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43 WM 2021

IN THE SUPREME COURT OF PENNSYLVANIA

THE BERT COMPANY d/b/a NORTHWEST INSURANCE SERVICES,	:	No. 43 WM 2021
	:	
Plaintiffs-Respondents,	:	No. _____ WAL 2021
	:	
v.	:	
	:	
MATTHEW TURK, FIRST NATIONAL INSURANCE AGENCY, LLC, FIRST NATIONAL BANK, AND FNB CORPORATION	:	
	:	
Defendants-Petitioners.	:	

ORDER

AND NOW, on this _____ day of _____, 2021, upon consideration of Pennsylvania Coalition for Civil Justice Reform's Application for Leave to File *Amicus Curiae* Brief in Support of Defendants-Appellants' Petition for Allowance of Appeal, and any response thereto, it is hereby ORDERED that the Application is GRANTED. The Prothonotary shall file the proposed Brief attached as "Exhibit A" to the Amicus's Application.

BY THE COURT:

_____, J.

IN THE SUPREME COURT OF PENNSYLVANIA

43 WM 2021; _____ WAL 2021

THE BERT COMPANY D/B/A NORTHWEST INSURANCE SERVICES,

Plaintiffs-Respondents,

v.

MATTHEW TURK, WILLIAM COLLINS, JAMIE HEYNES, DAVID MCDONNELL, FIRST NATIONAL INSURANCE AGENCY, LLC, FIRST NATIONAL BANK, AND FNB CORPORATION,

Defendants-Petitioners.

Application for Leave to File *Amicus Curiae* Brief in Support of Defendants-Appellants' Petition for Allowance of Appeal

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Todd M. Pappasergi
Pa. I.D. No. 209389
David C. Weber
Pa. I.D. No. 311767
Lauren L. Mathews
Pa. I.D. No. 322469

THE LYNCH LAW GROUP, LLC
375 Southpointe Blvd., Suite 3
Canonsburg, PA 15317

Tel: (724) 776-8000
Fax: (724) 776-8001

tpappasergi@lynchlaw-group.com
dweber@lynchlaw-group.com
lmathews@lynchlaw-group.com

IN THE SUPREME COURT OF PENNSYLVANIA

THE BERT COMPANY d/b/a NORTHWEST INSURANCE SERVICES,	:	No. 43 WM 2021
	:	No. _____ WAL 2021
Plaintiffs-Respondents,	:	
v.	:	
MATTHEW TURK, FIRST NATIONAL INSURANCE AGENCY, LLC, FIRST NATIONAL BANK, AND FNB CORPORATION	:	
Defendants-Petitioners.	:	

APPLICATION FOR LEAVE TO FILE *AMICUS CURIAE* BRIEF IN SUPPORT OF DEFENDANTS-APPELLANTS' PETITION FOR ALLOWANCE OF APPEAL

Pursuant to Pennsylvania Rule of Civil Procedure 531, *Amicus Curiae* Pennsylvania Coalition for Civil Justice Reform files the within Application for Leave to File *Amicus Curiae* Brief in Support of Defendants-Appellants' Petition for Allowance of Appeal and, in support thereof, avers as follows:

1. The Pennsylvania Coalition for Civil Justice Reform ("PCCJR") represents the interests of businesses, professional and trade associations, nonprofit entities, taxpayers, and other perspectives.

2. On or about May 5, 2021, the Superior Court issued an opinion, affirming the April 29, 2019 Order of the Court of Common Pleas of Warren County which denied Defendants/Appellants' Motion for Post-Trial Relief.

3. An *amicus curiae* brief may be filed: "(i) during merits briefing; (ii) in support of or against a petition for allowance of appeal, if the *amicus curiae* participated in the underlying proceeding as to which the petition for allowance of appeal seeks review; or (iii) by leave of court." Pa.R.A.P. 531(b)(1).

4. Pursuant to Rule 531(b)(1)(iii), PCCJR respectfully requests leave to file an *amicus curiae* brief in support of the Petition for Allocatur.

5. PCCJR is a statewide, bipartisan, nonprofit organization representing businesses, professional and trade associations, nonprofit entities, taxpayers, and other perspectives.

6. PCCJR advocates for improvement of the civil justice system to the benefit of individuals and businesses, alike.

7. In pursuit of this objective, PCCJR files the within Application.

8. For the foregoing reasons, PCCJR respectfully seeks leave of Court to file, as amicus curiae, the proposed brief attached as "**Exhibit A**."

9. On or about August 13, 2021, the undersigned counsel for PCCJR contacted appellate counsel for the parties to determine whether the parties would concur with the within Application.

10. Counsel for Defendants-Appellants indicated that Defendants-Appellants concurred in the Application.

11. PCCJR informed Counsel for Plaintiffs-Appellees that if Plaintiffs-Appellees did not affirmatively state that they concur with the PCCJR's request for leave, that PCCJR would presume that Plaintiffs-Appellees do not concur.

12. As of the time of filing, PCCJR has not heard from any Counsel for Plaintiffs' Appellees, and as such, PCCJR presumes that Plaintiffs-Appellees do not concur with PCCJR's request for leave.

WHEREFORE, the Pennsylvania Coalition for Civil Justice Reform respectfully requests that this Court grant the within Application for Leave to File Amicus Curiae Brief in Support of Defendants-Appellants' Petition for Allowance of Appeal, and enter the Order submitted herewith.

Date: August 13, 2021

Respectfully Submitted,

/s/ Todd M. Pappasergi

Todd M. Pappasergi
Pa. I.D. No. 209389
David C. Weber
Pa. I.D. No. 311767
Lauren L. Mathews
Pa. I.D. No. 322469
THE LYNCH LAW GROUP, LLC
375 Southpointe Blvd., Suite 3
Canonsburg, PA 15317
Tel: (724) 776-8000
Fax: (724) 776-8001

CERTIFICATE OF SERVICE

I hereby certify that the foregoing **Application for Leave to File Amicus Curiae Brief in Support of Defendants-Appellants' Petition for Allowance of Appeal** was served via email and First-Class Mail this 13th day of August, 2021, upon the following party of record:

Scott D. Cessar, Esq.
F. Timothy Grieco, Esq.
Casey A. Coyle, Esq.
Eckert Seamans Cherin & Mellott, LLC
U.S. Steel Tower, 44th Floor 600 Grant Street
Pittsburgh, Pennsylvania 15219
(*Counsel for Matthew Turk, First National Insurance Agency, LLC, First National Bank, and FNB Corporation*)

Kenneth W. Africano, Esq.
Daniel J. Altieri, Esq.
Harter Secrest & Emery LLP
50 Fountain Plaza, Suite 1000
Buffalo, NY 14202-2293
kafricano@hselaw.com
daltieri@hselaw.com
(*Counsel for The Bert Company, d/b/a Northwest Insurance Services, Inc.*)

Stephen J. Del Sole, Esq.
Zachary N. Gordon, Esq.
Del Sole Cavanaugh Stroyd LLC
Three PPG Place, Suite 600
Pittsburgh, PA 15222
sdelsole@dscslaw.com
zgordon@dscslaw.com
(*Counsel for The Bert Company, d/b/a Northwest Insurance Services, Inc.*)

Timothy R. Bevevino
Andmoragan Cody Thomas, Esq.
Swanson, Bevevino & Sharp, P.C.
311 Market St
Warren, PA 16365-2373
trbevevino@sbglawoffice.com
acthomas@sbglawoffice.com
(*Counsel for The Bert Company, d/b/a Northwest Insurance Services, Inc.*)

Date: August 13, 2021

/s/ Todd M. Pappasergi
Todd M. Pappasergi
Pa.I.D. No. 209389

CERTIFICATE OF COMPLIANCE

I certify that this filing complies with the provision of the *Public Access Policy of the Unified Judicial System of Pennsylvania: Case Records of the Appellate and Trial Courts* that require filing confidential information and documents differently than non-confidential information and documents.

Submitted by: The Lynch Law Group, LLC

Signature: */s/ Todd M. Pappasergi*

Printed Name: Todd M. Pappasergi, Esquire

Attorney No.: 209389

Phone No.: 724-776-8000

EXHIBIT

A

IN THE SUPREME COURT OF PENNSYLVANIA
43 WM 2021; _____ WAL 2021

THE BERT COMPANY D/B/A NORTHWEST INSURANCE SERVICES,

Plaintiffs-Respondents,

v.

MATTHEW TURK, WILLIAM COLLINS, JAMIE HEYNES, DAVID MCDONNELL, FIRST NATIONAL INSURANCE AGENCY, LLC, FIRST NATIONAL BANK, AND FNB CORPORATION,

Defendants-Petitioners.

BRIEF OF *AMICUS CURIAE* PENNSYLVANIA COALITION FOR CIVIL JUSTICE REFORM IN SUPPORT OF DEFENDANTS-PETITIONERS' PETITION FOR ALLOWANCE OF APPEAL

On Petition for Allowance of Appeal from the May 5, 2021 Opinion of the Superior Court of Pennsylvania at Docket Nos. 817 WDA 2019 and 975 WDA 2019, Affirming the May 29, 2019 Judgment of the Court of Common Pleas of 37th Judicial District, Warren County, Pennsylvania, Docket No. AD-260-2017

Todd M. Pappasergi
Pa. I.D. No. 209389
David C. Weber
Pa. I.D. No. 311767
Lauren L. Mathews
Pa. I.D. No. 322469
THE LYNCH LAW GROUP, LLC
375 Southpointe Blvd., Suite 3
Canonsburg, PA 15317

Counsel for Amicus Curiae Pennsylvania Coalition for Civil Justice Reform

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STATEMENT OF INTEREST OF *AMICUS CURIAE*

The Pennsylvania Coalition for Civil Justice Reform ("PCCJR") is a statewide, bipartisan, nonprofit organization representing businesses, professional and trade associations, nonprofit entities, taxpayers, and other perspectives. PCCJR advocates for reform in the legislature and fairness in the courts in its pursuit of improving Pennsylvania's civil justice system. PCCJR is further dedicated to being a voice for individuals and businesses alike, both of which deserve a fair and efficient justice system that evenly applies the laws to their mutual benefit. In addition, PCCJR pursues these objectives with the ultimate goal of preventing frivolity in the court system that causes individuals and businesses to incur substantial costs, thereby promoting growth in the economy and fair competition among businesses, as well as growth of the job market.

Pursuant to Pa.R.A.P. 531(b)(2), PCCJR files the instant *Amicus Curiae* Brief in its own right and on behalf of its respective members. PCCJR states that no person, other than respective members, and their respective counsel, paid for or authored this brief, in whole or in part.

INTRODUCTION

Cases litigated through the Commonwealth's civil justice system often have an impact that reaches far beyond the individuals involved in any single case. The issues decided by the Superior Court panel in the instant case are no exception and, in fact, are set to have a lasting, regrettable impact on individuals and businesses alike.

First, the holdings of both courts below that a "lift-out," in which one competitor hires certain key employees and support personnel from another competitor in a similar industry to gain competitive advantage, is *per se* unfair competition fail to not only apply long-standing Pennsylvania precedent, but further fail to reconcile these decisions with fundamental concepts of Pennsylvania public policy. This new *per se* rule developed by the lower courts also completely ignores the overriding interests of Pennsylvania individuals and businesses to engage in a free enterprise market where competition is encouraged.

As demonstrated herein, Pennsylvania jurisprudence stands for the proposition that unfair competition arises out of tortious conduct. In this case, the jury determined that the First National Petitioners did not engage in tortious activity, thereby rendering the unfair competition claim untenable. Rather than adhere to Pennsylvania precedent, the lower courts proceeded to create this new *per se* rule, and thus a new tort, for which there exists no support under Pennsylvania law.

Further, the instant decision by the Superior Court panel jeopardizes consistency in the civil justice system with regard to the constitutionality of punitive damage claims. Unlike other states, Pennsylvania has yet to adopt any legislation that conceptualizes a maximum ratio for compensatory to punitive damages, or that places a cap on punitive damage awards. As a result, defendants in civil cases are left without an adequate understanding or notice as to the punishment that may be imposed by the Commonwealth, and there remain inconsistencies with regard to judicial interpretation and affirmation of punitive damage awards. With these concepts in mind, and in an effort to address these inconsistencies, the Supreme Court of the United States developed certain due process guideposts through which all punitive awards must pass in order to be constitutionally reasonable and appropriate. Despite the creation of these guideposts by the Supreme Court, the Superior Court panel's decision departs significantly from what is required under the jurisprudence of the Supreme Court.

Finally, the Panel should have applied the gist-of-the-action doctrine to preclude Plaintiffs' tort claims and to prevent Plaintiffs from pursuing duplicative claims and retaining duplicative damage awards. Even assuming *arguendo* that the Panel properly determined that the doctrine did not apply, this holding must not be considered precedential and must only be applicable to the specific and unique facts of this case.

Accordingly, PCCJR respectfully urges this Honorable Court to grant the Petition for Allowance of Appeal filed by Defendants-Petitioners Matthew Turk, First National Insurance Agency, LLC, First National Bank, and FNB Corporation.

GROUNDS FOR GRANTING ALLOWANCE OF APPEAL

Pursuant to Rule 1114 of the Pennsylvania Rules of Appellate Procedure, there are six (6) standards upon which the Supreme Court of Pennsylvania may grant a request for review of a final order of the Superior Court. Pa.R.A.P. 1114(b). As demonstrated more fully herein, the decision issued by the Superior Court panel conflicts with decisions of the intermediate appellate courts, this Honorable Court, and the United States Supreme Court, while also presenting an issue of first impression, all of which further raise questions that are of "such substantial public importance as to require prompt and definitive resolution by the Pennsylvania Supreme Court." Pa.R.A.P. 1114(b)(2)-(4).

First, the Panel's affirmation that the punitive damages awarded to Plaintiffs were constitutionally permissible conflicts with the holdings by the Supreme Court of the United States in *State Farm Mut. Automobile Ins. Co. v. Campbell*, 538 U.S. 408 (2003) and *BMW of North America, Inc. v. Gore*, 517 U.S. 559 (1996). As such, the Panel's decision falls under Rule 1114(b)(2) and Petitioners' request for Allowance of Appeal should be granted.

In addition, the Panel's decision presents an issue of first impression as the Panel's holding as it relates to unfair competition has resulted in the creation of a new common law rule that a "lift-out" is *per se* unfair competition. Therefore,

because the question presented is one of first impression, Petitioner's Petition for Allowance of Appeal should be granted.

Finally, the Panel's holding relative to (1) the constitutionality of punitive damages; (2) the viability of an unfair competition claim when there exists no underlying tort; (3) the Panel's new common law rule that a "lift-out" is *per se* unfair competition; and (4) the inapplicability of the gist-of-the-action doctrine each raise issues that are of substantial importance to the public, and which necessitate resolution by the Pennsylvania Supreme Court.

PCCJR adopts the statement of facts provided in Petitioners' Petition for Allowance of Appeal in full as its own.

I. The Superior Court's Conclusion that a "Lift-Out" Constitutes Unfair Competition Violates Already Existing Precedent of Pennsylvania Jurisprudence

The United States and this Commonwealth strongly support the policy of free competition. *Sun Drug Co., Inc. v. W. Penn Realty Co.*, 268 A.2d 781, 784 (Pa. 1970) (J. Cohen dissenting). "In *Sears, Roebuck and Co. v. Stiffel*, 376 U.S. 225 (1964) and *Compco Corp. v. Day-Brite Lighting, Inc.*, 376 U.S. 234 (1964), the Supreme Court emphasized the great public interest in having access to all goods. It stated that restraints on this access were narrowly drawn and even then existed only because of important competing policy consideration (e.g., encouragement of invention). Even though the specific subjects of those cases were patent law and

unfair competition, what is important in this context is the emphasis on unfettered competition as the general rule with restraints being narrowly construed and existing only to promote specific policy objectives." *Id.* "In *Gulf Oil Corporation v. Mays*, 164 A. 2d 656 (Pa. 1960), we referred to 'our basic anti-monopoly philosophy of unfettered competition in the market of goods and services.'" *Id.*

The right to open competition long recognized by the Supreme Court of the United States and this Honorable Court extends beyond goods and services and into labor. A prohibition on the common practice of "lift-outs" not only stifles competition by businesses, but can also artificially depress wage growth and limit the movement of labor by essentially binding employees to their employer for life if they wish to stay in the same industry. The failure of the trial court to recognize this overriding concept of both a free enterprise market, as well as Pennsylvania law and the Superior Court's marked refusal to find error in the trial court's reasoning not on the merits, but rather on a tenuous finding of waiver (in a published, precedential opinion, no less), has the potential of throwing the Pennsylvania competitive marketplace into chaos.[1] Indeed, the decision of the courts below rests solely on the

[1] The PCCJR of course recognizes that, for this Honorable Court to even consider granting allowance of appeal on this issue, the Superior Court's threshold, yet erroneous, finding of waiver must first be overcome. PCCJR joins Petitioners' arguments in the Petition for Allowance of Appeal in this regard, and accordingly will concentrate on the public policy and legal aspects of the fair competition that occurred in this matter. It bears repeating, however, that the trial court did not make any such finding of waiver in either its opinion on post-trial motions or pursuant to

concept that the "lift-out" of four key employees from Northwest Insurance ("NWI") to First National Insurance Agency ("FNIA") is, *per se,* actionable and constitutes unfair competition. The problem, of course, is that this holding is out of step with long-standing Pennsylvania jurisprudence. To that end, and respectfully, this Honorable Court should accept review of this case, as this matter goes well beyond mere error review, and squarely into the confines of correcting a conflict in and with Pennsylvania law.

Recently, the U.S. District Court for the Western District of Pennsylvania cogently summarized the applicable standards for an unfair competition claim under Pennsylvania common law:

> Pennsylvania courts have recognized a cause of action for the common law tort of unfair competition where there is evidence of, among other things, trademark, trade name, and patent rights infringement, misrepresentation, tortious interference with contract, improper inducement of another's employees, and unlawful use of confidential information.

Peek v. Whittaker, No. 2:13-cv-01188, 2014 U.S. Dist. LEXIS 70461, at *37 (W.D. Pa. May 22, 2014). Competition itself is not a tort or otherwise actionable misconduct. Instead, unfair competition "contextually is limited to claims designed

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Rule 1925. Instead, the trial court properly analyzed Petitioners' allegation of error as a request to set aside the verdict (*i.e.,* as a claim that insufficient evidence existed for the jury's verdict) and rendered its decision based on the same. The Superior Court, inconceivably, then refused to review this important and compelling issue of statewide importance by finding waiver, *on a cold record,* and despite Petitioners' appropriate preservation of the issue at all turns.

to protect a business from another's misappropriation of its business organization or its expenditure of labor, skill or money, *i.e.*, injury to reputation, product, manner of doing business, identification and so forth." *USX Corp. v. Adriatic Ins. Co.*, 99 F.Supp.2d 593, 620 (W.D. Pa. 2000), (citing *Granite State Inc. Co. v. Aamco Transmissions Inc.*, 57 F.3d 316, 319-20 (3d Cir. 1995)) (applying Pennsylvania common law). The Superior Court of Pennsylvania has earlier held that "[a] claim of unfair competition encompasses trademark infringement, but also includes a broader range of unfair practices, which may generally be described as a misappropriation of the skill, expenditures and labor of another." *Pa. State Univ. v. Univ. Orthopedics*, 706 A.2d 863, 867 (Pa. Super. Ct. 1998) (citing *Murphy Door Bed Co. v. Interior Sleep Systems*, 874 F.2d 95, 102 (2d Cir. 1989)). Not all "lift-outs" misappropriate the skills, expenditures, or labor of another competitor. However, the Superior Court's decision in the instant matter essentially creates a bright-line rule that all "lift-outs" are *per se* unfair competition dramatically decreases the competitive landscape for labor. Indeed, a bright-line rule essentially makes it impossible for certain skilled employees to leave for more attractive positions and to bring their support team with them. Such an anti-competitive rule flies in the face of the policy of Pennsylvania and the United States.

However, assumedly, the courts below see the "lift-out" of the NWA employees to FNIA as falling into an unfair competition context. In its opinion

denying Petitioners' post-trial motions, the trial court stated that the "lift-out" was designed as a "'systematic inducing of employees to leave their present employment and take work to another' in order to 'cripple and destroy an integral part'" of NWA. Tr. Ct. Post-Trial Motion Op. at 16 (quoting *Albee Homes, Inc. v. Caddie Homes, Inc.* 207 A.2d 768, 771 (Pa. 1965)). The trial court did not cite to any other case within the whole of Pennsylvania jurisprudence to support the proposition that this "lift-out" constituted a tort under the common law. The Superior Court then gave its *imprimatur* on this holding in its published, precedential opinion.

Therein lies the problem and why this case presents a compelling issue for this Honorable Court to examine. The *sole* support for the Superior Court's decision—the *Albee Homes* case—arose in a meaningfully different legal and factual posture. Specifically, the plaintiffs in that case sought injunctive relief to prohibit the defendant from breaching employment contracts to induce employees to leave the employ of the plaintiff and work instead for the defendant. Here, by contrast, the jury *specifically found that the First National Petitioners did not tortiously interfere with any employment contracts, non-compete agreements, or the like.* Accordingly, all we are left with is a new rule of law that "lift-outs" constitute unfair competition *per se*, and there is simply no support for that in Pennsylvania jurisprudence.

Such a rule will not only unfairly and inappropriately handcuff businesses and

health systems throughout the Commonwealth (including those who are members of the PCCJR), from attempting to expand their businesses, employee bases, and portfolios, but it will also have the added and unintended consequence of creating a tort where none exists. Indeed, the courts below have created a *per se* rule that a "lift-out" constitutes unfair competition pursuant to *Albee Homes*, which is antithetical to all other aspects of Pennsylvania common law. Such a rule will not further the interests of Pennsylvania's capitalistic marketplace, but will instead stifle business competition and the ability for at-will employees (absent valid and binding covenants not to compete) to obtain new and employment superior opportunities.[2]

For these reasons, PCCJR respectfully requests that this Honorable Court grant review of this case and issue, as (1) the decisions in the courts below conflict with already controlling provisions of Pennsylvania jurisprudence, and (2) present questions of substantial and statewide importance. Pa.R.A.P. 1114(b).

II. The Panel's Novel Interpretation of Calculating Punitive Damages is an Issue of First Impression that also Raises a Question of Substantial Public Importance

[2] Adding to this idea, many states, Pennsylvania included, either disfavor or outright prohibit post-employment restrictive covenants. Nevertheless, in limited contexts, covenants not to compete or not to solicit serve useful purposes when tailored correctly and within the confines of fairness. The fact, however, that these contractual provisions must be narrowly tailored and supported by sufficient consideration only supports the conclusion that this Honorable Court should examine the issues presented by this case, to wit: absent a competing business unlawfully inducing an employee with a restrictive covenant to break that covenant, the competing business persuading the employee to leave his current employment for new employment should not, and cannot, be declared unlawful.

Consistency in the justice system is vital to ensuring an even and fair application of the law, including the reasonableness of punitive damage awards. As the law stands today, there exists no bright-line rule for assessing the reasonableness, and thus the constitutionality, of punitive damage awards. As such, the review and analysis of punitive damages presents a daunting challenge to any court and its ability to promote consistency in litigation. As a result of the lack of uniformity among punitive damage awards, the Supreme Court of the United States has addressed constitutional challenges that arise when an award violates due process. The Supreme Court, acknowledging the inconsistencies that plague punitive damage awards and the need to provide instruction on evaluating the constitutionality of these awards, developed certain due process "guideposts" through which every punitive damage award must pass. *Exxon Shipping Co. v. Baker*, 554 U.S. 471, 501 (2008), (citing *State Farm Mut. Automobile Ins. Co. v. Campbell*, 538 U.S. 408 (2003); *BMW of North America, Inc. v. Gore*, 517 U.S. 559 (1996)).

The Superior Court's decision below has, in essence, supplanted the due process guideposts instituted by the Supreme Court of the United States with its own formulaic equation to determine whether the punitive damages award in this case was constitutionally sound. As such, this Honorable Court should, respectfully, exercise its power to review the Superior Court's decision pursuant to Pa.R.A.P. 1114(b)(3) and (b)(4).

The due process guideposts imposed by the Supreme Court in *BMW*, and further analyzed in *State Farm*, were developed to strike a balance between the need to avoid arbitrary awards while also allowing states to further legitimate interests of punishing unlawful conduct and deterring said conduct from occurring in the future. *Philip Morris USA v. Williams*, 549 U.S. 346, 352 (2007). These guideposts also sought to address concerns raised by the Supreme Court relative to the inconsistencies that arise from punitive damage awards:

> Unless a State insists upon proper standards that will cabin the jury's discretionary authority, its punitive damages system may deprive a defendant of "fair notice . . .of the severity of the penalty that a State may impose,"; it may threaten "arbitrary punishments," i.e., punishments that reflect not an "application of law" but "a decisionmaker's caprice,"; and, where the amounts are sufficiently large, it may impose one State's (or the jury's) "policy choice," [. . .] upon "neighboring states" with different public policies.

Id. at 352-53 (internal citations omitted).

In *BMW*, the Supreme Court granted *certiorari* in an effort to "help illuminate 'the character of the standard that will identify unconstitutionally excessive awards' of punitive damages." 517 U.S. at 575. "This constitutional concern [regarding excessive punitive damage awards], itself harkening back to the *Magna Carta*, arises out of the basic unfairness of depriving citizens of life, liberty, or property, through the application, not of law and legal processes, but of arbitration coercion." *Id.* at 587 (Breyer, J., concurring), (citing *Daniels v. Williams*, 474 U.S. 327, 331 (1986);

Dent v. West Virginia, 129 U.S. 144 (1889)).

Under *BMW*, the Supreme Court analyzed whether an award of punitive damages was constitutionally appropriate through the lens of the following "guideposts": (1) the degree of reprehensibility of the conduct in question; (2) the disparity between plaintiff's actual or potential harm and the amount of the punitive damages award; and (3) the difference between the jury's punitive damages award and the civil penalties authorized or imposed in comparable cases. *Id.* at 575. As a result of its analysis, the Supreme Court concluded that the punitive damages awarded against BMW were unconstitutional, as its analysis revealed that BMW was not provided adequate notice of the sanction that could be imposed by the State of Alabama for failing to adhere to the statute at issue. *Id.* at 574.

Nearly seven years later, the Supreme Court again addressed what measure of punitive damages a State may impose against a defendant in a civil case in the *State Farm v. Campbell* decision. While punitive damages are meant to serve the same purpose as criminal penalties, the Supreme Court noted that defendants in civil cases are not afforded the same protections applicable to defendants in criminal proceedings; "[t]his increases our concerns over the imprecise manner in which punitive damages systems are administered." *Id.* at 417. In an effort to promote consistency for punitive damage awards, the Supreme Court held that "in practice, few awards exceeding a single-digit ratio between punitive and compensatory

damages, to a significant degree, will satisfy due process" and "[s]ingle-digit multipliers are more likely to compute with due process, while still achieving the State's goals of deterrence and retribution [.]" *Id*. at 425.

State regulation of punitive damages varies significantly, with some states, like Virginia, adopting statutory caps on punitive damages, while others, like Ohio, impose maximum ratios of punitive to compensatory damages, or a combination of both, like Alaska. *Exxon Shipping,* 554 U.S. at 495-96. For those states that have adopted a specific, acceptable ratio of punitive to compensatory damages, the multipliers range from 5:1 to 1:1. *Id*. These statutorily adopted ratios comport with the Supreme Court's pronouncement that punitive damage awards amounting to a single-digit multipliers likely comply with due process, and are therefore fair and reasonable. *State Farm,* 538 U.S. at 425.

Contrary to these already existing paradigms, the Superior Court instantly decided that an almost 11:1 ratio was constitutionally within the bounds of the guideposts, and did so in a way that considers a single compensatory damages award against multiple, joint and several defendants to drive the ratio down artificially to fit within the guideposts. *See 5* BUS. & COM. LITIG. FED. CTS. § 48:54 (4th ed. 2020) (footnote omitted); *see also, e.g.*, *Advocat, Inc. v. Sauer*, 111 S.W.3d 346 (Ark. 2003) (dividing total of punitive awards against three related companies by compensatory award to calculate ratio, where compensatory award was joint and

several). For the PCCJR's business and health care members, the Superior Court's holding in this regard is extremely worrisome because the untenable possibility now exists that potential punitive liability in future cases may be tied to conduct and compensatory awards that are not related to that specific entity.

Given this, and in order to ensure to have consistency in the justice system for all individuals, businesses, health care entities, and other going concerns within the Commonwealth, this Court should exercise its power to review the novel decision of the Superior Court as it relates to the constitutionality of punitive damage awards.

For the foregoing reasons, the PCCJR respectfully requests that this Honorable Court grant review of this case and issue to promote consistency of punitive damage awards in the civil justice system and address this issue of first impression as it relates to the constitutionality of punitive damage awards in the Commonwealth of Pennsylvania through the due process guideposts instituted by the Supreme Court of the United States.

III. The Panel's Finding Relative to the Gist of the Action Doctrine Presents a Question of Substantial Public Importance

The Superior Court has "taken varied approaches" on determining the gist-of-the-action doctrine bars a claim sounding in tort. *Bruno v. Erie Insurance Co.*, 106 A.3d 48, 67 (Pa. 2014). The purpose of the gist-of-the-action doctrine is to bar tort claims under four (4) situations: "(1) where the tort claim 'aris[es] solely from a contract between the parties'; (2) where 'the duties allegedly breached were created

and grounded in the contract itself'; (3) where 'the liability stems from a contract'; or (4) where the tort claim 'essentially duplicates a breach of contract claim or the success of which is wholly dependent on the terms of a contract.'" *Id*. (quoting *eToll, Inc. v. Elias/Savion Advertising, Inc.*, 811 A.2d 10 (Pa. Super. Ct. 2002)).

Contrary to the Panel's decision below, the facts in this case support a finding that at least one of the four situations described in *eToll* is applicable to the case at bar, such that the gist-of-the-action doctrine would have barred Plaintiffs' tort claims. It is our position that the Panel's decision is contradictory to the purpose of the doctrine itself, and offers yet another "varied approach" for determining whether the doctrine is applicable.

To the extent it is determined that the facts support the Panel's decision, which PCCJR denies, the Panel's holding must have a very limited application to the specific facts of this case, and must not serve as a blanket ruling that the gist of the action doctrine is not available in other breach of contract cases.

CONCLUSION

For the foregoing reasons, *Amicus Curiae* Pennsylvania Coalition for Civil Justice Reform respectfully requests this Honorable Court to grant the Petition for Allowance of Appeal filed by Defendants-Petitioners, pursuant to Pa.R.A.P. 1114(b)(2)-(4).

Date: August 13, 2021

Respectfully Submitted,

/s/ Todd M. Pappasergi
Todd M. Pappasergi
Pa. I.D. No. 209389
David C. Weber
Pa. I.D. No. 311767
Lauren L. Mathews
Pa. I.D. No. 322469

THE LYNCH LAW GROUP, LLC
375 Southpointe Blvd., Suite 3
Canonsburg, PA 15317

Tel: (724) 776-8000
Fax: (724) 776-8001

tpappasergi@lynchlaw-group.com
dweber@lynchlaw-group.com
lmathews@lynchlaw-group.com

CERTIFICATE OF COMPLIANCE

I hereby certify that the Brief of *Amicus Curiae* PCCJR complies with the word-count limit set forth in Rule 531(b)(3). Based on the word-count function of the word processing system used to prepare the Brief, the substantive portion of the Brief contains 3,890 words.

Date: August 13, 2021

/s/ Todd M. Pappasergi
Todd M. Pappasergi

CERTIFICATE OF SERVICE

I hereby certify that the foregoing **Brief of *Amicus Curiae* Pennsylvania Coalition for Civil Justice Reform in Support of Defendants-Appellants' Petition for Allocatur** was served via email and First-Class Mail this 13th day of August, 2021, upon the following party of record:

Scott D. Cessar, Esq.
F. Timothy Grieco, Esq.
Casey A. Coyle, Esq.
Eckert Seamans Cherin & Mellott, LLC
U.S. Steel Tower, 44th Floor 600 Grant Street
Pittsburgh, Pennsylvania 15219
(*Counsel for Matthew Turk, First National Insurance Agency, LLC, First National Bank, and FNB Corporation*)

Kenneth W. Africano, Esq.
Daniel J. Altieri, Esq.
Harter Secrest & Emery LLP
50 Fountain Plaza, Suite 1000
Buffalo, NY 14202-2293
kafricano@hselaw.com
daltieri@hselaw.com
(*Counsel for The Bert Company, d/b/a Northwest Insurance Services, Inc.*)

Stephen J. Del Sole, Esq.
Zachary N. Gordon, Esq.
Del Sole Cavanaugh Stroyd LLC
Three PPG Place, Suite 600
Pittsburgh, PA 15222
sdelsole@dscslaw.com
zgordon@dscslaw.com
(*Counsel for The Bert Company, d/b/a Northwest Insurance Services, Inc.*)

Timothy R. Bevevino
Andmoragan Cody Thomas, Esq.
Swanson, Bevevino & Sharp, P.C.
311 Market St
Warren, PA 16365-2373
trbevevino@sbglawoffice.com
acthomas@sbglawoffice.com
(*Counsel for The Bert Company, d/b/a Northwest Insurance Services, Inc.*)

Date: August 13, 2021

/s/ Todd M. Pappasergi
Todd M. Pappasergi

CERTIFICATE OF COMPLIANCE

I certify that this filing complies with the provision of the *Public Access Policy of the Unified Judicial System of Pennsylvania: Case Records of the Appellate and Trial Courts* that require filing confidential information and documents differently than non-confidential information and documents.

Submitted by: The Lynch Law Group, LLC

Signature: */s/ Todd M. Pappasergi*

Printed Name: Todd M. Pappasergi, Esquire

Attorney No.: 209389

Phone No.: 724-776-8000