IN THE SUPREME COURT
OF THE STATE OF GEORGIA

CHRYSLER GROUP LLC n/k/a "FCA US LLC", *Petitioner*,	)	
v.	)	Case No. S17G0832
JAMES BRYAN WALDEN and LINDSAY NEWSOME STRICKLAND, Individually and on behalf of the estate of their deceased son, REMINGTON COLE WALDEN, *Respondents*.	)	

AMICUS CURIAE BRIEF OF AMERICAN TORT REFORM ASSOCIATION IN SUPPORT OF PETITIONER CHRYSLER GROUP LLC

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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. Among its other activities, ATRA closely monitors civil litigation developments in courts across the country. Where courts systematically apply laws and court procedures in an unbalanced and unfair manner, ATRA publicly reports those findings through its Judicial Hellholes® program.

ATRA, however, is not a passive observer and commentator. 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, reflect a reasoned assessment rather than a windfall.[1]

Amicus Curiae American Tort Reform Association submits the following brief in support of Petitioner Chrysler Group LLC ("Chrysler").

[1] No party or party's counsel authored this brief in whole or in part, and no one except ATRA, its members, or their counsel funded the brief's preparation.

ARGUMENT

I. THE IMPROPER ADMISSION OF EVIDENCE AND ARGUMENT REGARDING THE CHRYSLER CEO'S PAY INFLAMED THE JURORS AND DEPRIVED CHRYSLER OF A FAIR TRIAL.

A fair trial does not occur if inflammatory evidence rouses the jury to act with an unjust motive. This Court stands as a bulwark to ensure that trials corrupted by an improper cause do not stand. *CSX Trans. Inc. v. Levant*, 262 Ga. 313, 314 (1992); *Cent. Georgia R.R. Co. v. Swindle*, 260 Ga. 685, 687 (1990). Trial tactics "designed to inflame and prejudice the jury" destroy the fairness and integrity of the trial process. *See Branham v. Ford Motor Co.*, 701 S.E.2d 5, 21-22 (S.C. 2010); *City of Cleveland v. Peter Kiewet Sons' Co.*, 624 F.2d 749, 757 (6th Cir. 1980).

In this case, the improper introduction of the Chrysler chief executive Sergio Marchionne's $60 million-plus annual compensation package, admitted on the pretext of showing that Chrysler's CEO is biased to support his own company, unfairly injected explosively prejudicial issues into the case. Because the admission of this evidence deprived Chrysler of a fair trial, this Court should vacate the judgment and remand for a new trial.

A. O.C.G.A. § 24-6-622 Does Not Override All Other Evidentiary Considerations When the Result Will Be an Unfair Trial.

O.C.G.A. § 24-6-622, and in particular its language that a witness's relationship to a party "may always be proved," was the legal basis for thrusting Mr. Marchionne's massive pay arrangements before the jury. This Court should not

allow O.C.G.A. § 24-6-622 to become a blanket rule of admission subject to no limitations, even if the evidence to be introduced would threaten the fairness of a trial. Up to now, Georgia courts have rejected the contention that invoking O.C.G.A. § 24-6-622 will categorically override concerns of unfair prejudice. *See Blige v. State*, 264 Ga. 166, 167 (1994) ("that statutory provision must not be read in a vacuum, but in the context of other rules relating to witnesses and evidence."). As the Georgia Court of Appeals has declared in applying this statute's predecessor, a "plaintiff['s] right to a thorough and sifting cross-examination must be balanced by the need to avoid the introduction of improper and prejudicial evidence." *Carlisle v. Abend*, 288 Ga. App. 150, 151 (2007), *quoting Pavamani, P.C. v. Cole*, 215 Ga.App. 594 (1994).

A party's interest in establishing an adverse witness's bias simply does not justify jeopardizing the fairness of a trial. *King v. State*, 273 Ga. 258, 273 (1994) (inflammatory bias evidence was properly excluded, as "even relevant evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice[.]")(citations omitted). Evidence likely to produce a powerfully prejudicial effect on the jury, such as the presence of liability insurance, should not be admitted even if that evidence were relevant to establish bias or demonstrate a financial affiliation with a party. *See, e.g., Chambers v. Gwinnett Community Hosp., Inc.*, Ga. App. 25, 26 (2001)("a financial interest of a witness in a defendant's

liability insurer is not so much more material than prejudicial as to warrant admitting it in evidence.") (citations omitted).

1. Evidence of CEO Pay Creates Extreme Unfair Prejudice.

Testimony describing the compensation package received by Chrysler's CEO represents exactly the type of highly inflammatory evidence that courts should exclude to prevent unfair prejudice from undermining the integrity of the trial. Admitting a corporate defendant's financial information "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). Although the chief executive officer is legally distinct from the corporate entity, the two are so strongly affiliated that the CEO becomes the face of the company in the eyes of the public. The chief executive's compensation reflects not only the corporation's financial standing and ability to pay, but also how the corporation chooses to expend those financial resources. Inserting the sums paid to a corporate defendant's CEO into a case accordingly has a powerfully prejudicial effect. *See, e.g.*, *Branham*, 701 S.E.2d at 25 (admission of Ford executives' compensation even in connection with a punitive damages claim "went far beyond the pale" and its submission was "error and highly prejudicial"); *Finch v. Hercules Inc.*, No. Civ. A. 92-251 MMS, 1995 WL 785100, at *10-11 (D. Del. Dec. 22, 1995) ("the prejudice to defendant resulting from admission of evidence of earnings of

Hercules and its senior executives . . . would substantially outweigh any probative value this evidence would have.").

Substantial justification exists to support these courts' assessment of the incendiary nature of CEO pay evidence, as 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 determined that "there is a general sense of outrage fueled in part by the political environment" regarding this issue.[2] Other recent reports similarly describe "public outrage over sky-high executive pay[.]"[3] A recent Gallup poll found that a substantial majority of Americans – 59% – "endorse government action to limit executive pay."[4] Gallup further observed that "[t]here has been a great deal of public anger over executives who have received large paydays while their companies

[2] David F. Larcker, Nicholas Donatiello & Brian Tayan, Americans and CEO Pay: 2016 Public Perception Survey on CEO Compensation 3 (2016), https://www.gsb.stanford.edu/sites/gsb/files/publication-pdf/cgri-survey-2016-americans-ceo-pay.pdf (emphasis added).

[3] Scott Anderson, *What's a CEO Worth?*, UofT Magazine, Summer 2009 ("Public outrage over sky-high executive pay isn't new, but it has taken on a particularly virulent tone in the unfolding financial crisis."). *See also* Dana Matioli, *Perks Are Trimmed Amid Pushback on Pay*, Wall Street Journal, April 1, 2010 (reporting "public outrage over executive pay[.]").

[4] Jeffrey M. Jones, Most Americans Favor Gov't. Action to Limit Executive Pay (Gallup June 16, 2009), http://www.gallup.com/poll/120872/americans-favor-gov-action-limit-executive-pay.aspx.

teetered on the brink of collapse and needed government money to survive." Chrysler and its CEO, Sergio Marchionne, squarely fit into that mold.[5]

2. Plaintiffs Exploited the CEO Pay Evidence to Provoke a Jury Response Based on Passion and Prejudice.

Presenting evidence of Mr. Marchionne's pay package to this jury laid bare this reservoir of public outrage and frustration over corporate executive pay. Plaintiffs explicitly and implicitly exploited this prejudicial evidence during closing argument by linking Mr. Marchionne's compensation to Plaintiffs' compensatory damages.[6]

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[5] Chrylser filed for bankruptcy in April of 2009 but survived as a going business concept after the federal government provided $6.6 billion in relief. The Chrysler unit emerged from bankruptcy to enter into a business operations alliance with Italian automaker Fiat. Sergio Marchionne was the chief executive of Fiat and became CEO of the combined operations. *See* Michael J. de la Merced and Micheline Maynard, *Fiat Deal with Chrysler Seals Swift 42-Day Overhaul*, New York Times, June 10, 2009, http://www.nytimes.com/2009/06/11/business/global/11chrysler.html

[6] *Walden v. Chrysler Group LLC*, 792 S.E.2d 754, 765 (Ga. Ct. App. 2016) (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.

Arguing that a connection exists between Mr. Marchionne's compensation and any aspect of Plaintiffs' compensatory damages encouraged the jury to determine their award by referencing a figure that has no relevance to their damages determination. The net worth or income of a corporate defendant, much less a single executive of that corporation, has absolutely no bearing on any element of Plaintiffs' wrongful death claims. *See, e.g., Clark v. Chrysler Corp.*, 436 F.3d 594, 604 (6th Cir. 2006) (in a product liability lawsuit, "Chrysler's wealth has no connection to the actual harm sustained by [the plaintiff]").[7] Arguments during closing that the jury should return an enormous compensatory damages award on the basis of such irrelevant financial information amount to nothing more than incitement for the jury to act on biases 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

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Plaintiffs' counsel also responded to the defense argument with reference to Mr. Marchionne's compensation, asserting that "what [defense counsel] said Remi's life was worth, Marchionn e made 43 times as much in one year." *Id.*

[7] In seeming recognition that evidence of financial standing has no relevance but may unfairly distract or prejudice the jury, Georgia excludes such evidence barring highly unusual circumstances. *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."). Although voiced in terms of the wealth of a "party litigant," the purpose of the rule in *Bailey* applies with equal force to individual witnesses closely linked to a corporate party.

verdict due to absence of "restraints against blatant appeals to bias and prejudice."); *see also City of Cleveland*, 624 F.2d at 757. Plaintiffs' argument that the jury should measure the value of Remington Walden's life by reference to Mr. Marchionne's earnings constitutes just the type of blatant wealth-based appeal to passion and prejudice that deprives a defendant of a fair trial. *See, e.g.*, *Draper*, 580 F.2d at 95 (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").

Raising Mr. Marchionne's compensation total during closing argument also fixed the jury's attention on that sum as a damages anchor figure. Anchoring is a well-established cognitive bias "in which individuals' numerical judgments are inordinately influenced by an arbitrary or irrelevant number."[8] Research has consistently found that anchoring affects civil damage awards.[9] As one leading

[8] Gretchen Chapman & B. H. Bornstein, *The More You Ask For, the More You Get Anchoring in Personal Injury Verdicts*, 10 Applied Cognitive Psychol. 519 (1996).

[9] *See*, *e.g.*, Chapman & Bornstein, 10 Applied Cognitive Psychol. 519; Reid Hastie, David A. Schkade & John W. Payne, *Juror Judgments in Civil Cases: Effects of Plaintiff's Requests and Plaintiff's Identity on Punitive Damage Awards*, 23 Law & Hum. Behav. 445 (1999); Verlin B. Hinsz & Kristin E. Indahl, *Assimilation to Anchors for Damage Awards in a Mock Civil Trial*, 25 J. Applied Soc. Psychol. 991 (1995); John Malouff & Nicola S. Schutte, *Shaping Juror Attitudes: Effects of Requesting Different Damage Amounts in Personal Injury Trials*, 129 J. Soc. Psychol. 491 (2001); Mollie W. Marti & Roselle L. Wissler, *Be Careful What You Ask For: The Effect of Anchors on Personal Injury Damages Awards*, 6 J. Experimental Psychol.: Applied 91 (2000).

study concluded, "[a]s the anchor amount increased, compensation increased."[10] This outcome was true even though the anchor number utilized had no logical connection to damages or even was absurdly extreme.[11] In this case, the erroneous admission of the Chrysler CEO's compensation figure not only laid the foundation for Plaintiffs' appeal to a damages award based on passion and prejudice, it enabled Plaintiffs to connect their damages request to an enormous number – $68 million – already established in the minds of the jurors by virtue of its appearance in testimony and draw on the influence of that anchor.

B. The Court of Appeals Erred by Failing to Recognize that the Unfairly Prejudicial Nature of the CEO Pay Evidence Required Its Exclusion.

[10] Chapman & Bornstein, 10 Applied Cognitive Psychol. at 526.

[11] The study and the results have been summarized as follows:

> researchers gave ordinary adults a description of a personal injury case and asked them for an appropriate damage award. The researchers varied the plaintiff's attorney's request for a specific damage award. The plaintiff either asked for no specific amount, for $20,000, for $5 million, or for $1 billion. Even though the range of requests was ridiculous, "[a]s the anchor amount increased, compensation increased." As the title of that article suggests, "the more you ask for, the more you get."

Jeffrey J. Rachlinski, Andrew J. Wistrich, Chris Guthrie, *Can Judges Make Reliable Numeric Judgments? Distorted Damages and Skewed Sentences*, 90 Ind. L.J. 695, 706 (2015)(citing Chapman & Bornstein, 10 Applied Cognitive Psychol. 519).

Although demonstrating a witness's bias holds some usefulness, it does not justify compromising the fairness of a trial. Admitting evidence of Mr. Marchionne's compensation was not necessary to establish bias. A deep affiliation with Chrysler is inherent in his position as leader of the company and the individual responsible for the actions that it takes. The impeachment purpose for introducing this evidence did not warrant injecting the inflammatory issue of CEO pay into this trial. *See King*, 273 Ga. at 273 (finding evidence to establish witness's bias properly excluded where "parallel lines of questioning were available that would have served the same purpose."). The language of O.C.G.A. § 24-6-622 does not alter the balance: the interest in showing a witness's bias must give way when the impeachment evidence carries an unfairly prejudicial effect that will prevent a party from receiving a fair trial. *See Blige*, 264 Ga. at 167; *Carlisle*, 288 Ga. App. at 151. The Court of Appeals failed even to consider the explosively prejudicial nature of evidence that Mr. Marchionne in 2014 received more than $60 million in salary, incentives, stock options and other benefits, prejudice compounded by Plaintiffs' closing argument linking that sum to the jury's damages assessment.

The Court should reverse and remand for a new trial to correct the Georgia Court of Appeals' abdication of its responsibility to safeguard the integrity of the trial process. Allowing the Court of Appeals' ruling to stand will perpetuate this unfair trial result by encouraging future plaintiffs who pursue tort claims against a

sizable corporate defendant to imitate Plaintiffs' tactics in an effort to match the size of this award.

II. CONSIDERING THE DAMAGES AWARD ONLY IN ISOLATION PREVENTS A MEANINGFUL ANALYSIS FOR EXCESSIVENESS.

With a single sentence voicing the truism "no two cases are exactly alike," the Court of Appeals brushed aside the well-established practice of comparing an award to similar cases as part of the excessiveness evaluation.[12] This rejection undermined the Court of Appeals' own ability to gauge the fairness of the astronomical $40 million total award in this case.

Comparison to awards in similar cases is frequently recognized as a critical component of an excessiveness analysis. *See, e.g., Gilbert v. DaimlerChrysler*, 685 N.W.2d 391, 399-400 (Mich. 2004)("judicial review of purportedly excessive jury verdicts should focus on the following objective factors: . . . [3] whether the amount actually awarded is comparable to awards in similar cases within the state and in other jurisdictions."); *Levka v. City of Chicago*, 748 F.2d 421, 425 (7th Cir. 1984) ("One factor we must consider in determining whether to set aside an award is whether the award is out of line compared to other awards in similar cases."). Where the subject award substantially differs from those allowed in similar cases, courts vacate or reduce the outlier awards. *See, e.g., Nairn v. Nat'l R.R. Passenger Corp.,*

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

837 F.2d 565, 568 (2d Cir.1988) (vacating a damages award as excessive in light of awards for similar injuries in other cases); *Dixon v. Int'l Harvester Co.*, 754 F.2d 573, 589-90 (5th Cir. 1985)(reducing award after observing it was disproportionate to past awards for similar injuries); *Martell v. Boardwalk Enterp.*, 748 F.2d 740, 753-54 (2d Cir. 1984)(reducing damages award by 60% after considering "awards for similar injuries condoned by New York state courts").

Wide variation in damages awards, when that occurs, demonstrates flaws in the civil justice process that requires judicial intervention to restore fairness. As one group of commentators explained:

> Why is variability a problem? There are important values served by improving the accuracy and predictability of damage awards. First, fundamental fairness requires similarly situated parties to be treated in a similar fashion by the legal system. It comforts parties little that jury valuations are reasonable in the aggregate when the award in their particular case varies greatly from the norm for the type and severity of the injury suffered. Rather, they are left to accept on faith alone that the discrepancy is warranted.
>
> Second, the inability to achieve sufficiently similar results in similar cases tends to erode general confidence in justice and the integrity of what has become a very large system for personal injury compensation. Harmonizing results across cases, is important as individual tort actions, especially in the aggregate, have great social impact (e.g., on insurance, product costs, availability of medical care).

Randall R. Bovbjerg, Frank A. Sloan & James F. Blumstein, *Valuing Life and Limb in Tort: Scheduling "Pain and Suffering,"* 83 Nw. U. L. Rev. 908, 924-25 (1989)

(emphasis original). Reference to damages awards in other cases therefore enhances consistency and adds stability to an analysis that otherwise depends on subjective assessment.

The Court of Appeals turned its back on the bedrock concept that "fundamental fairness requires similarly situated parties to be treated in a similar fashion by the legal system," and instead employed an abstract assessment of the damages that the trial court awarded in this case. As a result, its determination that the $40 million total award was not excessive was incomplete and incapable of ensuring a fair result.

CONCLUSION

This Court should reverse the judgment below and remand this case for a new trial.

Respectfully submitted this 31st day of August, 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 Petitioner Chrysler Group LLC 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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