IN THE SUPREME COURT
OF THE STATE OF GEORGIA

CHRYSLER GROUP LLC n/k/a "FCA US LLC", *Petitioner*,	)	
v.	)	Case No. S17C0832
JAMES BRYAN WALDEN and LINDSAY NEWSOME STRICKLAND, Individually and on behalf of the estate of their deceased son, REMINGTON COLE WALDEN, *Respondents*.	)	

AMICUS BRIEF OF AMERICAN TORT REFORM ASSOCIATION IN SUPPORT OF THE PETITION FOR A WRIT OF CERTIORARI

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IDENTITY AND INTEREST OF AMICUS

American Tort Reform Association (ATRA), founded in 1986, is a broad-based coalition of businesses, corporations, municipalities, associations, and professional firms that have pooled their resources to promote reform of the civil justice system with the goal of ensuring fairness, balance, and predictability in civil litigation. For more than two decades, ATRA has filed *amicus curiae* briefs in cases that have addressed important civil justice issues, including cases that raise concerns that businesses did not receive a fair trial or were subjected to excessive damages awards. Few issues are of greater concern to the ATRA coalition than ensuring that corporate defendants receive a fair trial when liability claims are raised and that damages awards, when entered, do not result from passion or prejudice.

Amicus Curiae American Tort Reform Association submits the following brief in support of the Petition for Writ of Certiorari pending before this Court.

ARGUMENT

THIS JURY ACTED OUT OF PASSION, PREJUDICE AND A PUNITIVE MOTIVE TO RETURN AN EXCESSIVE VERDICT.

Jury prejudice manifests itself in the size of a verdict. This jury's award totaling $150 million can only be described as breathtaking. The verdict exceeded by $110 million the damages that the trial judge found justifiable.[1] For perspective, just the amount disallowed from the jury's award is roughly equivalent to the entire 2015 annual budget for the Atlanta Fire Rescue Services Department, an organization that employed more than 1100 people.[2] The shocking degree by which this jury's award overshot the limit of rationality provides a strong indication that the jurors acted out of passion and with an improper motivation. Only a new trial will eliminate that prejudice and restore fairness to the process.

Unreasonably large awards do not arise out of a vacuum. Jurors respond to what they hear, and so courts reviewing excessive verdicts must scrutinize the trial proceedings to assess whether inflammatory arguments or unduly prejudicial

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[1] *Chrysler Group, LLC v. Walden*, 792 S.E.2d 754, 758 (Ga. Ct. App. 2016).

[2] City of Atlanta Fiscal 2015 Adopted Budget at 333, available at http://www.atlantaga.gov/modules/showdocument.aspx?documentid=16263 (listing 2015 budget for the Fire Rescue Department as $107,490,763 with 1,125 full-time employees).

evidence induced the jury to act with passion and prejudice.[3] In this case, Plaintiffs encouraged the jury to act on the basis of Chrysler's wealth and urged jurors to punish Chrysler. These exhortations confirm the suspicions generated by the size of the verdict that this jury acted with an improper purpose.

The Court of Appeals failed to apply established rules intended to ensure that civil defendants receive a fair trial. With its abrupt dismissal of contentions that the jury acted with a punitive motive provoked by improper argument and irrelevant evidence, the Court of Appeals' ruling calls into question whether those who do business in Georgia can expect fair treatment. This Court should safeguard the integrity of the trial process. Because Chrysler did not receive a fair trial, this Court should grant the Petition.

A. Evidence and Argument Regarding CEO Compensation Inflamed the Jurors and Improperly Influenced their Award.

The Court of Appeals erroneously affirmed the admission of CEO pay evidence and the allowance of Plaintiffs' inflammatory argument using the CEO's compensation as an anchor for the jury's damages award. Discussion of Sergio Marchionne's compensation thrust a highly-charged but entirely irrelevant issue

[3] *See, e.g.*, *City of Cleveland v. Peter Kiewet Sons' Co.*, 624 F.2d 749, 756 (6th Cir. 1980)(describing that courts should consider "the verdict itself" among the "totality of circumstances" to evaluate whether a verdict must be set aside as a result of improper arguments).

before the jury that undermined the integrity of the trial. These references distracted the jury away from the real issues in dispute in this product liability case and instead encouraged jurors to act on anti-corporate bias.

Among references to corporate financial information, the level of pay received by corporate executives provokes particularly strong emotional reactions among members of the public. A 2016 survey performed by professors at Stanford's Graduate School of Business describes that "there is a general sense of outrage fueled in part by the political environment" regarding this issue.[4] Other recent reports similarly have identified "public outrage over executive pay[.]"[5] It is against this backdrop that the Court should consider the propriety of allowing the jury to hear evidence that Defendant's Chairman and CEO received many millions of dollars in compensation, as well as argument that the jury's award of compensatory damages should relate to the amount of the CEO's compensation.

Information such as this, which can be expected to spark a passionate reaction, has no place in a fair trial. The net worth or income of a corporate defendant, much less a single executive of that corporation, has utterly no bearing on any element of Plaintiffs' wrongful death claims. *See, e.g.*, *Clark v. Chrysler Corp.*, 436 F.3d 594,

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[4] David F. Larcker, Nicholas Donatiello & Brian Tayan, Americans and CEO Pay: 2016 Public Perception Survey on CEO Compensation 3 (2016).

[5] Dana Matioli, *Perks Are Trimmed Amid Pushback on Pay*, Wall Street Journal, April 1, 2010.

604 (6th Cir. 2006) (in a product liability lawsuit, "Chrysler's wealth has no connection to the actual harm sustained by [the plaintiff]"). Due to the high visibility and controversial nature of corporate CEO pay, this information will attract jurors' attention to a degree vastly disproportionate to its significance to the issues in dispute. Courts exclude such provocative but irrelevant financial information reflecting a corporation's financial condition, as the CEO's compensation surely does, precisely because of the likelihood that juries will respond in a prejudicial manner and improperly use this evidence to set the amount of damages:

> It has been widely held by the courts that have considered the problem that the financial standing of the defendant is inadmissible as evidence in determining the amount of compensatory damages to be awarded. The rationale behind this general rule is sound. The design of compensatory damages is to make plaintiff whole [. . .], and the ability of a defendant to pay the necessary damages injects into the damage determination a foreign, diverting, and distracting issue which may effectuate a prejudicial result.

Geddes v. United Financial Group, 559 F.2d 557, 560 (9th Cir. 1977)(emphasis added)(citations omitted). Indeed, even in the context of a punitive damages claim, which was not present in this lawsuit, the U.S. Supreme Court has voiced grave concerns with presenting evidence of wealth, due to "the potential that juries will use their verdicts to express biases against big businesses, particularly those without

strong local presences." *State Farm Mut. Auto Ins. Co. v. Campbell*, 538 U.S. 408, 417 (2003)(citation omitted).

Arguments during closing that financial information justifies an enormous compensatory damages award, as was allowed to occur here, constitute invidious appeals for the jury to act on prejudices against big companies. *See, e.g., Draper v. Airco, Inc.*, 580 F.2d 91, 95-96 (3d Cir. 1978) (noting that "a jury should not be urged to predicate its verdict on a prejudice against bigness or wealth" and overturning judgment on jury verdict due to absence of "restraints against blatant appeals to bias and prejudice."); *see also City of Cleveland v. Peter Kiewet Sons' Co.*, 624 F.2d 749, 757 (6th Cir. 1980)(argument focusing on the large size of a corporate defendant was "obviously an appeal to passion and prejudice" and required new trial). Recognizing the potentially incendiary effect that such arguments may have on jurors, the U.S. Supreme Court has long cautioned that "appeals to class prejudice are highly improper and cannot be condoned and trial courts should ever be alert to prevent them." *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 610 S.Ct. 811, 852 (1940).

The Court of Appeals failed to recognize that courts should exclude discussion of corporate financial information to prevent verdicts based on anti-corporate bias. [6]

[6] *Walden*, 792 S.E.2d at 764.

As a result, it gave an improperly narrow interpretation to Georgia's rule regarding the exclusion of wealth evidence.[7] As indicated by the reports of "public outrage" generated by corporate executive pay,[8] extreme responses to corporate financial information are not restricted to data strictly relating to the corporation itself. The Court of Appeals' ruling rests on the unsupportable illusion that jurors will see the CEO as separate from the company itself. This view ignores the fundamental fact that the chief executive officer acts as the very face of the company. Mr. Marchionne directs the actions of Chrysler, and he stands as a proxy for the corporate entity. In this case, Plaintiffs used Mr. Marchionne's compensation to enrage the jury against Chrysler, and so the Court of Appeals' overly restrictive interpretation of *Bailey* does not comport with the aim of excluding corporate financial information likely to provoke the jury to act out of passion and prejudice.

The Court of Appeals also should not have accepted the pretext offered for the admission of the CEO compensation evidence, namely that it "made the existence of bias in favor of Chrysler more probable."[9] As Chrysler's chief executive

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[7] *See Bailey v. Edmundson*, 280 Ga. 528, 534 (2006), *citing Northwestern Univ. v. Crisp*, 211 Ga. 636, 641 (1955)("evidence of the wealth or worldly circumstances of a party litigant is never admissible, except in those cases where position or wealth is necessarily involved.").

[8] *See* notes 4 and 5, *supra*.

[9] *Walden*, 792 S.E.2d at 764.

officer, Mr. Marchionne's deep affiliation with the company is inherent in his position. Cross-examination to show "financial interest in the case" does not justify inserting this irrelevant information into the trial with respect to a corporate defendant's chief executive any differently than the corporate defendant itself. *Cf. Bailey*, 280 Ga. at 534 (affirming trial court's ruling that prevented cross-examination on a party's financial condition due to its irrelevance). Critically, Plaintiffs actual use of this evidence went far beyond attacking the credibility of Mr. Marchionne's testimony: they argued that the jury should use his compensation figures as the basis for their award of damages, and the jury did what counsel asked.[10] This overreach constitutes just the type of blatant wealth-based appeal to passion and prejudice that necessitates a new trial. *See, e.g.*, *Draper*, 580 F.2d at 95

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[10]*See Walden*, 792 S.E.2d at 765 (quoting Plaintiffs' closing argument) (emphasis added):

> We're going to ask you to return a verdict for pain and suffering in whatever amount you think is appropriate. We're going to ask for you to return a verdict for the full value of Remington Walden's life—this is the hard part of what I do. Frankly, it's totally up to you all. But I hope you'll return a verdict that's meaningful. We ask that you return a verdict for the full value of Remington's life of at least $120 million. The amount is totally up to you.... That's less than two years of what Mr. Marchionne made just last year. He made $68 million last year.

(argument required reversal where "it is clear that counsel's remarks were intended to arouse the prejudices of the jury rather than to make [an] evidentiary contention").

B. Plaintiffs Incited the Jury to Punish Chrysler.

Juries may not inflate awards for compensatory damages in order to punish a defendant. *CSX Trans. Inc. v. Levant*, 262 Ga. 313, 314 (1992); *Cent. Georgia R.R. Co. v. Swindle*, 260 Ga. 685, 687 (1990). When a jury returns an excessive award of damages, counsel's arguments must be assessed. *Swindle*, 260 Ga. at 687. Often, "the excessive size of the verdict demonstrates the prejudicial effect of counsel's comments." *City of Cleveland*, 624 F.2d at 759. Reduction of an excessive award will not suffice when improper arguments exhorted the jury to inflict punishment. In those situations, a new trial must occur. *Levant*, 262 Ga. at 314; *Swindle*, 260 Ga. at 687.

Plaintiffs in cases seeking only compensatory damages may not urge the jury to punish the defendant, but that is exactly what happened in this case. Counsel argued that Chrysler's actions were grounds for imprisonment.[11] Counsel raised the specter that other consumers would be harmed but incited the jury to "fix that" because it could change Chrysler's conduct with the verdict. Counsel tossed out rhetorical questions contending that Chrysler had ignored "a moral duty." The

[11] *Walden*, 792 S.E.2d at 765 (quoting argument that "Chrysler ought to be in Reidsville instead of Bryan Harrell.").

message embedded in these incendiary statements is unmistakable: the jury should wallop Chrysler with a huge verdict to inflict pain and retribution. Such tactics, which were "designed to inflame and prejudice the jury," compromise the fairness and integrity of the trial process. *Branham v. Ford Motor Co.*, 701 S.E.2d 5, 21-22 (S.C. 2010) (ordering new trial because prejudicial closing arguments improperly incited the jury to act out of passion and punish the defendant for potential harm to non-parties). *See also Janssen Pharmaceutica, Inc. v. Bailey*, 878 So.2d 31, 62 (Miss. 2004) (new trial ordered where the jury responded to "inflammatory and improper argument" for punishment with an unjustifiably high award of damages); *Levant*, 262 Ga. at 314; *Swindle*, 260 Ga. at 687.

Despite the jaw-dropping size of the verdict, the Court of Appeals brushed aside concerns that the jury acted out of passion and prejudice after being urged to punish a large corporate defendant capable of paying its CEO millions of dollars. Assessing whether the jury's $150 million award resulted from an improper motive received a scant four paragraphs from the Court of Appeals; the propriety of arguments that the jury should imprison Chrysler got only three.[12] These issues deserve a more probing analysis to ensure that Chrysler received a fair trial.

"Exacting appellate review" must occur with awards of punitive damages to ensure that they reflect "an application of law rather than a decisionmaker's caprice."

[12] *Walden*, 792 S.E.2d at 768, 765.

Campbell, 538 U.S. at 418 (citations omitted). Although this case did not involve a claim for exemplary damages, the manner in which this case was presented to the jury justifies scrutiny on appeal similar to what a punitive damages case would receive. Plaintiffs raised arguments frequently raised in punitive damages cases, including calls for the defendant's imprisonment and determination of damages based on corporate finances. Further, the size of this jury award eclipses some punitive damages awards found so extreme that they violated due process limitations. *See, e.g., id.* at 429 (overturning punitive damages award of $145 million as "irrational and arbitrary"); *Clark*, 436 F.3d at 600 ($3 million punitive damages award in product liability wrongful death case found "constitutionally excessive").

The Court should not allow Plaintiffs to avoid undergoing "exacting appellate review." The issues raised in this case implicate the same concerns for fairness in the trial process present when punitive damages are at issue. The Court of Appeals afforded too much deference to the jury and trial court, and did not give sufficient consideration to ensuring that the jurors acted fairly and rationally when returning their $150 million award.

CONCLUSION

This Court should grant the petition for certiorari to give close scrutiny to this massive jury award and whether the evidence and argument that led to the verdict induced the jury to act on an improper basis.

Respectfully submitted this 25th day of January, 2017.

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CERTIFICATE OF SERVICE

I hereby certify that I have this day served a copy of this Amicus Brief of American Tort Reform Association in Support of the Petition for a Writ of Certiorari upon all parties to this matter via the Court's efiling system and by posting a true copy of the same in the U.S. Mail, proper postage prepaid, addressed to counsel of record as follows:

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