer or a supplier or a retailer, with absolute positive proof of the ability of the community to lash out at this kind of conduct. For example, [the] legitimate state purpose in a product liability case would be to protect both the consumers and the guests that come to Nevada. . . . [T]he kinds of cases in which you have punitive damages awarded, are those in which the manufacturers or distributors have covered up facts, concealed documents, destroyed evidence[,] or intimidated witnesses. In those kinds of situations, you would not want a restriction for a Fortune 500 company in the amount of $300,000, which would be totally insignificant. . . . You are not going to intimidate retailers or manufacturers with a $300,000 limitation on punitive damages.

Minutes of the Senate Committee on Judiciary, 65th Sess, at 14 (Nev. May 18, 1989) (hearing on A.B. 307) (testimony of Allen Earl). The justifications for

excepting products liability cases are not exclusive to that kind of litigation. Punishing corporations for destroying evidence and forcing companies to consider the economic consequences of their misconduct justifies the imposition of the full $1.5 million punitive damages award in this case.

Here, DHI and Callihan's instances of misconduct and bad acts, as outlined above, are prolific. These extensive acts of fraud engaged in by the Appellants would "shock the conscience" of the reasonable person, and, therefore, punitive damages awarded by a jury in response to such conduct should not be reduced to the statutory cap. A full punitive damages award is the only way to sufficiently punish a successful company, like DHI Mortgage, and deter similar conduct in the future. Two juries found damages in excess of the statutory cap were warranted and so too should this Court.

CONCLUSION

Accordingly, the petition for writ of certiorari should be granted.

Respectfully submitted this 13th day of March, 2015.

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IN THE SUPREME COURT
OF THE STATE OF NEVADA

D.R. HORTON, INC., A NEVADA CORPORATION; DHI MORTGAGE COMPANY, LTD., A TEXAS LIMITED PARTNERSHIP F/K/A CH MORTGAGE COMPANY, LTD., A NEVADA LIMITED PARTNERSHIP, Appellants/Cross-Respondents, vs. STEVEN M. BETSINGER, Respondent/Cross-Appellant.	No. 59319 (Filed Oct. 16, 2014)

Appeal and cross-appeal from a final district court judgment entered on remand in a torts action. Eighth Judicial District Court, Clark County; Linda Marie Bell, Judge.

Affirmed in part, reversed in part, and remanded.

McDonald Carano Wilson LLP and
Pat Lundvall, Debbie A. Leonard, and
Kerry St. Clair Doyle, Las Vegas,
for Appellants/Cross-Respondents.

Feldman Graf, P.C., and David J. Feldman and
John C. Dorame, Las Vegas,
for Respondent/Cross-Appellant.

BEFORE THE COURT EN BANC.[1]

OPINION

By the Court, CHERRY, J.:

This appeal arises from punitive damages proceedings on remand after we issued our decision in *Betsinger v. D.R. Horton, Inc.* (*Betsinger I*), 126 Nev. 162, 232 P.3d 433 (2010), a case that involved fraud and deceptive trade practices in the context of a real estate purchase and loan arrangement. On appeal, we consider whether the proceedings on remand violated NRS 42.005(3), which requires any trier of fact who determines that punitive damages are warranted to also determine the amount of damages to award. Specifically, we consider whether NRS 42.005(3) applies in a remand situation so as to require the second jury on remand to reassess whether punitive damages are warranted before that jury may determine the amount of punitive damages to be awarded. We conclude that NRS 42.005(3) is unambiguous in imposing this requirement. Thus, when the fact-finder is limited to solely making a determination regarding punitive damages, NRS 42.005(3) requires that fact-finder to first determine whether punitive damages are justified – *i.e.,* whether there is clear and convincing evidence of a defendant's oppression, fraud, or malice – and then to determine the

[1] The Honorable Ron D. Parraguirre, Justice, did not participate in the decision of these matters.

amount of damages to award. Because the jury on remand in this case was prevented from determining whether punitive damages were justified, we reverse the district court's punitive damages award and remand for a new trial. We also affirm the denial of attorney fees to D.R. Horton.

FACTS AND PROCEDURAL HISTORY

This case arose from a failed attempt to purchase a home in Las Vegas, the details of which are more fully set forth in *Betsinger I,* 126 Nev. 162, 232 P.3d 433 (2010). Briefly, respondent/cross-appellant Steven Betsinger contracted to purchase a house from appellant/cross-respondent D.R. Horton, Inc., and applied for a loan to fund that purchase with D.R. Horton's financing division, appellant/cross-respondent DHI Mortgage, Ltd. *Id.* at 163, 232 P.3d at 434. After DHI Mortgage refused to fund the loan at the interest rate originally offered, Betsinger canceled the purchase contract. When D.R. Horton failed to return Betsinger's earnest-money deposit, he sued, asserting claims for fraud and deceptive trade practices based on allegations that D.R. Horton caused him to cancel the purchase agreement with false assurances that his deposit would be returned and that it and DHI Mortgage used a "bait and switch" tactic to lure him into making the deposit in the first place. After a trial, the jury found in favor of Betsinger and awarded him compensatory damages against D.R. Horton and DHI Mortgage consisting of actual damages and emotional distress damages, as well as punitive

damages against DHI Mortgage.[2] *Id.* at 164, 232 P.3d at 434-35.

All parties appealed, and we reversed the judgment as to consequential damages because of Betsinger's failure to present evidence of any physical manifestation of emotional distress. *Id.* at 166, 232 P.3d at 436. We accordingly reduced the compensatory damages award to the amount of Betsinger's actual damages, $10,727 ($5,190 from D.R. Horton and $5,537 from DHI Mortgage). *Id.* at 164, 167, 232 P.3d at 434, 436. Because it was impossible to determine what the jury would have awarded Betsinger in punitive damages against DHI Mortgage given the reduction in the compensatory damages award, we declined to arbitrarily reduce the punitive damages amount. Instead, we concluded that "the punitive damages award must be remanded for further proceedings because we cannot be sure what the jury would have awarded in punitive damages as a result of the substantially reduced compensatory award." *Id.* at 167, 232 P.3d at 437.

On remand, questions arose as to the appropriate scope of the trial in light of this court's remand instructions. Specifically, confusion arose regarding

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[2] The jury also awarded emotional distress damages and punitive damages against another defendant, who was DHI Mortgage's branch manager, for his role in the "bait and switch." *Betsinger I,* 126 Nev. at 164, 232 P.3d at 434-35. Given this court's resolution of the first appeal, that defendant was not involved in the remanded proceedings.

whether the jury needed to first consider DHI Mortgage's liability for punitive damages, or if the jury was simply to consider the amount of punitive damages warranted. Ultimately, the district court instructed the jury that it was to decide "what amount, if any, Mr. Betsinger is entitled to for punitive damages."[3] Based on this instruction, the jury returned a verdict against DHI Mortgage and in favor of Betsinger with respect to punitive damages in the amount of $675,000. The district court subsequently entered judgment against D.R. Horton in the amount of $5,190 plus interest and denied D.R. Horton attorney fees. Judgment was entered against DHI Mortgage in the amount of $5,537 plus interest and $300,000 in punitive damages, the total after NRS 42.005(1)(b)'s punitive damages cap was applied. Thereafter, D.R. Horton and DHI Mortgage appealed, and Betsinger cross-appealed.

DISCUSSION

Although the parties raise numerous arguments on appeal and cross-appeal, this opinion need analyze only two of those arguments. We first address DHI Mortgage's argument that the district court's jury instruction regarding punitive damages violated NRS

[3] We note that the requirements of NRS 42.007(1) did not need to be met coming into the second trial because the first jury had previously determined that DHI Mortgage had engaged in fraud and in deceptive trade practices. *Betsinger I,* 126 Nev. at 164, 232 P.3d at 434.

42.005(3)'s "same trier of fact" requirement. We then turn to whether the district court should have awarded D.R. Horton attorney fees.

NRS 42.005(3) requires the same fact-finder to determine whether liability exists for punitive damages and, if so, the amount of damages

NRS 42.005 governs when punitive damages are authorized and the process by which those damages are to be awarded. In particular, subsection 1 authorizes punitive damages when "it is proven by clear and convincing evidence that the defendant has been guilty of oppression, fraud or malice." NRS 42.005(1). Subsection 3, in turn, sets forth the process by which those damages are to be awarded:

> If punitive damages are claimed pursuant to this section, *the trier of fact shall make a finding of whether such damages will be assessed.* If such damages are to be assessed, a subsequent proceeding must be conducted *before the same trier of fact to determine the amount of such damages* to be assessed.

NRS 42.005(3) (emphases added). On appeal, DHI Mortgage asserts that NRS 42.005(3) unambiguously provides that a single jury must determine both a defendant's liability for punitive damages – *i.e.,* whether clear and convincing evidence demonstrates that the defendant is guilty of oppression, fraud, or malice – *and* the amount of any award. Thus, according to DHI Mortgage, the district court erred as a matter of law by permitting the second jury to

consider only the amount of damages to be awarded. In response, Betsinger contends that NRS 42.005(3)'s "same trier of fact" requirement should not apply when a case has been remanded. In particular, Betsinger contends that DHI Mortgage's reading of NRS 42.005(3) is untenable, as it would essentially entitle DHI Mortgage to a new trial on its underlying liability for fraud, since the jury considering whether punitive damages are warranted would necessarily need to find that DHI Mortgage was guilty of oppression, fraud, or malice.[4]

In interpreting this statute de novo, we will not look beyond the plain language when it is clear on its face. *Pub. Agency Comp. Trust v. Blake,* 127 Nev. ___, ___, 265 P.3d 694, 696 (2011); *Pankopf v. Peterson,* 124 Nev. 43, 46, 175 P.3d 910, 912 (2008). Here, the plain language of NRS 42.005(3), specifically the phrase "before the same trier of fact," indicates that a single judge or jury must determine *both* whether punitive damages should be assessed and, in a subsequent proceeding, the amount of such damages. NRS

[4] Betsinger also contends that DHI Mortgage should be barred by the law-of-the-case doctrine from arguing that the trial on remand violated NRS 42.005(3). "Th[is] doctrine only applies to issues previously determined, not to matters left open by the appellate court." *Wheeler Springs Plaza, LLC v. Beemon,* 119 Nev. 260, 266, 71 P.3d 1258, 1262 (2003). To the extent that Betsinger is contending that we determined in *Betsinger I* that a new trial was warranted on the *amount* of punitive damages only, we do not read *Betsinger I* as having made such a narrow determination.

42.005(3). Because this language is plain and clear, we decline to delve into legislative history. *Pankopf,* 124 Nev. at 46, 175 P.3d at 912. As for Betsinger's contention that NRS 42.005(3) necessarily leads to a retrial of the entire action, we disagree. In many instances, such as in this case's first trial, the fact-finder who determines whether compensatory damages are warranted will be the same one as determines liability for and the extent to which punitive damages are warranted. Nevertheless, "[t]he issue of exemplary damages is separate and distinct from that of actual damages, for they are assessed to punish the defendant and not to compensate for any loss suffered by the plaintiff," *Brewer v. Second Baptist Church of L.A.,* 197 P.2d 713, 720 (Cal. 1948), and thus, we think, they may be tried separately on remand. Nothing in the statute purports to govern the procedure on remand, and there is no reason why issues concerning compensatory damages, already affirmed by this court in *Betsinger I,* must be relitigated to determine issues concerning the punitive damages sought.[5] *See Wickliffe v. Fletcher Jones of Las Vegas, Inc.,* 99 Nev. 353, 357, 661 P.2d 1295, 1297 (1983) (recognizing, without discussing any statutory language, that in a retrial on remand based on failure to give a punitive damages instruction, a litigant should

[5] While we agree with Betsinger that, in some instances, there will be an overlap of evidence presented in an initial trial and in a second trial ordered on remand for punitive damages only, we believe that this is the only reasonable application of NRS 42.005(3)'s unambiguous requirement.

not have to readdress issues concerning liability and amount of compensatory damages when those issues were not challenged on appeal), *superseded by statute on other grounds as stated in Countrywide Home Loans, Inc. v. Thitchener,* 124 Nev. 725, 741 n.39, 742-43, 192 P.3d 243, 253 n.39, 254-55 (2008).

But where, as in this case's second trial, the fact-finder is tasked only with making a determination regarding punitive damages, NRS 42.005(3) unambiguously requires that fact-finder to first determine whether punitive damages are warranted – *i.e.,* whether there is clear and convincing evidence of a defendant's oppression, fraud, or malice – before determining the amount of punitive damages to award. Thus, we agree with DHI Mortgage that the district court's interpretation and application of our remand instruction in *Betsinger I* deprived it of its right under NRS 42.005(3) to have the jury determine whether punitive damages were warranted. Even if the district court's instruction that the jury was to determine "what amount, if any, Mr. Betsinger is entitled to for punitive damages" may have permitted the jury to determine that $0 was an appropriate award, this instruction did not require the jury to make the threshold determination of whether punitive damages could be awarded. We emphasize that, under NRS 42.005(3), the trier of fact who determines the amount of punitive damages to be awarded must also make the initial determination of whether punitive damages are warranted.

Attorney fees

Finally, we consider D.R. Horton's separate appeal of the district court's order denying its post-remittitur motion for attorney fees as untimely. We conclude that the district court did not abuse its discretion in declining to award attorney fees under the offer of judgment rule. *Certified Fire Prot., Inc. v. Precision Constr., Inc.,* 128 Nev. ___, ___, 283 P.3d 250, 258 (2012); *Farmers Ins. Exch. v. Pickering,* 104 Nev. 660, 662, 765 P.2d 181, 182 (1988). In addition to reversing and remanding for determination of punitive damages as to DHI Mortgage, *Betsinger I* reduced the compensatory damages award against D.R. Horton to an amount less than its pretrial offer of judgment to Betsinger. 126 Nev. at 167, 232 P.2d at 436. However, after this reduction triggered D.R. Horton's ability to seek attorney fees, D.R. Horton waited nine months to file a motion for attorney fees, and did so the night before the second trial was to commence against DHI Mortgage. Thus, we cannot conclude that the district court abused its discretion in determining that D.R. Horton's nine-month delay was unreasonable, and we affirm the district court's decision denying attorney fees to D.R. Horton.

CONCLUSION

Under NRS 42.005(3), a defendant is entitled to have the same finder of fact who determines the amount of punitive damages to be awarded also make the threshold determination of whether punitive

damages are warranted. Because that did not happen here, we reverse and remand for a new trial on punitive damages.[6]

/s/ Cherry, J.
Cherry

We concur:

/s/ Gibbons, C.J.
Gibbons

/s/ Pickering, J.
Pickering

/s/ Hardesty, J.
Hardesty

/s/ Douglas, J.
Douglas

/s/ Saitta, J.
Saitta

[6] Having considered all of the other issues raised by the parties, we conclude that they either lack merit or need not be addressed given our disposition of this appeal.

ORDR

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DISTRICT COURT

CLARK COUNTY, NEVADA

STEVEN M. BETSINGER, Plaintiff, vs. D. R. HORTON, INC., a Nevada Corp., JEFF WARD, DEBRA MARTINEZ, RICK KNOBLOCH, DHI MORTGAGE COMPANY, LTD., a Texas Limited Partnership f/k/a CH MORTGAGE COMPANY I, LTD., a Nevada Limited Partnership, DANIEL CALLIHAN, individually, and DOES I through V, inclusive, Defendants.	Case No.: A503121 Department XXV

EIGHTH AMENDED ORDER AND JUDGMENT ON JURY VERDICT

(Nunc Pro Tunc to Seventh Amended Order and Judgment on Jury Verdict)

(Filed Feb. 6, 2013)

This matter having come on for jury trial on August 27 through August 31, 2007, and pursuant to the Nevada Supreme Court's Opinion of May 27, 2010 (126 Nev. Advance Opinion 17) ordering a new trial on punitive damages, and punitive damages having been tried to a second jury on February 23, 2011 through March 2, 2011, the jury having reached its verdicts, whereas the jury found as follows:

As to Plaintiff Steven Betsinger's claim for Fraud, liability was assessed against Defendant DHI Mortgage Company, Ltd.

As to Plaintiff Steven Betsinger's claims for violations of the Deceptive Trade Practices Act, liability was assessed against Defendants D.R. Horton, Inc., DHI Mortgage Company, Ltd., Daniel Callihan, Jeff Ward, and Debra Martinez.

Based on the verdicts of the jury,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that Judgment be entered in favor of Plaintiff Steven Betsinger and against Defendants D.R. Horton, Inc., and DHI Mortgage Company, Ltd., as follows:

As to Defendant DIU Mortgage Company, Ltd., Five Thousand, Five Hundred Thirty-Seven Dollars ($5,537.00) in compensatory damages, and interest accruing from May 6, 2005 in the amount of Two Thousand, Six Hundred Five Dollars and Sixty-Eight Cents ($2,605.68) as of March 31, 2011, with interest accruing thereafter at the statutory rate until satisfied;

As to Defendant D.R. Horton, Inc., Five Thousand, One Hundred Ninety Dollars ($5,190.00) in compensatory damages, and interest accruing from May 6, 2005 in the amount of Two Thousand, Four Hundred. Forty-Two Dollars and Forty-Three Cents ($2,442.43) as of March 31, 2011, with interest accruing thereafter at the statutory rate until satisfied.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that Plaintiff Steven Betsinger shall have Judgment against Defendant DHI Mortgage Company, Ltd. for punitive damages in the amount of Three Hundred Thousand Dollars ($300,000.00) pursuant to NRS 42,005(10), with interest accruing at the statutory rate from May 19, 2011 until satisfied;

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that Plaintiff Steven Betsinger shall have Judgment against Defendants D.R. Horton, Inc. and DHI Mortgage Company, Ltd., jointly and severally, an award of attorney's fees of $69,510.00 and costs of $23,068.90, with interest

accruing at the statutory rate from February 4, 2008 until satisfied.

IT Is FURTHER ORDERED, ADJUDGED AND DECREED that Plaintiff Steven Betsinger shall have Judgment against Defendant. DHI Mortgage Company, Ltd., an award of attorney's fees of $50,087.00 and costs of $2,552.24 awarded from the second trial on punitive damages, with interest accruing at the statutory rate from November 21, 2011 until satisfied.

IT IS SO ORDERED.

DATED THIS 5th day of February, 2013.

/s/ [Illegible]
DISTRICT COURT JUDGE
[cb]

Respectfully submitted by:	**APPROVED AS TO FORM AND CONTENT:**
FELDMAN GRAF, P.C.	McDONALD CARANO WILSON, LLC.
/s/ [Illegible]	/s/ Kerry Doyle
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D.R. Horton, Inc, and Dill
Mortgage Company, Ltd.

126 Nev., Advance Opinion 17

IN THE SUPREME COURT OF
THE STATE OF NEVADA

STEVEN M. BETSINGER, Appellant/Cross-Respondent, vs. D.R. HORTON, INC., A NEVADA CORPORATION; JEFF WARD; DEBRA MARTINEZ; DHI MORTGAGE COMPANY, LTD., A TEXAS LIMITED PARTNERSHIP F/K/A CH MORTGAGE COMPANY, LTD., A NEVADA LIMITED PARTNERSHIP; AND DANIEL CALLAHAN, INDIVIDUALLY, Respondents/Cross-Appellants.	No. 50510 (Filed May 27, 2010)

Appeal and cross-appeal from a district court final judgment in an action based on fraud and deceptive trade practices. Eighth Judicial District Court, Clark County; Sally L. Loehrer, Judge.

Affirmed in part, reversed in part, and remanded with instructions.

Bailey Kennedy and Dennis L. Kennedy and Sarah E. Harmon, Las Vegas; Feldman Graf, P.C., and David J. Feldman and J. Rusty Graf, Las Vegas, for Appellant/Cross-Respondent.

Lionel Sawyer & Collins and David N. Frederick and Todd E. Kennedy, Las Vegas; Wood, Smith, Henning & Berman, LLP, and Joel D. Odou and Tod R. Dubow, Las Vegas, for Respondents/Cross-Appellants.

BEFORE THE COURT EN BANC.

OPINION

By the Court, PARRAGUIRRE, C.J.:

In this opinion, we consider the proper burden of proof that should apply for a cause of action brought under NRS Chapter 598's deceptive trade practices statutory scheme. We conclude that any cause of action for deceptive trade practices under NRS Chapter 598 must be proven by a preponderance of the evidence. We further conclude that a substantial portion of Steven Betsinger's compensatory damage award must be reversed because he failed to present evidence of any physical manifestation of emotional distress. As a consequence of this decision, we reverse the punitive damages award against Daniel Callahan because Betsinger failed to recover any general damages against Callahan aside from damages for emotional distress. Additionally, we remand for a new trial on punitive damages against DHI Mortgage Company, Ltd., because we are unable to adequately review the jury's punitive damages award in light of our decision to substantially reduce the compensatory damages award.

FACTS AND PROCEDURAL HISTORY

This appeal and cross-appeal arise out of a lawsuit filed by appellant/cross-respondent Steven Betsinger against respondents/cross-appellants (respondents) D.R. Horton, Inc. (DRH), DHI Mortgage Company, Ltd., Daniel Callahan, Jeff Ward, and Debra Martinez for fraud and deceptive trade practices involving the sale of a house built by DRH with financing from DHI Mortgage.

In this case, Betsinger contracted to buy a DRH-built house in Las Vegas. He sought a mortgage loan from DRH's financing division, DHI Mortgage, and made a $4,900 earnest-money deposit to secure the purchase.

After making final preparations to relocate his family to Las Vegas, Betsinger was informed by Callahan, a DHI Mortgage branch manager, that DHI Mortgage could not offer him the low mortgage interest rate that had been originally suggested. Instead of the originally suggested "primary residence" rate of 4.625%, Callahan told Betsinger that DHI Mortgage could only offer him a rate of 6.5% under the premise that the Las Vegas house could not qualify as Betsinger's "primary residence" because he did not intend to seek full-time employment in the Las Vegas area.

Unwilling to accept the higher rate of interest, Betsinger canceled the purchase contract. Before doing so, Betsinger inquired as to whether his deposit would be refunded. Although the unsigned purchase

contract provided that the deposit was nonrefundable, Betsinger testified that Callahan, Ward (the Director of Sales and Marketing for DRH), and Martinez (a DRH salesperson) all informed him that his $4,900 deposit would be returned. DRH never refunded Betsinger's deposit.

Betsinger subsequently commenced this action, alleging that (1) DRH, Ward, and Martinez had engaged in fraud by telling him that his earnest-money deposit would be returned after he canceled his purchase contract; (2) Callahan had engaged in fraud by "baiting" him with a 4.625% mortgage rate so that he would place a $4,900 earnest-money deposit, then "switching" the rate to 6.5%; and (3) all defendants had engaged in deceptive trade practices.

After a five-day trial, the jury returned a special verdict finding that DHI Mortgage and Callahan had engaged in fraud, that all the defendants had engaged in deceptive trade practices, and that punitive damages should be awarded against DHI Mortgage and Callahan. The jury awarded Betsinger $53,727 in compensatory damages: actual damages in the amount of $10,727 ($5,190 from DRH and $5,537 from DHI Mortgage); and consequential damages for emotional distress, mental anguish, embarrassment, and loss of peace of mind in the amount of $43,000 ($11,000 from DRH, $22,000 from DHI Mortgage, and $10,000 from

Callahan).[1] The jury also awarded Betsinger $1,542,500 in punitive damages ($1,500,000 from DHI Mortgage and $42,500 from Callahan), which was later reduced to $300,000 pursuant to NRS 42.005's statutory cap. This appeal and cross-appeal followed.[2]

DISCUSSION

A cause of action for deceptive trade practices must be proven by a preponderance of the evidence

Respondents allege on cross-appeal that the district court failed to appropriately instruct the jury as to the correct burden of proof for a deceptive trade practices claim against them. They allege that the district court imprecisely instructed the jury that some deceptive trade practices must only be proven by a preponderance of the evidence while others require proof by clear and convincing evidence, and that the district court did not specify which burden of proof was required for which particular deceptive trade practice. While we agree that the district court

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[1] The jury awarded $48,000 in emotional distress damages, but $5,000 of that amount was against an individual who settled and is not a party to this appeal.

[2] Having concluded that the punitive damages award against DHI Mortgage must be remanded to the district court for additional proceedings, we decline to address Betsinger's only issue on appeal challenging the constitutionality of NRS 42.005's statutory cap on punitive damages in this instance. We also reject respondents' other challenges to the district court's judgment on cross-appeal that are not specifically addressed in this opinion.

improperly instructed the jury on both burdens of proof, reversal on this ground is unnecessary because deceptive trade practices must only be proven by a preponderance of the evidence, which is a lesser evidentiary standard than clear and convincing evidence.

Generally, a preponderance of the evidence is all that is needed to resolve a civil matter unless there is clear legislative intent to the contrary. *See Mack v. Ashlock,* 112 Nev. 1062, 1066, 921 P.2d 1258, 1261 (1996) ("[A]bsent a clear legislative intent to the contrary . . . the standard of proof in [a] civil matter must be a preponderance of the evidence.").

NRS Chapter 598 is silent as to the plaintiff's burden of proof for deceptive trade practices. *See* NRS 598.0903-.0999. Thus, while some deceptive trade practices defined in NRS Chapter 598 sound in fraud, *see, e.g.,* NRS 598.0923(2), which, under common law, must be proven by clear and convincing evidence, *see Bulbman, Inc. v. Nevada Bell,* 108 Nev. 105, 110-11, 825 P.2d 588, 592 (1992), we cannot conclude that deceptive trade practices claims are subject to a higher burden of proof absent a legislative directive. *See Mack,* 112 Nev. at 1066, 921 P.2d at 1261.

This accords with the approach taken by many other jurisdictions that have enacted similar consumer protection statutes. *See Hanson-Suminski v. Rohrman Motors,* 898 N.E.2d 194, 203 (Ill. App. Ct. 2008) ("[T]he appropriate standard of proof for a statutory fraud claim [under the Illinois Consumer

Fraud Act] is preponderance of the evidence."); *Dunlap v. Jimmy GMC of Tucson, Inc.,* 666 P.2d 83, 88-89 (Ariz. Ct. App. 1983); *State Ex Rel. Spaeth v. Eddy Furniture Co.,* 386 N.W.2d 901, 903 (N.D. 1986).[3]

In *Dunlap,* the Arizona Court of Appeals recognized that a plaintiff has the burden of proving common law fraud by clear and convincing evidence. 666 P.2d at 88. However, because statutory fraud is separate and distinct from common law fraud, the Court stated that "[t]he mere fact that the word 'fraud' appears in the title of [Arizona's] consumer protection statute does not give rise to an inference that the legislature intended to require a higher degree of proof than that ordinarily required in civil cases." *Id.* at 89. The court further concluded that the purpose of the consumer protection statute was to provide consumers with a cause of action that was easier to establish than common law fraud, and therefore, statutory fraud must only be proven by a preponderance of the evidence. *See id.*

We agree with the Arizona Court of Appeals' reasoning in *Dunlap.* Statutory offenses that sound in fraud are separate and distinct from common law fraud. Therefore, we conclude that deceptive trade practices, as defined under NRS Chapter 598, must only be proven by a preponderance of the evidence.

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[3] Similar consumer fraud legislation carries a variety of titles, such as "unfair trade practices," "consumer fraud," and "deceptive trade practices." *See Dunlap,* 666 P.2d at 89 n.1.

Having concluded as such, we do not need to disturb the jury's verdict because the jury found all defendants liable for deceptive trade practices even though the district court improperly instructed the jury that some deceptive trade practices must be proven by the higher standard of clear and convincing evidence. Accordingly, we affirm the district court's judgment in this respect.[4]

Compensatory damages award – damages for emotional distress

Respondents next contend on cross-appeal that the jury's compensatory award relating to emotional distress damages must be reversed because Betsinger failed to demonstrate any physical manifestation of emotional distress. We agree, and therefore reverse the jury's $43,000 emotional distress damages award.

We have previously required a plaintiff to demonstrate that he or she has suffered some physical manifestation of emotional distress in order to support an award of emotional damages. *See, e.g., Barmettler v. Reno Air, Inc.,* 114 Nev. 441, 448, 956 P.2d 1382, 1387 (1998) ("[I]n cases where emotional distress damages are not secondary to physical injuries,

[4] Respondents tangentially argue that NRS Chapter 598's statutory scheme does not regulate the deceptive sale of real property; therefore, DRH could not be held liable for a deceptive trade practice. Having reviewed this issue, we reject respondents' narrow interpretation of NRS Chapter 598 and conclude that this argument is without merit.

but rather, precipitate physical symptoms, either a physical impact must have occurred or, in the absence of physical impact, proof of 'serious emotional distress' causing physical injury or illness must be presented."); *Chowdhry v. NLVH, Inc.,* 109 Nev. 478, 482-83, 851 P.2d 459, 462 (1993). While we have relaxed the physical manifestation requirement in a few limited instances, *see Olivero v. Lowe,* 116 Nev. 395, 400, 995 P.2d 1023, 1026 (2000) (explaining that the physical manifestation requirement is more relaxed for damages claims involving assault), we cannot conclude that a claim for emotional distress damages resulting from deceptive trade practices in connection with a failed real estate and lending transaction should be exempted from the physical manifestation requirement.

Unlike in *Olivero,* where we stated that "the nature of a claim of assault is such that the safeguards against illusory recoveries mentioned in *Barmettler* and *Chowdhry* are not necessary," 116 Nev. at 400, 995 P.2d at 1026, there is no guarantee of the legitimacy of a claim for emotional distress damages resulting from a failed real estate and lending transaction without a requirement of some physical manifestation of emotional distress.

Thus, because Betsinger failed to present any evidence that he suffered any physical manifestation of emotional distress, we reverse the jury's award of $43,000 in emotional distress damages. Accordingly, Betsinger's compensatory damages award should be

reduced to $10,727, the amount of Betsinger's actual damages, as determined by the jury.

The punitive damages must be reversed and remanded

In light of our decision to reduce Betsinger's compensatory damages award by more than 80%, we must now consider the appropriateness of his punitive damages award against Callahan and DHI Mortgage.

As against Callahan, the punitive damages award must be stricken in its entirety because Betsinger did not recover any compensatory damages from Callahan other than those relating to emotional distress. *See Bongiovi v. Sullivan,* 122 Nev. 556, 582-83, 138 P.3d 433, 451-52 (2006); *City of Reno v. Silver State Flying Serv.,* 84 Nev. 170, 180, 438 P.2d 257, 264 (1968) ("Punitive damages cannot be awarded by a jury unless it first finds compensatory damages.").

As against DHI Mortgage, the punitive damages award must be remanded for further proceedings because we cannot be sure what the jury would have awarded in punitive damages as a result of the substantially reduced compensatory award. Because of our uncertainty, we are unable to meaningfully review the excessiveness of the current punitive damages award, and we refuse to arbitrarily reduce the amount. *See Bongiovi,* 122 Nev. at 582-83, 138 P.3d at 452 (explaining that we review whether punitive damages are excessive de novo to " 'ensure that the measure of punishment is both reasonable

and proportionate to the amount of harm to the plaintiff and to the general damages recovered'" (quoting *State Farm Mut. Automobile Ins. Co. v. Campbell,* 538 U.S. 408, 426 (2003))).

Accordingly, we affirm the district court court's judgment in part, reverse in part, and remand this matter to the district court for proceedings consistent with this opinion.

/s/ Parraguirre C.J.
Parraguirre

We concur:

/s/ Hardesty, J
Hardesty

/s/ Douglas, J
Douglas

/s/ Cherry, J
Cherry

/s/ Saitta, J
Saitta

/s/ Gibbons, J
Gibbons

/s/ Pickering, J
Pickering

IN THE SUPREME COURT OF
THE STATE OF NEVADA

D.R. HORTON, INC., A NEVADA CORPORATION; DHI MORTGAGE COMPANY, LTD., A TEXAS LIMITED PARTNERSHIP F/K/A CH MORTGAGE COMPANY, LTD., A NEVADA LIMITED PARTNERSHIP, Appellants/Cross-Respondents. vs. STEVEN M. BETSINGER, Respondent/Cross-Appellant.	No. 59319

ORDER DENYING REHEARING

(Filed Dec. 16, 2014)

Rehearing denied. NRAP 40(c).

It is so ORDERED.

/s/ Gibbons, C.J.
Gibbons

/s/ Pickering, J.
Pickering

/s/ Hardesty, J
Hardesty

/s/ Douglas, J.
Douglas

/s/ Cherry, J
Cherry

/s/ Saitta, J.
Saitta

cc: Hon. Linda Marie Bell, District Judge
McDonald Carano Wilson LLP/Reno
Feldman Graf
Eighth District Court Clerk

UNITED STATES CONSTITUTIONAL PROVISIONS

Amendment V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Amendment XIV

Section 1.

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Section 2.

Representatives shall be apportioned among the several states according to their respective numbers, counting the whole number of persons in each state, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice President of the United States, Representatives in Congress, the executive and judicial officers of a state, or the members of the legislature thereof, is denied to any of the male inhabitants of such state, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such state.

Section 3.

No person shall be a Senator or Representative in Congress, or elector of President and Vice President, or hold any office, civil or military, under the United States, or under any state, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any state legislature, or as an executive or judicial officer of any state, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the

enemies thereof. But Congress may by a vote of two-thirds of each House, remove such disability.

Section 4.

The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any state shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave; but all such debts, obligations and claims shall be held illegal and void.

Section 5.

The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

NEVADA CONSTITUTIONAL PROVISIONS

ARTICLE. 1. – Declaration of Rights.

Sec: 3. Trial by jury; waiver in civil cases. The right of trial by Jury shall be secured to all and remain inviolate forever; but a Jury trial may be waived by the parties in all civil cases in the manner to be prescribed by law; and in civil cases, if three fourths of the Jurors agree upon a verdict it shall stand and have the same force and effect as a verdict by the whole Jury, Provided, the Legislature by a law passed by a two thirds vote of all the members elected to each branch thereof may require a unanimous verdict notwithstanding this Provision.

Sec: 6. Excessive bail and fines; cruel or unusual punishments; detention of witnesses. Excessive bail shall not be required, nor excessive fines imposed, nor shall cruel or unusual punishments be inflicted, nor shall witnesses be unreasonably detained.

Sec. 8. Rights of accused in criminal prosecutions; jeopardy; rights of victims of crime; due process of law; eminent domain.

5. No person shall be deprived of life, liberty, or property, without due process of law.

ARTICLE. 3. – Distribution of Powers.

Section 1. Three separate departments; separation of powers; legislative review of administrative regulations.

1. The powers of the Government of the State of Nevada shall be divided into three separate departments, – the Legislative, – the Executive and the Judicial; and no persons charged with the exercise of powers properly belonging to one of these departments shall exercise any functions, appertaining to either of the others, except in the cases expressly directed or permitted in this constitution.

2. If the legislature authorizes the adoption of regulations by an executive agency which bind persons outside the agency, the legislature may provide by law for:

(a) The review of these regulations by a legislative agency before their effective date to determine initially whether each is within the statutory authority for its adoption;

(b) The suspension by a legislative agency of any such regulation which appears to exceed that authority, until it is reviewed by a legislative body composed of members of the Senate and Assembly which is authorized to act on behalf of both houses of the legislature; and

(c) The nullification of any such regulation by a majority vote of that legislative body, whether or not the regulation was suspended.

A.B. 307 of the 65th Session

1989

PUNITIVE DAMAGES

218.NV
LCB/SOL
1989

NEVADA LEGISLATURE
SIXTY-FIFTH SESSION
1989

SUMMARY OF LEGISLATION

[SEAL]

PREPARED BY

LEGISLATIVE COUNSEL BUREAU
RESEARCH LIBRARY

RESEARCH DIVISION APR 20 1990

LEGISLATIVE COUNSEL BUREAU

COURTS (continued)

* * *

A.B. 272 (chapter 89)

Assembly Bill 272 permits public attorneys to represent indigent persons if:

1. The attorney first receives the permission of his supervisor;

2. The interests of the indigent person do not conflict with the interests of the state or the attorney's employer;

3. The representation is provided through or is in association with the organization that provides free legal assistance to indigent persons; and

4. The attorney receives no compensation for the representation.

The bill also allows indigent persons to obtain reporting, recording or transcription of a civil case at the expense of the county, at a reduced rate as set by the county, if the court determines that this action would be helpful to the adjudication or appellate review of the case.

A.B. 291 (chapter 60)

Assembly Bill 291 clarifies the authority of the attorney general to prosecute certain criminal actions and deletes the requirement that the attorney general obtain leave of the court before instituting criminal proceedings.

This bill also allows the attorney general to prosecute persons who act in concert with, whether as a principal or accessory, a person who commits a crime while confined in or committed to an institution or facility of the department of prisons. Existing law grants the attorney general jurisdiction to prosecute a crime committed by the inmate.

A.B. 307 (chapter 218)

Assembly Bill 307 provides that, to collect punitive damages in a civil case, the plaintiff must prove by clear and convincing evidence that the defendant has been guilty of oppression, fraud or malice. The bill also limits the amount of punitive damages to $300,000 or three times the amount of compensatory damages awarded, whichever is greater.

The limitation on the amount of punitive damages does not apply to actions against the following:

1. A manufacturer, seller or distributor of a defective product;
2. An insurer who acts in bad faith regarding its obligations to provide insurance coverage;
3. A person violating federal or state law regarding discriminatory housing practices, if the law provides for damages in excess of the limits;
4. A person for damages or an injury caused by the emission, disposal or spilling of a hazardous material; or
5. A person for defamation.

The bill does not apply to actions against a person guilty of driving under the influence of alcohol or drugs.

The act is effective upon passage and approval but does not of apply to punitive damages awarded before that date (May 30, 1989).

A.B. 343 (chapter 157)

Assembly Bill 343 requires a material witness who has been detained to be brought before a judge or magistrate within 72 hours after the beginning of his detention. The judge or magistrate shall determine if the amount of bail required should be modified and if detention should continue, and shall set a schedule for periodic review of these actions.

A.B. 382 (chapter 233)

Assembly Bill 382 provides for the use of a simplified procedure in a civil action in which the amount in controversy, excluding attorney's fees, interest and costs of suit, is between $2,500 and $15,000. The parties to the action may stipulate, pending acceptance by the court, that the matter be dealt with as a summary proceeding. The bill establishes the procedure to be followed for the summary proceeding.

No party may conduct discovery, and the judgment of the court is not subject to appeal. The measure specifies the established court rules and procedures that apply to any summary proceeding. In addition, the supreme court or each district court is required to adopt rules for setting summary proceeding trials and other necessary rules for this procedure.

" . . . Let's turn it the other way and talk about the victim where the award is made. . . . Remember, the sole purpose of punitive damages is to punish the defendant for whatever they've done. There's been an award made, you have somebody that's seriously injured. In that case, the award to the plaintiff becomes ordinary income because, in effect, it's a windfall and they pay ordinary taxes on it.

"So on one end, you may not be able to deduct the judgment for business purposes and on the other end . . . it is ordinary income. And, of course, what happens frequently, in reference to the mere assertion of punitive damages, remembering now that that wedge has been driven between you and your insurance company, what do you say? You tell your insurance company, 'Let's settle this case immediately, whether it's frivolous or not, let's get it out of the way. I cannot run the risk of being subjected to a multi-million dollar award for punitive damages.' . . . so the cases are settled in such a way that is maybe too rapidly – in other words, you don't owe the case, but you settle it because you don't want to be sued for punitive damages because this becomes a public record and if you're in business you're going to go out and seek a loan, you're going to have some problems."

Mr. DeLanoy asserted that a good trial or defense attorney could readily determine from compilations of

jury awards, what could reasonably be expected in any given case involving punitive damages. With precedence to proceed on, that attorney could then go to the defendant's attorney with a predetermined amount for settlement, and 97 percent of all punitive damages cases were, indeed, settled out of court. If A.B. 307 was passed the "two times compensatory damages" provision would allow a way to negotiate between both the plaintiff and defense counsel, thereby avoiding litigation.

Mr. DeLanoy continued with development of customary court process. He also suggested the committee consider the area of punitive damages being bifurcated, or separated from the regular portion of the case. While he thought that juries did the right thing in 85 to 90 percent of the cases, he also saw the telling potential for "deep pocket" influence. Separating the issues had worked well in their practice in southern Nevada, Mr. DeLanoy concluded.

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Testimony of Judge David Gamble, District Judge, Douglas County

Opposing both A.B. 307 and A.B. 436, Judge Gamble said he thought there were problems with both bills. The "clear and convincing evidence test" was not a

problem. He acknowledged it was not an easy rule to apply, but it was used often enough that judges were comfortable using it. Judge Gamble discussed the various provisions of each bill and explained his objection to each. One provision which drew particular attention was the concept of "notice pleading." This, Judge Gamble thought, gave plaintiff's lawyers the advantage of using it whenever they chose to. He continued saying, " . . . anytime you impose an absolute limit on anything within the law, what you're doing is reducing the flexibility that's available to the courts and to juries. I have found, in my law practice and as a judge especially, that juries are uniquely capable of cutting through the falsity, and arriving at those nuggets of truth. . . ." Most importantly, Judge Gamble asked that the committees not do anything which would inhibit the court's flexibility. He also asked the committees to carefully consider the factors contained in *Ace Trucking, supra,* and *Ainsworth, supra,* and compare how the end results would apply. In one case the Supreme Court protected, as best they could within the law, the smaller employers (defendants) and yet applied an appropriate punishing blow to a large defendant who would not feel the blow if the blow was simply twice times compensatory damages.

In response to Mr. Triggs' question regarding bifurcation, Judge Gamble said he thought the concept of bifurcation would operate in these types of situations, although there were positive as well as negative aspects to the concept. The negative aspect would

involve the time delay involved in trying cases, although there were so few it was not a weighty concern. The positive aspect, he thought, was it would provide a "cooling off" period for a jury. Judge Gamble disagreed with previous testimony from industry that punitive damages should be public policy codified by legislative statute. He thought public policy embodied a much broader definition than simply something created by the legislature. The people of the state of Nevada, he said, had the power to create public policy by referendum, votes on bond issues, etc. This subject was discussed by Mr. Gaston and Judge Gamble.

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The Chairman commented this committee participated in joint hearings regarding the concept of punitive damages. She stated the purpose of today's hearing is to focus on *A.B. 307* as it has been amended by the Assembly. In speaking for the members of the committee in wanting to know how they went from a joint hearing to what is here in *A.B. 307,* she advised this hearing is to provide an explanation and defense of those positions taken. She provided the committee with a copy of the Constitutional opinion prepared by Legislative Counsel dated May 1, 1989, which is attached as *Exhibit G.*

Testimony of Mike Sloan, Vice President and General Counsel, Circus Circus Enterprises, Inc.

Mr. Sloan reminded the committee he spoke on behalf of the Nevada Resort Association and the Gaming Industry Association to voice support for the concept of limitations on punitive damages. He advised he would briefly go through the bill to point out the changes that have been made or the rationales for the particular amendment.

> In section 2, at the bottom of page 1, lines 23 and 24, *A.B.* 307 changes the standard of proof from a preponderance of the evidence to clear and convincing evidence, you will recall this was discussed at the joint hearing and there seemed to be general acceptance of the concept that if you are, in fact, going to impose punitive damages under the existing statutory criteria, that at least the evidence supporting that finding should be by the higher standard of clear and convincing evidence. . . . The next change is in lines 6 through 9 [page 2], and there we have the cap that has been agreed on in the compromise of [A.B.] 307. The cap has two concepts, one of which was discussed at the joint hearing and one of which was not. As you recall, the testimony was that there are a number of states that had put some cap, which was based on a relationship between the amount of compensatory damages and the punitive damages. In this instance, the bill does retain a cap of three times the compensatory damages. It also introduces an additional

concept which basically provides a floor for punitive damages. The concern that motivated this particular change was the possibility that a case would involve conduct which would warrant punitive damages, but would not involve significant compensatory damages. And so it was the thinking of the Chairman of the Assembly committee,

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and I think acquiesced by both the trial lawyers and . . . the gaming industry, that this particular provision would ensure that there would be punitive damages in a case where the compensatory damages might be as little as $5 or $5,000 or $10,000. Yet if the conduct which had given rise to the injury, even though the injury was slight, if the conduct was outrageous that the system would contemplate allowing punishment of the greater amount than the ratio of 3 to 1. So that is the section B, on [lines] 8 and 9, providing the $300,000. Lines 10 through 22 are, exceptions to the general cap and these will be addressed in detail by trial lawyers as to the justification and rationale for treating some actions differently than the general rule, which would be limited to the caps. The next area is lines 22 through 34. This again was discussed at the joint hearing, [which] was the issue of bifurcation. The question

as to whether or not it made sense to first determine the liability of the defendant before introducing the evidence as to the defendant's wealth. There seemed to be general acceptance, at least not violent opposition from the opponents of the bill, to this concept. It was something we felt made a lot of sense. . . . The thinking is if you get into discussions of the net worth or wealth of the defendant before you have concluded a finding as to the actual liability of the defendant, sometimes juries can be persuaded that the amount of money that the defendant has is so great in relationship to the wrong that was done that perhaps it colors their judgment on the issue of liability. And so it was thought that the bifurcation would ensure fairness to the defendant, as well as to the plaintiff. The other section that has drawn some discussion and which was not discussed at length at the joint hearing is section 4, which is the transitional rule. Section 4 on page 3 makes it clear that the provisions of this act do not apply to any cause of action where the trier of fact has made a decision to award exemplary or punitive damages before the effective date of this act. Essentially what this does is, say that if a verdict has been rendered . . . then this law will have no application. But to the extent that there are causes of action or instances which have occurred prior to the passage of this bill, the proponents and opponents of the bill have concluded that the fairest and best way to

resolve the application of this policy statement of the Nevada

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