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## **PUNITIVE DAMAGES — Judgment Granting Equitable Relief Cannot Support Award Of Punitive Damages Where Actual Damages Are Not Also Recovered**

*Nabours v. Longview Savings & Loan Association*  
28 Tex. Sup. Ct. J. 571 (July 17, 1985)

In April of 1981, the Nabours purchased Burke's home which was subject to a lien and deed of trust<sup>1</sup> held by Metropolitan Savings and Loan Association.<sup>2</sup> Since both the lien and deed of trust contained a due-on-sale clause,<sup>3</sup> the Nabours sought Metropolitan's consent to finance the house by means of a wraparound mortgage.<sup>4</sup> Metropolitan gave consent conditioned upon the assumption of Burke's loan by the Nabours.<sup>5</sup> Since Metropolitan had previously informed Mr. Nabours that a violation of the due-on-sale clause would not result in foreclosure, the Nabours refused to assume the loan.<sup>6</sup> After the

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1. See *Nabours v. Longview Sav. & Loan Ass'n*, 28 Tex. Sup. Ct. J. 571, 571 (July 17, 1985).

2. See *Longview Sav. & Loan v. Nabours*, 673 S.W.2d 357, 359 (Tex. App.—Texarkana 1984), *aff'd*, 28 Tex. Sup. Ct. J. 571 (July 17, 1985). Metropolitan Savings and Loan Association was succeeded by Longview Savings and Loan Association. See *id.* at 359.

3. See *Nabours v. Longview Sav. & Loan Ass'n*, 28 Tex. Sup. Ct. J. 571, 571 (July 17, 1985). The lien and deed of trust contained a consent clause which stated: "The Grantors further agree that they will not make any voluntary inter-vivos transfers of the premises or any part thereof without first obtaining the written consent of the mortgagee. Any such transfer, if the mortgagee shall not so consent, shall constitute a default under the terms of this instrument. . . ." See *id.* at 571.

4. See *id.* at 571-72. Nabours avoided assuming Burke's mortgage at a higher interest rate by reaching an agreement with Burke to finance the sale by means of a "wraparound" mortgage. See *Longview Sav. & Loan Ass'n v. Nabours*, 673 S.W.2d 357, 359 (Tex. App.—Texarkana 1984), *aff'd*, 28 Tex. Sup. Ct. J. 571 (July 17, 1985). A wraparound mortgage is defined as:

a second mortgage which wraps around or exists in addition to a first or other mortgage.

A form of secondary financing typically used on older properties having first mortgages with low interest rates in which a lender assumes the developer's first mortgage obligation and also loans additional money, taking back from developer a junior mortgage in total amount at an intermediate interest rate.

BLACK'S LAW DICTIONARY 1441 (5th ed. 1979).

5. See *Nabours v. Longview Sav. & Loan Ass'n*, 28 Tex. Sup. Ct. J. 571, 572 (July 17, 1985). Metropolitan's letter to Nabours stated that a transfer of property without their consent would be considered a default under the deed of trust. See *Longview Sav. & Loan Ass'n v. Nabours*, 673 S.W.2d 357, 360 (Tex. App.—Texarkana 1984), *aff'd*, 28 Tex. Sup. Ct. J. 571 (July 17, 1985). Metropolitan's letter further stated that foreclosure procedures would be pursued in response to any default. See *id.* at 360

6. See *Nabours v. Longview Sav. & Loan Ass'n*, 28 Tex. Sup. Ct. J. 571, 572 (July 17,

sale became final, Mr. Burke continued to make mortgage payments to Metropolitan.<sup>7</sup> In August of 1981, Metropolitan commenced foreclosure proceedings against the Nabours alleging that the Nabours had assumed Burke's loan and defaulted on the payments.<sup>8</sup> The Nabours obtained a temporary injunction, filed suit to prohibit any foreclosure action, and sought to recover damages.<sup>9</sup> After a jury trial, the Nabours were granted a permanent injunction prohibiting foreclosure and were awarded punitive damages and attorneys' fees.<sup>10</sup> The Texarkana Court of Appeals affirmed the permanent injunction, but reversed the award of punitive damages and attorneys' fees.<sup>11</sup> The Nabours' application for writ of error to the Supreme Court of Texas was granted<sup>12</sup> to address the issue of whether punitive damages could be awarded based on an equitable remedy without there being any actual dam-

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1985). Nabours previously had purchased a home in which Metropolitan held the lien and deed of trust. *See id.* at 572. At that time, a vice-president of Metropolitan informed Nabours that any response by Metropolitan for violating the consent clauses was a mere formality. *See id.* at 572.

7. *See id.* at 572. The vice-president of Metropolitan contacted Nabours the day before the sale was to close. *See Longview Sav. & Loan Ass'n v. Nabours*, 673 S.W.2d 357, 360 (Tex. App.—Texarkana 1984), *aff'd*, 28 Tex. Sup. Ct. J. 571 (July 17, 1985). The vice-president advised Nabours not to proceed with the sale, but did not mention the enforcement of the consent clause. *See id.* at 360. After the sale, Metropolitan did not object to Burke making the mortgage payments. *See id.* at 360.

8. *See Nabours v. Longview Sav. & Loan Ass'n*, 28 Tex. Sup. Ct. J. 571, 572 (July 17, 1985). The majority in *Nabours* stated that since Burke had breached the due-on-sale clause, default on the note had occurred. *See id.* at 572.

9. *See id.* at 571-72. The Nabours also sought damages and attorney's fees under the Deceptive Trade Practices Act. *See id.* at 574.

10. *See id.* at 572. The jury found that Metropolitan had waived the due-on-sale clause by continuing to accept mortgage payments from Burke. *See id.* at 571. The jury's punitive damage award was \$126,200. *See id.* at 572. The jury also concluded that Metropolitan had caused confusion as to whether written consent was required to waive the due-on-sale clause. *See Longview Sav. & Loan Ass'n v. Nabours*, 673 S.W.2d 357, 361 (Tex. App.—Texarkana 1984), *aff'd*, 28 Tex. Sup. Ct. J. 571 (July 17, 1985).

11. *See Longview Sav. & Loan Ass'n v. Nabours*, 673 S.W.2d 357, 362 (Tex. App.—Texarkana 1984), *aff'd*, 28 Tex. Sup. Ct. J. 571 (July 17, 1985). The court held that the Nabours were not "consumers" under the Deceptive Trade Practice-Consumer Act and, therefore, the Nabours were not entitled to relief under the Act. *See id.* at 361-62. Under the Deceptive Trade Practice-Consumer Act, a consumer is defined as:

[A]n individual, partnership, corporation, this state, or a subdivision or agency of this state who seeks or acquires by purchase or lease, any goods or services, except that the term does not include a business consumer that has assets of \$25 million or more, or that is owned or controlled by a corporation or entity with assets of \$25 million or more.

TEX. BUS. & COM. CODE ANN. § 17.45(4) (Vernon Supp. 1985).

12. *See Nabours v. Longview Sav. & Loan Ass'n*, 28 Tex. Sup. Ct. J. 210, 213 (Feb. 2, 1985).

ages recovered.<sup>13</sup> Held — *Affirmed*. Judgment granting equitable relief cannot support an award of punitive damages where actual damages are not also recovered.<sup>14</sup>

Punitive damages developed from excessive awards of compensatory damages.<sup>15</sup> In the eighteenth century, English juries would, in effect, grant punitive sums since the compensatory damages awarded were far in excess of the injury to the plaintiff.<sup>16</sup> Early English courts were reluctant to set aside excessive awards, choosing instead to defer to the judgment of the jury.<sup>17</sup> As

13. See *Nabours v. Longview Sav. & Loan Ass'n*, 28 Tex. Sup. Ct. J. 571, 572 (July 17, 1985).

14. See *id.* at 573-74 (Nabours sought and were denied actual damages in form of "loss of market value" on their home).

15. See Sales & Cole, *Punitive Damages: A Relic That Has Outlived Its Origins*, 37 VAND. L. REV. 1117, 1119 (1984) (remedy of multiple awards preceded punitive damages). See generally K. REDDEN, PUNITIVE DAMAGES § 2.2(A)(1) (1980) (multiple damages recognized several thousand years before punitive damages). Examples of punitive damages have been noted in the Code of Hammurabi in 2000 B.C., the Hittite Law in 1400 B.C., the Hindu Code of Manu in 200 B.C., and the Bible. See *id.* at 24.

16. See *Huckle v. Money*, 95 Eng. Rep. 768, 769 (C. P. 1763) (suit for wrongful detention, trespass, and assault based on invalid general warrant). The defendant alleged that the damages were "most outrageous" to which the court responded:

[T]he personal injury done to him was very small, so that if the jury had been confined by their oath to consider the mere personal injury only, perhaps 20 pounds damages would have been thought damages sufficient . . . they saw a magistrate over all the King's subjects exercising arbitrary power, violating Magna Carta, and attempting to destroy the liberty of the Kingdom by insisting upon the legality of this general warrant . . . These are the ideas which struck the jury on the trial; and I think they have done right in giving exemplary damages.

*Id.* at 768-69; see also Note, *The Imposition of Punishment by Civil Courts: A Reappraisal of Punitive Damages*, 41 N.Y.U. L. REV. 1158, 1160 (1966) (after jury award of excessive damages, court affirmed grant by setting forth concept of punitive damages as statement of societal disapproval). The *Huckle v. Money* decision was the first to articulate punitive damages. See *id.* at 1160.

17. See, e.g., *Leith v. Pope*, 96 Eng. Rep. 777, 778 (C. P. 1780) (court declined to interfere with jury award unless evidence indicated award was so excessive it pointed to misconduct by jury); *Tulledge v. Wade*, 95 Eng. Rep. 909, 909 (C. P. 1769) (court sustained plaintiff's damage award in excess of actual injury); *Grey v. Grant*, 95 Eng. Rep. 794, 795 (C. P. 1764) (court denied defendant's plea to set aside excessive damages awarded to plaintiff). See generally J. GHIARDI & J. KIRCHER, PUNITIVE DAMAGES LAW AND PRACTICE § 1.02, at 3 (1985) (presents historical analysis of punitive damages in English common law). In order to understand the granting of excessive awards by English juries and the courts' reluctance to overrule excessive awards, it is important to first understand the composition of English juries. See *id.* at 3. English juries in the eighteenth century were comprised of local citizens who acted as both witnesses and jurors due to their familiarity with the disputed issue. See K. REDDEN, PUNITIVE DAMAGES § 2.2(A)(2), at 26 (1980). Based on the jurors' familiarity with the dispute, the court not only deferred to the jury, but was reluctant to review excessive awards. See Note, *The Imposition of Punishment by Civil Courts: A Reappraisal of Punitive Damages*, 41 N.Y.U. L. REV. 1158, 1159-60 (1966).

the English courts began to recognize that sums awarded in excess of the plaintiff's actual injury were punitive in nature, the judiciary focused on both the defendant's conduct<sup>18</sup> and the resulting injury to the plaintiff.<sup>19</sup> Judgments awarding excessive damages were sustained to punish the defendant's misconduct<sup>20</sup> and to compensate the plaintiff for intangible yet egregious injuries.<sup>21</sup>

Early American courts generally adopted the English concepts of awarding punitive damages for compensation and punishment,<sup>22</sup> but the American courts considered punitive and compensatory damages as two separate and distinct types of awards.<sup>23</sup> These early courts held that punitive damages could only be awarded incident to an independent cause of action.<sup>24</sup> The

18. See, e.g., *Merest v. Harvey*, 128 Eng. Rep. 761, 761 (C. P. 1814) (court sustained excessive award stating worse conduct could not be conceived); *Leith v. Pope*, 96 Eng. Rep. 777, 778 (C. P. 1780) (judge approved jury's excessive award upon finding that defendant acted maliciously); *Grey v. Grant*, 95 Eng. Rep. 794, 795 (C. P. 1764) (excessive damages upheld by the court based on defendant's use of excessive physical force).

19. See *Bruce v. Rawlins*, 95 Eng. Rep. 934, 934-35 (C. P. 1770) (since plaintiff's home and family were disturbed, court refused to reduce damages); *Tulledge v. Wade*, 95 Eng. Rep. 909, 909 (C. P. 1769) (where plaintiff insulted in own home, court refused to overrule damages). For a historical discussion of the origin of punitive damages in England and America, see Note, *Exemplary Damages in the Law of Torts*, 70 HARV. L. REV. 517 (1957).

20. See *Merest v. Harvey*, 128 Eng. Rep. 761, 761 (C. P. 1814) (damages in excess of injury sustained in order to restrain and punish defendant); *Wilkes v. Wood*, 98 Eng. Rep. 489, 498-99 (C. P. 1763) (purpose of damages to compensate plaintiff and punish and deter guilty party); see also C. MCCORMICK, *HANDBOOK ON THE LAW OF DAMAGES* § 78, at 278 (1935) (unclear in England whether theory of punitive damages is punitive or compensatory in nature).

21. See *Bruce v. Rawlins*, 95 Eng. Rep. 934, 934 (C. P. 1770) (where plaintiff's reputation injured by defendant's actions, court sustained large damages); *Huckle v. Money*, 95 Eng. Rep. 768, 769 (court recognized harm to plaintiff was small, but upheld excessive award due to indignity suffered by plaintiff); see also Note, *Exemplary Damages in the Law of Torts*, 70 HARV. L. REV. 517, 519 (1957) (English courts permitted excessive damages in aggravated cases for injuries to plaintiff's dignity, feelings, and mental suffering). See generally K. REDDEN, *PUNITIVE DAMAGES* § 2.2(C), at 18 (1980) (punitive damages developed to compensate for intangible injuries to victim not recoverable at common law).

22. Compare *Bixby v. Dunlap*, 56 N.H. 456, 464 (1876) (when malice involved, plaintiff entitled to compensation deserved and defendant should pay) and *Fay v. Parker*, 53 N.H. 342, 355 (1873) (punitive damages compensatory in nature) with *Hawk v. Ridgeway*, 33 Ill. 473, 476 (1864) (court authorized award to plaintiff of damages beyond actual injury as punishment for defendant's willful and wanton misconduct) and *McNamara v. King*, 7 Ill. 432, 437 (1845) (excessive damages upheld to punish defendant).

23. See *Gill v. Selling*, 267 P. 812, 814 (Or. 1928) (plaintiff must be satisfied with complete compensation; punitive damages awarded only in appropriate cases); *Kerschbaum v. Lowrey*, 206 N.W. 171, 173 (Minn. 1925) (punitive damages awarded at discretion of jury, not as a matter of right); see also W. PROSSER & W.P. KEETON, *THE LAW OF TORTS* § 2, at 9 (5th ed. 1984) (punitive damages awarded to plaintiff over and above actual damages).

24. See, e.g., *Schippel v. Norton*, 16 P. 804, 807 (Kan. 1888) (cause of action cannot be based on punitive damages); *Ganssly v. Perkins*, 30 Mich. 492, 494-95 (1874) (when plaintiff

requirement that there be an independent cause of action fostered the general rule in American courts that actual damages are a prerequisite to the granting of punitive damages.<sup>25</sup> The courts' different applications of the rule requiring actual damages before allowing punitive awards has been attributable to courts' varying interpretations of the rule's requirements.<sup>26</sup>

Today, punitive damages are awarded for the purposes of punishment and deterrence.<sup>27</sup> Both the punishment and deterrence purposes focus on the defendant's improper actions.<sup>28</sup> Punitive damages are awarded if a defendant acts wilfully or wantonly, or in a malicious, reckless, or oppressive manner.<sup>29</sup> Once the requisite behavior is established,<sup>30</sup> punitive damages are

has right to complain and proves injury, punitive damages recoverable); *Hoagland v. Forest Park Highlands Amusement Co.*, 70 S.W. 878, 880 (Mo. 1902) (punitive damages incident to actual damages and cannot form basis of cause of action).

25. *See, e.g.*, *Hubbard v. Superior Ct. of Maricopa County*, 535 P.2d 1302, 1303 (Ariz. 1975) (before punitive damages recovered, actual damages must be established); *Armilio v. Ward Transp.*, 302 P.2d 517, 519 (Colo. 1956) (proof of actual damages needed before punitive damages awarded); *Smith v. Krutar*, 457 P.2d 459, 464 (Mont. 1969) (plaintiff must show entitlement to actual damages before punitive damages recoverable).

26. *Compare Martin v. United Sec. Servs., Inc.*, 314 So. 2d 765, 772 (Fla. 1975) (actual damages must be shown before punitive damages recoverable) *and Wagner v. Dan Unfug Motors, Inc.*, 529 P.2d 656, 659 (Colo. Ct. App. 1974) (actual damages must be awarded before punitive damages granted) *with Harris v. Wagshal*, 343 A.2d 283, 288 (D. C. 1975) (punitive damages awarded where actual damages not recovered) *and Haugabrook v. Taylor*, 168 S.E.2d 162, 163 (Ga. 1969) (nominal damages will support an award of punitive damages); *see also Saunders Hardware Five and Ten, Inc. v. Low*, 307 So. 2d 893, 894 (Fla. Dist. Ct. App. 1974) (injury presumed in defamation suit and will sustain an award of punitive damages even if no actual damages). *See generally* Note, *Exemplary Damages in the Law of Torts*, 70 HARV. L. REV. 517, 528 (1957) (relationship between punitive and actual damages controversial subject).

27. *See, e.g.*, *Acheson v. Shafter*, 490 P.2d 832, 834 (Ariz. 1971) (punitive damages awarded to punish and deter wrongdoer); *Motor Equip. Co. v. McLaughlin*, 133 P.2d 149, 159 (Kan. 1943) (purpose of punitive damages to punish and restrain defendant from further wrongful acts and deter others); *Main v. Levine*, 118 P.2d 252, 255 (Okla. 1941) (punitive damages designed to punish, warn, and deter transgressor); *see also Sales & Cole, Punitive Damages: A Relic That Has Outlived Its Origin*, 37 VAND. L. REV. 1117, 1124 (1984) (majority of commentators acknowledge basis of punitive damages are punishment and deterrence). *But see Doroszka v. Lavine*, 150 A. 692, 693 (Conn. 1930) (purpose of punitive damages is compensation to plaintiff for injuries); *Wise v. Daniel*, 190 N.W. 746, 747 (Mich. 1922) (punitive damages not considered punishment, but used to enlarge compensatory damages).

28. *See, e.g.*, *Strum, Ruger & Co., Inc. v. Day*, 594 P.2d 38, 46 (Alaska 1979) (punitive damages recoverable when defendant's conduct outrageous); *Satterfield v. Rebsamen Ford, Inc.*, 485 S.W.2d 192, 195 (Ark. 1972) (malicious conduct by defendant will support award of punitive damages); *Riegel v. Aastad*, 272 A.2d 715, 718 (Del. 1970) (when tortfeasor commits wrongdoing willfully or wantonly, punitive damages recoverable); *see also J. GHIARDI & J. KIRCHER, PUNITIVE DAMAGES LAW AND PRACTICE* § 5.01, at 2 (1985) (focus of punitive damages on defendant's conduct).

29. *See, e.g.*, *Bridges v. Alaska Hous. Auth.*, 375 P.2d 696, 702 (Alaska 1962) (malice, recklessness, or bad motive justify punitive damages); *Winn & Lovett Grocery Co. v. Archer*,

assessed to punish the defendant's wrongdoing, and to deter the defendant from further misconduct.<sup>31</sup> Punishing the defendant for his misconduct also serves as a general deterrent, by way of example, to others who might engage in similar misconduct.<sup>32</sup>

Traditionally, punitive damages were not recoverable in a suit seeking equitable relief due to the separation of law and equity.<sup>33</sup> Today, since courts

171 So. 214, 221 (Fla. 1936) (where wrongdoer acted willfully, wantonly, with malice, violence, oppression, or fraud, punitive damages may be awarded); *Gilman Paper Co. v. James*, 219 S.E.2d 447, 450 (Ga. 1975) (willful and wanton misconduct authorize punitive damages).

30. See W. PROSSER, *HANDBOOK ON THE LAW OF TORTS* § 2, at 9-10 (4th Ed. 1971). Professor Prosser asserts:

Something more than the mere commission of a tort is always required for punitive damages. There must be circumstances of aggravation or outrage, such as spite or "malice" or a fraudulent or evil motive on the part of the defendant, or such a conscious and deliberate disregard of the interests of others that his conduct may be called willful or wanton.

*Id.* at 9-10; see also C. MCCORMICK, *HANDBOOK ON THE LAW OF DAMAGES* § 79, at 280 (1935). Professor McCormick states:

Since these damages are assessed for punishment and not for reparation, a positive element of conscious wrongdoing is always required. It must be shown either that the defendant was actuated by ill-will, malice, or evil motive (which may appear by direct evidence of such motive, or from the inherent character of the tort itself, or from the oppressive character of his conduct, sometimes called "circumstances of aggravation"), or by fraudulent purposes, or that he was so wanton and reckless as to evince a conscious disregard of the rights of others.

*Id.* at 280.

31. See *Main v. Levine*, 118 P.2d 252, 255 (Okla. 1941) (punitive damages to punish and deter defendant and others); *Hicks v. Herring*, 144 S.E.2d 151, 155 (S.C. 1965) (punitive damages awarded to punish defendant and deter from like offenses). See generally Comment, *Deterrence and Punishment in the Common Law of Punitive Damages: A Comment*, 56 S. CAL. L. REV. 133, 134-47 (1982) (discussion of deterrent and punishment purposes of punitive damages).

32. See, e.g., *F. B. C. Stores, Inc. v. Duncan*, 198 S.E.2d 595, 599 (Va. 1973) (punishment of defendant to serve as example to others who would engage in such conduct); *John Mohr & Sons, Inc. v. Jahnke*, 198 N.W.2d 363, 368 (Wis. 1972) (punitive damages to punish defendant and deter others); *Danculovich v. Brown*, 593 P.2d 187, 191 (Wyo. 1979) (since punitive damages punish defendant, others warned and deterred).

33. See, e.g., *United States v. Bunard*, 202 F. 728, 732 (9th Cir. 1913) (equity court has no authority to award punitive damages); *Superior Const. Co. v. Elmo*, 104 A.2d 581, 586 (Md. 1954) (punitive damages not recoverable in equity); *Mortgage Loan Co. v. Townsend*, 152 S.E. 878, 887 (S.C. 1930) (equity court lacks jurisdiction and cannot grant punitive damages). But see Note, *Punitive Damages in Equity*, 16 MD. L. REV. 68 (1956) (author points out that much authority disallowing punitive damages in equity fails to explain any rationale for their position). Complete justice could be rendered by allowing punitive damages with equitable relief. See *id.* at 72. See generally DOBBS, *HANDBOOK ON THE LAW OF REMEDIES* § 3.9, at 211 (1973) (traditional rule denies punitive damages with equitable relief). Equity courts have rejected the idea of allowing punitive damages with equitable relief for the following reasons: (1) plaintiff waived his right to punitive damages by seeking equitable relief; (2) equity courts lack the power to grant punitive damages; and (3) the principles upon which equitable remedies are based are incompatible with punitive damages. See *id.* at 211-12.

of law and equity have merged,<sup>34</sup> the trend is to allow the recovery of punitive damages in conjunction with equitable relief.<sup>35</sup> However, varying rules have emerged among the states as to what criteria must be present before punitive damages can be granted with equitable relief.<sup>36</sup> A number of states allowing punitive damages in equitable suits require at least a "showing" or "finding" of actual damages before punitive damages will be granted.<sup>37</sup>

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34. See *I. H. P. Corp. v. 210 Cent. Park S. Corp.*, 228 N.Y.S.2d 883, 888 (N.Y. App. Div. 1962) (court granted injunctive relief and compensatory and punitive damages for interference with plaintiff's use of premises), *aff'd*, 189 N.E.2d 812, 312 N.Y.S.2d 32 (N.Y. 1963). The court rejected the general rule denying punitive damages in equity suits and reasoned that since law and equity courts have merged, this rule is based on outdated procedural decisions. See *id.* at 888; see also Note, *Punitive Damages Held Recoverable in Action for Equitable Relief*, 63 COLUM. L. REV. 175, 179 (1963) (continued adherence to general rule undermines rationale for merging law and equity).

35. See DOBBS, HANDBOOK ON THE LAW OF REMEDIES § 3.9, at 211 (1973) (movement to allow punitive damages with equitable relief). The following decisions have held punitive damages may be awarded with equitable relief: *Martin v. Swenson*, 335 F. Supp. 765, 767-68 (M.D. Mo. 1971); *Berry v. McLeod*, 604 P.2d 610, 613 (Ariz. 1979); *Union Oil Co. v. Reconstruction Oil Co.*, 66 P.2d 1215, 1222 (Cal. Dist. Ct. App. 1937); *General Refractories Co. v. Rogers*, 239 S.E.2d 795, 800 (Ga. 1977); *Lussier v. Mau-Van Dev., Inc.*, 667 P.2d 804, 825 (Hawaii Ct. App. 1983); *Hedworth v. Chapman*, 192 N.E.2d 649, 651 (Ind. 1963); *Charles v. Epperson & Co.*, 137 N.W.2d 605, 618 (Iowa 1965); *Tideway Oil Programs, Inc. v. Serio*, 431 So. 2d 454, 464 (Miss. 1983); *Tahoe Village Realty v. DeSmet*, 590 P.2d 1158, 1161 (Nev. 1979); *I. H. P. Corp. v. 210 Central Park S. Corp.*, 228 N.Y.S.2d 883, 888, (N.Y. App. Div. 1962), *aff'd*, 189 N.E.2d 812, 312 N.Y.S.2d 32 (N.Y. 1963); 12 N.Y.S.2d 32; *Eakman v. Robb*, 237 N.W.2d 423, 430 (N. D. 1975); *Z. D. Howard Co. v. Cartwright*, 537 P.2d 345, 347 (Okla. 1975); *Kneeland v. Bruce*, 336 S.W.2d 319, 325 (Tenn. Ct. App. 1960); *National Bank of Commerce v. May*, 583 S.W.2d 685, 691 (Tex. Civ. App.—Eastland 1979, writ ref'd n.r.e.); *White v. Ruditys*, 343 N.W.2d 421, 425 (Wis. Ct. App. 1983).

36. Compare *Smith v. Krutar*, 457 P.2d 459, 464 (Mont. 1965) (to recover punitive damages, the plaintiff must show he is first entitled to actual damages) with *Wilner v. O'Donnell*, 637 S.W.2d 757, 762 (Mo. Ct. App. 1982) (actual damages must be recovered before punitive damages can be granted).

37. See *Westway Trading Corp. v. River Terminal Corp.*, 314 N.W.2d 398, 404 (Iowa 1982) (in suit for interference with lease rights, equitable relief and punitive damages sustained, while actual damages reversed). The court in *Westway* held that although the amount of actual damages could not be ascertained, punitive damages were still recoverable since actual injury was demonstrated. See *id.* at 404; see also *Miller v. Fox*, 571 P.2d 804, 808 (Mont. 1977) (award of punitive damages for wrongful attachment). The trial court in *Miller* found that the plaintiff had suffered actual damages due to expenses incurred. See *id.* at 808. The award of punitive damages in *Miller* was sustained by the Montana Supreme Court which stated that actual damages are a prerequisite to recovery of punitive damages. See *id.* at 808; see also *Barber v. Hohl*, 123 A.2d 785, 789-90 (N.J. Super. Ct. App. Div. 1956) (suit for injunction and actual and punitive damages). Even though the court in *Barber* held that the plaintiff was entitled to a new trial on the issue of actual damages, punitive damages were sustained. See *id.* at 789-90. The *Barber* court found that when an individual is injured as a result of an invasion of a legal right, damages are inferred. See *id.* at 789; see also *Hutchinson v. Pyburn*, 567 S.W.2d 762, 765-66 (Tenn. Ct. App. 1977) (action for rescission of deed and punitive damages). In *Hutchinson*, the court held that the plaintiffs were entitled to punitive



Courts requiring a "showing" or "finding" of actual damages contend that if the plaintiff provides evidence of the injury suffered, the plaintiff may recover punitive damages without recovering actual damages.<sup>38</sup> Other states permit an injured plaintiff to recover punitive damages in an equitable action where only nominal damages are recovered.<sup>39</sup> A small minority of states have allowed recovery of punitive damages with equitable relief absent a showing or recovery of either actual or nominal damages.<sup>40</sup> Despite more lenient views, many states require that actual damages be recovered as a prerequisite to an award of punitive damages, even when equitable relief is granted.<sup>41</sup>

Since 1855,<sup>42</sup> Texas has followed the minority viewpoint, permitting the

damages since the plaintiffs proved entitlement to the rescission of the deed, return of the purchase price, and incurred incidental damages. *See id.* at 766.

38. *See Miller v. Fox*, 571 P.2d 804, 808 (Mont. 1977) (unnecessary for monetary value to be placed on actual damage award); *Topanga Corp. v. Gentile*, 58 Cal. Rptr. 713, 719 (Cal. Ct. App. 1967) (tortious act needs to be proven to meet requirements of actual damages before punitive damages recoverable); *see also Sterling Drug v. Benatar*, 221 P.2d 965, 970 (Cal. Ct. App. 1950) (punitive damages sustained although amount of actual damages not ascertainable); *cf. Wells v. Smith*, 297 S.E.2d 872, 880 (W. Va. 1982) (in suit where no equitable relief sought, court held when plaintiff establishes injury caused by defendant, an award of actual damages not necessary to sustain punitive damages).

39. *See Onslow Wholesale Plumbing & Elec. v. Fisher*, 298 S.E.2d 718, 723 (N.C. Ct. App. 1982) (in suit for violation of fiduciary duties, punitive damages denied in absence of recovery of nominal or compensatory damages). The *Onslow* court held that nominal damages were the minimum requirement before punitive damages could be granted with an equitable remedy. *See id.* at 723; *see also Civic W. Corp. v. Zela Indus., Inc.* 135 Cal. Rptr. 915, 926 (Cal. Ct. App. 1977) (in action for injunction and recovery on promissory notes, punitive damages recoverable though actual damages nominal).

40. *See, e.g., Village of Peck v. Denison*, 450 P.2d 310, 314-15 (Idaho 1969) (equitable suit to enjoin interference with water rights sustained award of punitive damages); *Capital Fed. Sav. & Loan Ass'n v. Hohman*, 682 P.2d 1309, 1310 (Kan. 1984) (punitive damages recoverable in foreclosure action where no actual damages awarded); *Nash v. Craigco, Inc.*, 585 P.2d 775, 778 (Utah 1978) (in action for rescission of property, punitive damages determined considering defendant's conduct, not whether actual damages shown). *But see Smith v. Krutar*, 457 P.2d 459, 464 (Mont. 1969) (in suit to enjoin defendants from use of stream water, punitive damages denied since plaintiff not entitled to actual damages).

41. *See, e.g., Wilner v. O'Donnell*, 637 S.W.2d 757, 762 (Mo. Ct. App. 1982) (punitive damages denied after actual damage award reversed); *Johnson v. Pilgram Mut. Ins. Co.*, 425 A.2d 1119, 1125 (Pa. Super. Ct. 1980) (punitive award upheld after finding that plaintiff had been granted compensatory damages); *National Bank of Commerce v. May*, 583 S.W.2d 685, 691 (Tex. Civ. App.—Eastland 1979, writ ref'd n.r.e.) (punitive damages denied where no actual damages recovered).

42. *See, e.g., Western Cottage Piano & Organ Co. v. Anderson*, 97 Tex. 432, 435, 79 S.W. 516, 517 (1904) (punitive damages recovered in suit for fraudulent misrepresentation); *Oliver v. Chapman*, 15 Tex. 400, 410 (1855) (jury not restricted to awarding actual damages in suit for fraudulent acts, thus punitive damages recoverable); *Mossop v. Zapp*, 189 S.W. 979, 981 (Tex. Civ. App.—San Antonio 1916, writ ref'd) (punitive damages in rescission action sus-

recovery of punitive damages in an action for equitable relief.<sup>43</sup> In *International Bankers Life Insurance Co. v. Holloway*,<sup>44</sup> the Texas Supreme Court reaffirmed the early trend of permitting equitable relief and punitive damages to be recovered in the same action.<sup>45</sup> In *Holloway*, the plaintiff sought both punitive damages and equitable relief.<sup>46</sup> In reference to the plaintiff's pursuit of an equitable remedy, the *Holloway* court stated that the plaintiff's choice of remedy should not prohibit the recovery of punitive damages.<sup>47</sup> However, the general rule in Texas that punitive damages may only be granted where actual damages are recovered was still applicable to equitable actions seeking punitive relief.<sup>48</sup> Texas courts have sustained awards of punitive damages in equitable suits where the plaintiff has recovered property or consideration-paid-out as a result of the defendant's misconduct.<sup>49</sup> Texas courts regard the plaintiff's recovery of property or consideration as actual damages sufficient to support a punitive award.<sup>50</sup>

In *Nabours v. Longview Savings & Loan Association*,<sup>51</sup> the Texas Supreme Court held that punitive damages are not recoverable in an equitable action

tained). *But see* *Bush v. Gaffney*, 84 S.W.2d 759, 763-64 (Tex. Civ. App.—San Antonio 1935, no writ) (punitive damages denied when equitable relief of rescission sought).

43. *See* *Mack v. Newton*, 737 F.2d 1343, 1363 (5th Cir. 1984) (contrary to majority rule, Texas allows punitive damages in equitable actions); Note, *Punitive Damages in Equity*, 16 MD. L. REV. 68, 70 (1956) (although general rule is that punitive damages not allowed in equity, Texas adopts view allowing punitive damages to be recovered with equitable relief).

44. 368 S.W.2d 567 (Tex. 1963).

45. *See id.* at 583. The *Holloway* court recognized that there is a difference of opinion among the states on whether to allow punitive damages to be awarded with equitable relief. *See id.* at 583. The *Holloway* court stated, however, that the trend in Texas has been to allow punitive damages in equitable suits. *See id.* at 583.

46. *See id.* at 570-71.

47. *See id.* at 584.

48. *See* *Bibby v. Preston*, 555 S.W.2d 898, 903 (Tex. Civ. App.—Tyler 1977, no writ) (right to seek damages acknowledged in suit to remove cloud from title, but punitive damages denied since no actual damages recovered); *Teas v. Republic Nat'l Bank of Dallas*, 460 S.W.2d 233, 244 (Tex. Civ. App.—Dallas 1970, writ ref'd n.r.e.) (recovery of actual damages required before awarding punitive damages in equitable action).

49. *See* *Russell v. Truitt*, 554 S.W.2d 948, 955 (Tex. Civ. App.—Fort Worth 1977, writ ref'd n.r.e.) (return of \$8,000 in agency fees sufficient to support punitive damages in forfeiture action); *Pollard v. El Paso Nat'l Bank*, 343 S.W.2d 909, 912 (Tex. Civ. App.—El Paso 1961, writ ref'd n.r.e.) (punitive damages upheld where plaintiff allowed to rescind fraudulently induced conveyances).

50. *See* *Kress v. Soules*, 255 S.W.2d 244, 249 (Tex. Civ. App.—Austin 1953) (in suit for specific performance of contract, punitive damages sustained based on recovery of rental value of property), *rev'd on other grounds*, 261 S.W.2d 703 (Tex. 1953); *see also* *Briggs v. Rodriguez*, 236 S.W.2d 510, 515-16 (Tex. Civ. App.—San Antonio 1951, writ ref'd n.r.e.) (suit for rescission of deed). In *Briggs*, the court stated "the recovery of the consideration paid as a result of fraud constitutes actual damages and will serve as a basis for the recovery of exemplary damages." *See id.* at 516.

51. 28 Tex. Sup. Ct. J. 571 (July 17, 1985).

unless there is a finding of actual damages by the trier of fact.<sup>52</sup> The majority focused on two Texas rules as a basis for adhering to the requirement that actual damages be recovered before an award of punitive damages may be had.<sup>53</sup> The first rule adhered to by the court was that actual damages are a prerequisite since any punitive damages assessed must bear a reasonable relationship to the plaintiff's actual damage award.<sup>54</sup> Secondly, the court upheld the rule that punitive damages can only be recovered incident to a tort action in which actual damages are a necessary element.<sup>55</sup> The majority distinguished other Texas cases allowing recovery of punitive damages with equitable relief when actual damages were not awarded by the court.<sup>56</sup> The court explained that the actual damage requirement was met in these earlier cases because the plaintiff recovered property or consideration from the defendant.<sup>57</sup>

Writing for the dissent, Justice Kilgarlin strongly contended that the ma-

52. See *id.* at 574. The *Nabours* court cited *Doubleday & Co., Inc. v. Rogers* and *City Prods. Corp. v. Berman* to support the rule requiring recovery of actual damages before granting punitive damages. See *id.* at 572; see also *Doubleday & Co., Inc. v. Rogers*, 674 S.W.2d 751, 753-54 (Tex. 1984) (punitive damages denied in defamation where actual damages not awarded); *City Prods. Corp. v. Berman*, 610 S.W.2d 446, 450 (Tex. 1980) (punitive damages denied when only equitable relief granted).

53. See *Nabours v. Longview Sav. & Loan Ass'n*, 28 Tex. Sup. Ct. J. 571, 573 (July 17, 1985).

54. See *id.* at 573. The *Nabours* court cited *Alamo Nat'l Bank v. Kraus*, *Southwestern Inv. Co. v. Neely*, and *International Bankers Life Ins. Co. v. Holloway*, as authority for requiring punitive damages to be reasonably proportionate to actual damages. See *id.* at 573; see also *Alamo Nat'l Bank v. Kraus*, 616 S.W.2d 908, 910 (Tex. 1981) (*Kraus* court set forth factors to determine whether punitive damages award was excessive); *Southwestern Inv. Co. v. Neeley*, 452 S.W.2d 705, 707-08 (Tex. 1970) (court remanded case where appellate court failed to consider ratio between punitive and actual damages); *International Bankers Life Ins. Co. v. Holloway*, 368 S.W.2d 567, 584 (Tex. 1963) (excessiveness of award determined by injury to plaintiff and defendant's conduct).

55. See *Nabours v. Longview Sav. & Loan Ass'n*, 28 Tex. Sup. Ct. J. 571, 573 (July 17, 1985). In *Nabours*, the court relied on *Amoco Prod. Co. v. Alexander*, and *City Prods. Corp. v. Berman*, as requiring a proof of a tort before punitive damages are recoverable. See *id.* at 573; see also *Amoco Prod. Co. v. Alexander*, 622 S.W.2d 563, 571 (Tex. 1981) (recovery of punitive damages denied since no proof of independent tort); *City Prods. Corp. v. Berman*, 610 S.W.2d 446, 450 (Tex. 1980) (even when distinct willful tort proven, plaintiff must also prove actual damages suffered to recover punitive damages).

56. See *Nabours v. Longview Sav. & Loan Ass'n*, 28 Tex. Sup. Ct. J. 571, 573 (July 17, 1985). The court distinguished *Fillion v. Troy* which was relied upon by the *Nabours* as authority for permitting injunctive relief to support punitive damages. See *id.* at 573 (distinguishing *Fillion v. Troy*, 656 S.W.2d 912 (Tex. App.—Houston [1st Dist.] 1983, writ ref'd n.r.e.)). The majority points out that *Fillion* dealt with rescission of conveyances, not injunctive relief. See *id.* at 573.

57. See *id.* at 573. In discussing *Fillion*, the majority points out that in equitable actions where the plaintiff is allowed to recover property, the actual damage requirement is met. See *id.* at 573. In *Fillion*, the plaintiff was granted a rescission of a conveyance which the *Fillion*

jority disregarded the historical basis of punitive damages by requiring that actual damages be recovered before punitive damages can be awarded.<sup>58</sup> The dissenting opinion attacked the majority's reliance on the rule requiring actual damages based on the theory that punitive damages will not be excessively awarded.<sup>59</sup> Justice Kilgarlin noted that other factors are available to assess the appropriateness of the punitive award.<sup>60</sup> The dissent further asserted that the majority incorrectly focused on the plaintiff's choice of remedy rather than the defendant's misconduct,<sup>61</sup> thus ignoring the purpose for which punitive damages are imposed.<sup>62</sup> Justice Kilgarlin argued that equitable relief should be sufficient support for an award of punitive damages without the recovery of actual damages.<sup>63</sup> The dissent cited other jurisdictions allowing the plaintiff to recover punitive damages upon proof that a legally protected right was invaded by a defendant possessing the requisite intent as support for its position.<sup>64</sup>

The Texas Supreme Court in *Nabours* adheres to the majority viewpoint requiring the recovery of actual damages before punitive damages can be awarded.<sup>65</sup> The first weakness with the majority's stance, assuming that a

court held sustained an award of punitive damages. See *Fillion v. Troy*, 656 S.W.2d 912, 915 (Tex. App.—Houston [1st Dist.] 1983, writ ref'd n.r.e.).

58. See *Nabours v. Longview Sav. & Loan Ass'n*, 28 Tex. Sup. Ct. J. 571, 573 (July 17, 1985) (Kilgarlin, J., joined by Spears, Ray, and Robertson, J.J., dissenting).

59. See *id.* at 575 (Kilgarlin, J., dissenting).

60. See *id.* at 575 (Kilgarlin, J., dissenting). Justice Kilgarlin cited *Alamo Nat'l Bank v. Kraus*, 616 S.W.2d 908 (Tex. 1981), for factors to be used in assessing the appropriateness of a punitive damage award. The dissent also points out that the majority could have used the value of the Nabours' house as a foundation for determining the amount of punitive damages. See *id.* at 575.

61. See *id.* at 575 (Kilgarlin, J., dissenting). Justice Kilgarlin stated that the majority's ruling forces the Nabours to make a "Hobson's choice." See *id.* at 575. The Nabours would be forced to allow the defendant to foreclose on their home or abandon their action for punitive damages. See *id.* at 575.

62. See *id.* at 575 (Kilgarlin, J., dissenting). By denying the Nabours punitive damages, the dissent questioned what will deter the defendant and others from engaging in similar conduct in the future. See *id.* at 575.

63. See *id.* at 576 (Kilgarlin, J., dissenting). The dissent pointed out that the requirement of actual damages is part of a broader rule requiring the plaintiff to first plead an independent cause of action. See *id.* at 576.

64. See *id.* at 576 (Kilgarlin, J., dissenting); see also *Haskins v. Shelden*, 558 P.2d 487, 492-93 (Alaska 1976) (punitive damages granted in absence of recovery of actual damages when independent cause of action demonstrated); *Village of Peck v. Dennison*, 450 P.2d 310, 314 (Idaho 1969) (where legally protected interest was invalid, actual damages need not be recovered before granting punitive damages).

65. See *Nabours v. Longview Sav. & Loan Ass'n*, 28 Tex. Sup. Ct. J. 571, 572 (July 17, 1985); see also *Anderson v. Alcus*, 42 S.W.2d 294, 296 (Tex. Civ. App.—Beaumont 1931, no writ) (plaintiff denied punitive damages in defamation suit since only nominal damages recovered). The rule adhered to by the *Anderson* court illustrates a failure to recognize when actual damages are an element of the cause of action. See Note, 16 MINN. L. REV. 438, 439 (1931-

viable cause of action exists, is that the actual damage prerequisite ignores the purpose behind the imposition of punitive damages.<sup>66</sup> Another weakness with the majority's viewpoint is that the historical basis for the rule requiring recovery of actual damages prior to punitive damages is unclear and out dated.<sup>67</sup> A third weakness with the majority's reasoning is the majority's reliance upon the rule requiring actual damages for the purpose of avoiding excessive punitive awards.<sup>68</sup> Finally, the majority's stance, requiring actual damages or the equivalent to be recovered, is overbroad since such a rule prevents the granting of punitive damages in all equitable actions.<sup>69</sup>

The *Nabours* decision ignores the general Texas practice of imposing punitive damages to punish and deter the defendant for the benefit of society.<sup>70</sup> Texas courts have traditionally given effect to the punishment and deterrent

32). A showing of actual damages is held by a majority of jurisdictions to be sufficient to support an award of punitive damages. See Note, *Punitive Damages — No Recovery When Compensatory Damages Are Compromised*, 23 U. MIAMI L. REV. 261, 262 (1968).

66. See *Bernal v. Seitt*, 158 Tex. 521, 527, 313 S.W.2d 520, 523 (1958) (punitive damages awarded as punishment for wrongdoing). The fundamental purpose of punitive damages is not to compensate the plaintiff, but to punish the defendant and deter similar conduct. See *Burlington-Rock Island R.R. Co. v. Newsom*, 239 S.W.2d 734, 737 (Tex. Civ. App.—Waco 1951, no writ).

67. See *Fort Worth Elevators Co. v. Russell*, 123 Tex. 128, 150, 70 S.W.2d 397, 409 (1934). In *Russell*, the court cites 13 TEXAS JURISPRUDENCE § 132 as authority for the rule requiring the recovery of actual damages. See *id.* 150, 70 S.W.2d at 409. Section 132 of TEXAS JURISPRUDENCE cites one case in which the plaintiff was denied actual damages, but still was granted punitive damages by the jury. See 13 TEX. JUR. § 132 (1955) (citing *Dees v. Thompson*, 166 S.W. 56, 57 (Tex. Civ. App.—El Paso 1914, no writ)).

68. See *Schutz v. Morris*, 201 S.W.2d 144, 147 (Tex. Civ. App.—Austin 1947, no writ). The court in *Schutz* stated:

No set rule or ratio as between the amount of actual damages and that of exemplary damages can be laid down. Of necessity excessiveness vel non of exemplary damages must depend upon the facts of the particular case; and is a matter left largely to the discretion of the jury. The amount of exemplary damages warranted depends, among other things, upon the nature of the wrong, the character of the conduct involved, the degree of culpability of the wrongdoer, the situation and sensibilities of the parties concerned, and the extent to which such conduct offends a public sense of justice and propriety.

*Id.* at 147.

69. *Compare City Prods. Corp. v. Berman*, 610 S.W.2d 446, 450 (Tex. 1980) (injunctive relief granted, but punitive damages denied since no actual damages recovered) with *Fillion v. Troy*, 656 S.W.2d 912, 915 (Tex. App.—Houston [1st Dist.] 1983, writ ref'd n.r.e.) (punitive damages affirmed based on rescission of conveyances even though no actual damages recovered).

70. See *Bennett v. Howard*, 141 Tex. 101, 109, 170 S.W.2d 709, 713 (1943) (punitive damages awarded in excess of actual damage to punish defendant); *Cotton v. Cooper*, 209 S.W. 135, 138 (Tex. Comm'n App. 1919, opinion adopted) (punitive damages intended to punish defendant for public good). The policy consideration allowing punitive damages in Texas is punishment of the wrongdoer's behavior. See *Pedernales Elec. Coop., Inc. v. Schultz*, 583 S.W.2d 882, 884-85 (Tex. Civ. App.—Waco 1979, writ ref'd n.r.e.).

objectives by focusing on the defendant's misconduct to determine whether punitive damages were warranted.<sup>71</sup> The majority in *Nabours*, however, denied punitive damages based on the plaintiff's choice of remedy.<sup>72</sup> The focus adopted by the *Nabours* court is a shift from its earlier viewpoint in *Holloway*,<sup>73</sup> where the court stated that the plaintiff's choice of remedy should not prohibit the recovery of punitive damages.<sup>74</sup> In assessing whether the amount of punitive damages granted was excessive, the *Holloway* court explained that the proper considerations were the defendant's conduct and the remedy chosen in relation to the injury suffered by the plaintiff.<sup>75</sup> The court in *Holloway* recognized the purpose of punitive damages and stated that punitive damages in equitable actions should be determined on a case-by-case basis.<sup>76</sup> In *Nabours*, however, the court strictly adheres to the rule requiring actual damages as a prerequisite to an award of punitive damages.<sup>77</sup> *Nabours*, therefore, fails to impose punitive damages against the defendant in spite of jury findings that the defendant's conduct warranted a punitive award.<sup>78</sup> Thus, the majority's ruling in *Nabours* conflicts with the recog-

71. See *Chandler State Bank v. Dorsey*, 618 S.W.2d 113, 116 (Tex. Civ. App.—Tyler 1981, no writ) (malice inferred from defendant's conduct will sustain punitive damages); *Lubbock Bail Bond v. Joshua*, 416 S.W.2d 523, 525 (Tex. Civ. App.—Amarillo 1967, no writ) (to sustain punitive damages, defendant's actions must be malicious).

72. See *Nabours v. Longview Sav. & Loan Ass'n*, 28 Tex. Sup. Ct. J. 571, 573-74 (July 17, 1985). The majority in *Nabours* remarks that if the Nabours had sought actual damages on a broader scale, instead of limiting the jury to the loss of market value, perhaps the Nabours would have been granted actual damages. See *id.* at 573-74.

73. See *International Bankers Life Ins. Co. v. Holloway*, 368 S.W.2d 567, 584 (Tex. 1963). In *Holloway*, the court stated that the willful and fraudulent acts of the defendant supported the equitable relief sought. See *id.* at 584. In holding that the remedy sought should not preclude punitive damages, the *Holloway* court further stated that equitable principles permitted the awarding of punitive damages for the defendant's unconscionable conduct. See *id.* at 584.

74. See *id.* at 584.

75. See *id.* at 584. In *Holloway*, the plaintiff alleged that the defendants conspired to breach their fiduciary duty by misappropriating the plaintiff's corporate funds. See *id.* at 570.

76. See *id.* at 584.

77. See *Nabours v. Longview Sav. & Loan Ass'n*, 28 Tex. Sup. Ct. J. 571, 572-73 (July 17, 1985). In *Nabours*, the majority fails to address the nature and purpose of punitive damages, the defendant's conduct, or the injury to the Nabours. See *id.* at 572-74.

78. See *id.* at 574 (Kilgarlin, J., dissenting) (findings of jury indicates Longview Savings knew their actions were wrong). The Nabours secured the following jury findings:

(i) The bank instituted foreclosure proceedings against the Nabours home . . . with full knowledge of the facts and circumstances surrounding the Nabours' purchase. (Issues Nos. 5, 5a, 7, 7a, 7b; (Tr. 101, 103). . . . despite having knowingly and intentionally waived its rights of foreclosure by at least three acts prior to its attempt to foreclose. (Issue Nos. 2a, 5a, 6a, 7b, 8a; Tr. 98, 101, 102, 103, 104).

(ii) The bank's foreclosure documents contained false statements which were knowingly made with the intent to cause confusion and harmful consequences to the Nabours. (Issues Nos. 9, 9a, 9b, 10, 10b; Tr. 105-106).

nized purposes of punitive damages; that is, punishment and deterrence.<sup>79</sup>

The court's absolute adherence to the rule requiring recovery of actual damages prior to punitive damages is further misplaced since Texas case law is ambiguous on this requirement.<sup>80</sup> The leading case discussing the necessity of recovering actual damages prior to punitive damages is *Fort Worth Elevators Co. v. Russell*.<sup>81</sup> The *Russell* court stated that punitive damages cannot be awarded unless actual damages are recovered.<sup>82</sup> The intent of the Texas Supreme Court in *Russell*, however, was unclear.<sup>83</sup> Confusion arose as to the intent of the *Russell* court, when the court recognized that the

(iii) The bank falsely represented the nature of the deed of trust under which it sought foreclosure. (Issues Nos. 12, 12a; Tr. 110.)

(iv) The bank's foreclosure and related acts, were "unconscionable" conduct, done with knowledge of their falsity, deception, or unfairness. (Issue Nos. 13, 13b; Tr. 112-113). Moreover . . . the Nabours also secured four affirmative findings that the bank's conduct caused them actual damage. In Special Issues Nos. 9b, 10a, 12a, and 13 (Tr. 105, 106, 110), the jury answered "Yes" to the question of whether the bank's conduct " \*\*\* was a producing cause of any damage to the plaintiffs. \*\*\*" (Tr. 105, 106, 110).

See Brief for Appellant at 27-8, *Nabours v. Longview Sav. & Loan Ass'n*, 28 Tex. Sup. Ct. J. 571 (July 17, 1985).

79. See, e.g., *Pan Am. Petroleum Corp. v. Hardy*, 370 S.W.2d 904, 908 (Tex. Civ. App.—Waco 1963, writ ref'd n.r.e.) (good of public and punishment are purposes of punitive damages); *South Texas Coaches v. Eastland*, 101 S.W.2d 878, 883 (Tex. Civ. App.—Dallas 1937, writ dism'd) (punitive damages combine punishment of defendant with interests of society and plaintiff); *Foster v. Bourgeois*, 253 S.W. 880, 884-85 (Tex. Civ. App.—Austin 1923) (theory of punitive damages to punish defendant and deter others), *aff'd*, 113 Tex. 489, 259 S.W. 917 (1924).

80. Compare *Hughes v. Belman*, 200 S.W.2d 431, 434 (Tex. Civ. App.—Austin 1947, writ ref'd n.r.e.) (punitive damages not recoverable when actual damages not recovered) with *Garza v. San Antonio Light*, 531 S.W.2d 926, 930 (Tex. Civ. App.—Corpus Christi 1975, writ ref'd n.r.e.) (actual damages must be shown before punitive damages granted).

81. 123 Tex. 128, 70 S.W.2d 397 (Tex. 1934). The *Russell* case has been cited on numerous occasions as authority for requiring actual damages as a prerequisite to recovery of punitive damages. See, e.g., *Doubleday & Co., Inc. v. Rogers*, 674 S.W.2d 751, 754 (Tex. 1984) (*Russell* cited as authority for denying punitive damages in defamation action where no actual damages recovered); *City Prods. Corp. v. Berman*, 610 S.W.2d 446, 450 (Tex. 1980) (injunctive relief granted while actual damages denied; court citing *Russell* as authority for requirement of recovery of actual damages prior to award of punitive damages); *Teas v. Republic Nat'l Bank of Dallas*, 460 S.W.2d 233, 244 (Tex. Civ. App.—Dallas 1970, writ ref'd n.r.e.) (in suit for cancellation and rescission of conveyances, court denied punitive damages citing *Russell* as authority that there must first be proof of injury or loss).

82. See *Fort Worth Elevators Co. v. Russell*, 123 Tex. 128, 149-50, 70 S.W.2d 397, 409 (1934). The court in *Russell* first stated that punitive damages can only be recovered when the plaintiff is shown to have suffered injury. See *id.* at 149, 70 S.W.2d at 409.

83. See *id.* at 149-50, 70 S.W.2d at 409. The Texas Supreme Court in *Russell* uses "shown," "recovery," and "entitled" when addressing actual damages as a prerequisite to punitive damages. See *id.* at 149-50, 70 S.W.2d at 409. In *Russell*, the plaintiff was seeking only punitive damages from the defendant for the death of her husband. See *id.* at 130, 70 S.W.2d at 399. The *Russell* court addressed the issue of a corporation's liability for punitive damages

plaintiff was precluded from the recovery of actual damages due to the Workmen's Compensation Act.<sup>84</sup> The *Russell* court stated that the workmen's compensation problem did not change the rule and that the plaintiff could recover punitive damages by showing entitlement to actual damage.<sup>85</sup> The confusion surrounding *Russell* has increased with a recent interpretation in *Doubleday & Company, Inc. v. Rogers*.<sup>86</sup> The plaintiff in *Doubleday* relied on the entitlement theory stated in *Russell* in requesting punitive damages for libel *per se* when no actual damages had been awarded.<sup>87</sup> The court in *Doubleday* stated *Russell* was limited to its unique factual situation; that is, the entitlement theory would allow a punitive award only in a suit where actual damages were barred due to the Workmen's Compensation Act.<sup>88</sup> The *Doubleday* interpretation, however, is questionable since Texas case law, both before and after *Russell*, used the terms "finding" or "showing" or "proof" when addressing the requirement of actual damages as a prerequisite to punitive damages.<sup>89</sup> Furthermore, the *Doubleday* court's restricted reading of the entitlement theory is erroneous in light of numerous cases applying the entitlement theory to a variety of situations other than worker's compensation.<sup>90</sup>

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and the effect of workmen's compensation payments on the recovery of punitive damages. *See id.* at 130, 70 S.W.2d at 399.

84. *See id.* at 149-50, 70 S.W.2d at 409.

85. *See id.* at 150, 70 S.W.2d at 409.

86. 674 S.W.2d 751 (Tex. 1984).

87. *See id.* at 754. In *Doubleday*, the plaintiff was seeking punitive damages in a libel suit. *See id.* at 754. The plaintiff contended that since general damages are presumed in a libel suit, he was entitled to recover punitive damages even though no actual damages were recovered. *See id.* at 754.

88. *See id.* at 754. The majority in *Doubleday* stated that the rule in *Russell* was "clearly intended" to be applicable to the facts of that case only. *See id.* at 754. The *Doubleday* court noted that the plaintiff in *Russell* was statutorily barred from recovering actual damages due to the Workmen's Compensation Act. *See id.* at 754.

89. *See, e.g.,* Giraud v. Moore, 86 Tex. 675, 676, 26 S.W. 945, 946 (1894) (no actual damages shown, thus no recovery of punitive damages); Traweek v. Martin-Brown Co., 79 Tex. 460, 464, 14 S.W. 564, 565 (1890) (must have proof of actual damages to recover punitive damages); Jones v. Matthews, 75 Tex. 1, 1, 12 S.W. 823, 823 (1889) (actual damages must be found for punitive damages to be allowed); *see also* City Prods. Corp. v. Berman, 610 S.W.2d 446, 450 (Tex. 1980) (before punitive damages can be granted, plaintiff must prove actual damages); Woodruff v. Bryant, 558 S.W.2d 535, 543 (Tex. Civ. App.—Corpus Christi 1977, writ ref'd n.r.e.) (finding of actual damages required before punitive damages allowed); Forbau v. Producers Gas Co., 601 S.W.2d 550, 552 (Tex. Civ. App.—Amarillo 1980, no writ) (must have finding of actual damages to recover punitive damages); Seegers v. Spradley, 522 S.W.2d 951, 957 (Tex. Civ. App.—Beaumont 1975, writ ref'd n.r.e.) (punitive damages allowed with finding of actual damages).

90. *See, e.g.,* Mabry v. Abbott, 471 S.W.2d 442, 446 (Tex. Civ. App.—Waco 1971, writ ref'd n.r.e.) (in action to recover debt prerequisite to award of punitive damages is showing of loss or injury); Pan Am. Petroleum Corp. v. Mitchell, 338 S.W.2d 740, 742 (Tex. Civ. App.—



The majority in *Nabours* also inferred that the rule requiring actual damages to be awarded prior to a punitive award requires the trier of fact place a monetary value on the actual damages.<sup>91</sup> The *Nabours* majority cited the *Russell* case as the authority requiring that a monetary amount for the actual damages be ascertained, even in cases where actual damages are not recoverable.<sup>92</sup> However, in doing so, the court adheres to the outdated practice of ascertaining the amount of actual damages before allowing punitive damages.<sup>93</sup> Since the pecuniary amount of actual damages is often not ascertainable,<sup>94</sup> the position of many jurisdictions is that the plaintiff need only secure a finding of actual damages or injury suffered as a prerequisite to punitive damages.<sup>95</sup> By requiring that actual damages be ascertained *and* valued before an award of punitive damages can be made, the Texas Supreme Court sets a standard that is neither logical nor practical in many situations.<sup>96</sup>

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El Paso 1960, no writ) (punitive damages sustained when actual damages found or shown in trespass case); *Texas Elec. Serv. Co. v. Lineberry*, 333 S.W.2d 596, 599 (Tex. Civ. App.—El Paso 1960, no writ) (rule in Texas is that actual damages must be recoverable before punitive damages awarded in trespass case).

91. See *Nabours v. Longview Sav. & Loan Ass'n*, 28 Tex. Sup. Ct. J. 571, 572 (July 17, 1985). The *Nabours* court stated that in situations where actual damages are not recoverable, the plaintiff must still obtain a finding from the trier of fact on the amount of the actual damages before punitive damages are recoverable. See *id.* at 572.

92. See *id.* at 572.

93. See *Miller v. Fox*, 572 P.2d 804, 808 (Mont. 1977). "Although the trier of fact, as a prerequisite for awarding exemplary damages, must find the claimant suffered actual damages, it is unnecessary that the trier of fact place a monetary value on the actual damages or make any award of actual damages." *Id.* at 808; see also *Henson v. A. T. Sistare Constr. Co.*, 113 S.E.2d 341, 345 (S.C. 1960) (presumption of nominal damages that are incapable of being measured will uphold award of punitive damages).

94. See *Howell v. Association Hotels*, 40 Hawaii 492, 497 (Hawaii 1954) (showing of actual damages before awarding punitive damages is possibly holding of majority of cases). The Hawaii Supreme Court discusses the various ways in which punitive damages can be sustained. See *id.* at 496-97. The court stated that a majority of cases hold that "proof of actual damages must be shown even though the actual extent of the money damages may not be possible of ascertainment." *Id.* at 497; see also *Sterling Drug v. Benatar*, 221 P.2d 965, 970 (Cal. Ct. App. 1950) (even though court recognized difficulty in ascertaining monetary value of actual damages, punitive damages were sustained); *Singer Shop-Rite, Inc. v. Rangel*, 416 A.2d 965, 968 (N.J. Super. Ct. App. Div. 1980) (even though the pecuniary value of the injury cannot be shown, punitive damages are recoverable).

95. See *Nappe v. Anshelewitz, Barr, Ansell & Bonello*, 477 A.2d 1224, 1232 (N.J. 1984) (punitive damages may be recovered where plaintiff establishes intentional tort, even though no actual damages recovered); see also *Howell v. Association Hotels*, 40 Hawaii 492, 497 (Hawaii 1954) (better rule permits punitive damages when plaintiff establishes cause of action even though no actual damages measured or shown); *Westfield Centre Serv., Inc. v. Cities Serv. Oil*, 386 A.2d 448, 464 (N.J. Super. Ct. Ch. Div. 1978) (where court determines that legal right invaded, punitive damages recoverable without recovery of actual damages).

96. Compare *Nabours v. Longview Sav. & Loan Ass'n*, 28 Tex. Sup. Ct. J. 571, 572-73

The majority in *Nabours* argues that ascertaining the amount of actual damage is necessary so that the punitive damages will bear a reasonable relationship to the actual damages awarded.<sup>97</sup> The purpose of the reasonable relationship rule is to avoid excessive punitive awards.<sup>98</sup> The reasonable relationship rule has been adopted by a majority of the jurisdictions to provide guidelines for jurors in assessing punitive damages,<sup>99</sup> but the application of the rule has been varied.<sup>100</sup> The current trend is to assess the reasonableness of the punitive damage award in relation to the defendant's conduct and the injury inflicted on the plaintiff.<sup>101</sup> This variation allows courts to grant punitive damages when the defendant's conduct so warrants, even if no actual damages are found or ascertained.<sup>102</sup> In *Alamo National Bank v. Kraus*,<sup>103</sup> the Texas Supreme Court set forth several factors to be considered in assess-

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(July 17, 1985) (actual damages in specific amount necessary to support punitive damages award) *with* *Howell v. Association Hotels*, 40 Hawaii 492, 497 (Hawaii 1954) (no actual damages need be determined to support punitive damages) *and* *Westfield Centre Serv., Inc. v. Cities Serv. Oil*, 386 A.2d 448, 464 (N.J. Super. Ct. Ch. Div. 1978) (value of legal right may not be ascertainable, even so breach of right may support punitive damages).

97. *See Nabours v. Longview Sav. & Loan Ass'n*, 28 Tex. Sup. Ct. J. 571, 573 (July 17, 1985) (rule requiring proof of actual damages follows from rule requiring punitive damages to be reasonably proportionate to actual damages).

98. *See* K. REDDEN, PUNITIVE DAMAGES § 3.6(c), at 63 (1980) (discussion of reasonable relation rule). "The value of the 'reasonable relation rule' is that it serves as a rough device to allow a court to pare down an excessive award of punitive damages." *Id.* § 3.6; *see also* W. PROSSER & W.P. KEETON, PROSSER & KEETON ON TORTS § 2, at 14-15 (5th ed. 1984) (punitive damages and actual damages must bear reasonable relationship because small compensatory award will not support a large punitive award).

99. *See* Comment, *The Imposition of Punishment by Civil Courts: A Reappraisal of Punitive Damages*, 41 N.Y.U. L. REV. 1158, 1170 (1966) (reasonable relationship rule attempts to specify standards for imposing punitive damages); Note, *Exemplary Damages in the Law of Torts*, 70 HARV. L. REV. 517, 530 (1957) (purpose of reasonable relationship method is to limit jury's discretion).

100. *Compare* *Benyon v. Nesselth*, 646 P.2d 1043, 1044-47 (Kan. 1982) (award of \$9,326.06 actual damages and \$100,000 punitive damages upheld because it did not shock the conscience of the court) *with* *Senn v. Manchester Bank of St. Louis*, 583 S.W.2d 119, 138 (Mo. 1979) (\$491,892 actual damages and \$737,838 punitive damages calculated by specific formula of a "multiple of one and one-half times actual damages").

101. *See, e.g.,* *Stambaugh v. International Harvester Co.*, 435 N.E.2d 729, 746 (Ill. App. Ct. 1982) (where jury found defendant acted with conscious indifference with regard to safety of product users, punitive damages award was appropriate); *Leimgruber v. Claridge Assoc., Ltd.*, 375 A.2d 652, 655 (N.J. 1977) (in assessing punitive damages, two factors to consider are nature of defendant's acts and injury inflicted on plaintiff); *Black v. Gardner*, 320 N.W.2d 153, 161 (S.D. 1982) (when determining amount of punitive damages, one should consider amount of actual damages as well as wrongdoer's conduct and intent).

102. *See, e.g.,* *Haskins v. Sheldon*, 558 P.2d 487, 492 (Alaska 1976) (where complaint states a claim for relief, independent of claim for punitive damages, no actual damages need be recovered); *Nales v. State Farm Mut. Auto. Ins. Co.*, 398 So. 2d 455, 457 (Fla. Dist. Ct. App. 1981) (invasion of legal right or injury suffered is requisite to awarding punitive damages, not recovery of actual damages); *Wells v. Smith*, 297 S.E.2d 872, 880 (W. Va. 1982) (where evi-

ing whether a punitive damage award is excessive.<sup>104</sup> The *Kraus* court stressed that consideration of the following factors would help evaluate the appropriateness of the punitive sum awarded: "(1) the nature of the wrong, (2) the character of the conduct involved, (3) the degree of culpability of the wrongdoer, (4) the situation and sensibilities of the parties concerned, and (5) the extent to which such conduct offends a public sense of justice and propriety."<sup>105</sup> The factors set forth by the *Kraus* court focus on the defendant's conduct, and do not address the monetary value of the actual damage award.<sup>106</sup> Although the *Nabours* court admits that the value of actual damages is only one factor to be considered, the court denied the punitive damages award without assessing the other factors as noted in *Kraus*.<sup>107</sup> In *Nabours*, the plaintiffs secured jury findings that the defendant made false statements with the foreclosure notice, misrepresented the rights and obligations involved in the deed of trust, and acted maliciously.<sup>108</sup> The court in *Nabours* therefore denied punitive damages when ample criteria were available to assess reasonable punitive damages.<sup>109</sup>

The majority's rule requiring the recovery of actual damages prior to granting punitive damages denies punitive awards to plaintiffs who recover equitable relief but do not recover actual damages or the equivalent.<sup>110</sup> This requirement is unsound if punitive damages are to be effectively and fairly applied.<sup>111</sup> Traditionally, courts have required an independent cause of ac-

dence of injury to plaintiff, failure to recover actual damages does not preclude granting of punitive damages).

103. 616 S.W.2d 908 (Tex. 1981).

104. *See id.* at 910.

105. *See id.* at 910.

106. *See id.* at 910.

107. *See Nabours v. Longview Sav. & Loan Ass'n*, 28 Tex. Sup. Ct. J. 571, 573 (July 17, 1985) (proportionate rule not rigid, but to be used based on facts of case).

108. *See id.* at 571.

109. *See id.* at 575 (Kilgarlin, J., dissenting). Justice Kilgarlin suggests that the value of the house could have been used to determine the proper proportion of punitive damages. *See id.* at 575 (Kilgarlin, J., dissenting). *Alamo Nat'l Bank v. Kraus* is also cited by the dissenting opinion as setting forth criteria to assess the excessiveness of the punitive damages award. *See id.* at 575 (Kilgarlin, J., dissenting); *see also Alamo Nat'l Bank v. Kraus*, 616 S.W.2d 910 (Tex. 1981) (factors used in determining whether punitive damage award excessive include injury inflicted, defendant's conduct, situation of parties, and public response to conduct).

110. *See Nabours v. Longview Sav. & Loan Ass'n*, 28 Tex. Sup. Ct. J. 571, 574 (July 17, 1985). The *Nabours* were successful in obtaining injunctive relief which did not require actual damages as an element. *See id.* at 571. Because the *Nabours* did not receive a jury finding of actual damages the *Nabours* were denied punitive damages. *See id.* at 574.

111. *Compare City Prods. Corp. v. Berman*, 610 S.W.2d 446, 450 (Tex. 1980) (punitive damages denied with case granting injunctive relief) *with Russell v. Truitt*, 554 S.W.2d 948, 955 (Tex. Civ. App.—Fort Worth 1979, writ ref'd n.r.e.) (punitive damages granted where plaintiff recovered money lost as result of defendant breaching fiduciary duty).

tion before punitive damages could be granted.<sup>112</sup> The requirement of an independent cause of action satisfies the existing rule that an action for punitive damages alone cannot be maintained.<sup>113</sup> Unfortunately, since most tort actions require a showing of actual damages, many courts expanded the rule to include recovery of actual damages.<sup>114</sup> Many jurisdictions have adopted the rule that when a plaintiff establishes an independent cause of action and the requisite misconduct of the defendant, punitive damages should be allowed.<sup>115</sup> These jurisdictions recognize that the invasion of a legal right often does not result in pecuniary loss.<sup>116</sup> Therefore, the rule allowing a punitive award after equitable relief, without an actual damage award, allows punitive damages to be imposed for their intended purposes of punishment and deterrence.<sup>117</sup> The rule applied by the majority in *Nabours* fosters

112. See *Schippel v. Norton*, 16 P. 804, 807 (Kan. 1888) (if plaintiff has no "cause of action independent of claim" for punitive damages, there is no valid claim for punitive damages); see also C. MCCORMICK, HANDBOOK ON THE LAW OF DAMAGES § 83, at 293 (1935) (punitive damages do not create causes of action). "[T]he first inquiry must be, 'Does the complaint state a cause of action if the allegations relied upon solely to support the claim for exemplary damages be disregarded?' If it does not, it is insufficient, and the claim for exemplary damages collapses with the rest of the case." *Id.* at 293.

113. See *Pringle Tax Serv., Inc. v. Knoblauch*, 282 N.W.2d 151, 154 (Iowa 1979) (punitive damages recoverable incident to a cause of action); *Hilbert v. Roth*, 149 A.2d 648, 652 (Pa. 1959) (punitive damages mere incident to a cause of action).

114. See C. MCCORMICK, HANDBOOK ON THE LAW OF DAMAGES § 22, at 88 (1935) (in evolution of tort actions, more torts required actual loss or damages to be actionable). In earlier tort actions, proof of wrongdoing by the defendant would support an award of damages. See *id.* at 87. The movement in the law of tort requiring actual damages or injury to be present before a cause of action is viable has fostered the rule that actual damages must be recovered before punitive damages can be recoverable. See *id.* at 294.

115. See *Holden v. Construction Mach. Co.*, 202 N.W.2d 348, 359 (Iowa 1972) (stockholders derivative action). The court in *Holden* recognized that punitive damages are recoverable where a legally protected right has been invaded. See *id.* at 359. The requirement of actual damages as a prerequisite to granting punitive damages is to ensure that there is an invasion of a legally protected right before granting punitive relief. See *Village of Peck v. Denison*, 450 P.2d 310, 314-15 (Idaho 1969). The court in *Peck* held that this requirement can be filled by an award of equitable relief. See *id.* at 315. In either situation, a legally protected interest of the plaintiff has been invaded and should be compensated. See *id.* at 315.

116. See, e.g., *Nappe v. Anschelwitz, Barr, Ansul & Bonello*, 477 A.2d 1224, 1228 (N.J. 1984) (nominal damages inferred in absence of actual loss where legal right invaded); *Westfield Centre Serv., Inc. v. Cities Serv. Oil Co.*, 386 A.2d 448, 464 (N.J. 1978) (since injunction prevented jury from finding actual damages, nominal damages inferred to support award of punitive damages); *Henson v. A. T. Sistar Constr. Co.*, 113 S.E.2d 341, 345 (S.C. 1960) (where no substantial damage shown, but a legally protected right involved, punitive damages supported by inferred nominal damages).

117. See *Capitol Fed. Sav. & Loan Ass'n v. Hohman*, 682 P.2d 1309, 1310 (Kan. 1984) (punitive damages granted for willful breach of trust even though no actual damages were recovered). In *Hohman*, the court held that the requirement of actual damages was satisfied by the grant of equitable relief. See *id.* at 1310. In *Hohman*, the court allowed punitive damages stating that the deterrent effect was proper. See *id.* at 1310. The issue of whether to grant

inconsistent and unfair results because it does not effectuate the punishment and deterrence purposes of punitive damages.<sup>118</sup> The inequity promoted by the *Nabours* court's adherence to ambiguous Texas law is apparent since Texas courts may allow punitive damages to be granted with equitable relief if the plaintiff recovers actual damages for a loss caused by the defendant's misconduct, yet still deny punitive damages in cases granting equitable relief alone.<sup>119</sup>

By failing to assess the facts present in the *Nabours* situation, the Texas Supreme Court continues to follow a rule that is outdated and unsound. The decision by the court in *Nabours* overlooks the historical basis and policies underlying punitive damages. The Texas Supreme Court fails to give credence to the punishment and deterrence purposes of punitive damages by insisting on adherence to the rule requiring the recovery of actual damages prior to granting punitive damages. The court in *Nabours* adheres to this

punitive damages should be based on the defendant's conduct, and not actual damages. See *Nash v. Craigco, Inc.*, 585 P.2d 775, 778 (Utah 1978) (punitive damages must be based on defendant's conduct).

118. Compare *Nabours v. Longview Sav. & Loan Ass'n*, 28 Tex. Sup. Ct. J. 571, 574 (July 17, 1985) (where no actual damages awarded by jury, no punitive damages can be awarded) with *Fillion v. Troy*, 656 S.W.2d 912, 915 (Tex. Civ. App.—Houston [1st Dist.] 1983, writ ref'd n.r.e.) (court awarded punitive damages in absence of recovery of actual damages where plaintiff allowed to rescind deeds).

119. See, e.g., *Adams v. Harris*, 564 S.W.2d 152, 156 (Tex. Civ. App.—Houston [14th Dist.] 1978, writ ref'd n.r.e.) (equitable relief allows punitive damage recovery when actual damages granted); *Phillips v. Wertz*, 546 S.W.2d 902, 907 (Tex. Civ. App.—Dallas 1977, writ ref'd n.r.e.) (where only injunctive relief granted, plaintiffs denied punitive damages); *Teas v. Republic Nat'l Bank of Dallas*, 460 S.W.2d 233, 244 (Tex. Civ. App.—Dallas 1970, no writ) (plaintiff granted rescission of conveyances, but denied punitive damages where no actual damages recovered); see also *Press Pub. Co. v. Monroe*, 73 F. 196, 201 (2nd Cir. 1896) (court declined to follow Texas rule requiring recovery of actual damages before granting punitive damages). In this regard, the *Monroe* court stated:

[T]here is neither sense nor reason in the proposition that such additional damages may be recovered by a plaintiff who is able to show that he has lost \$10.00, and may not be recovered by some other plaintiff who has sustained, it may be, far greater injury, but is unable to prove that he is poorer in pocket by the wrongdoing.

*Id.* at 201. In addition, if the purpose of punitive damages is to punish the wrongdoer, punitive damages should be granted when a defendant's conduct so warrants and there is an invasion of a legally protected right. See *Howell v. Association Hotels*, 40 Hawaii 492, 498-500 (1954). The *Howell* court further stated:

Consequently, it seems desirable to recognize the principle that, if a cause of action is found to exist by the jury, in a case where "actual" damage is not an essential element of the cause of action, then, if the necessary culpability on defendant's part be established, a verdict for exemplary damages is proper, though the award of other damages is nominal or absent entirely.

*Id.* at 499 (quoting C. McCORMICK, HANDBOOK ON THE LAW OF DAMAGES § 83, at 294 (1935)). The *Howell* court also points out that McCormick refused to follow the Texas doctrine. See *id.* at 499.

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rule even though confusion exists in Texas courts over the proper application and requirements of the rule. The majority misapplies the requirement that actual and punitive damages be reasonably related by focusing only on the monetary value of actual damages and disregarding the defendant's egregious conduct. Furthermore, the majority's position results in inconsistent and unfair results when equitable remedies are at issue. When the plaintiff establishes both a cause of action, independent of the request for punitive damages, and sufficient misconduct by the defendant, punitive damages should be awarded. The effect of the majority's ruling in *Nabours* is that punitive damages will continue to be awarded in an inconsistent manner. The *Nabours* case offered an excellent opportunity for the Supreme Court of Texas to restore consistency and equity to the application and availability of punitive damage awards, but the court unfortunately bypassed the opportunity.

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