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About the authors...

Quentin F. Urquhart, Jr. is a founding Member of Irwin Fritchie Urquhart & Moore, LLC in New Orleans, Louisiana, and practices the areas of products liability, toxic torts and general litigation.

Edward W. Trapolin is an associate at Irwin Fritchie Urquhart & Moore, LLC in New Orleans, Louisiana, and practices in the areas of products liability and general litigation.

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One North Franklin, Chicago, IL 60606 USA

www.iadclaw.org

Phone: 312.368.1494 Fax: 312.368.1854

E-mail: aomaley@iadclaw.org

Supreme Court Continues Effort To Provide Guidance For Achieving “Error Free” Punitive Damages Awards.

Quentin F. Urquhart, Jr.¹
Edward W. Trapolin²

On February 20, 2007, a strongly divided United States Supreme Court rendered a decision in *Phillip Morris Inc. v. Williams*, No. 05-1256, 549 U.S. ____ (2007), that continued the Court’s quest to define the Constitutional limits for punitive damage awards. The Court held that a punitive damages award that punishes a defendant for harming persons who are not before the court is an unconstitutional taking of property without due process.³ The Court directed that states must guard against such constitutionally impermissible verdicts and strive for constitutionally “error free” verdicts. As noted by the dissenters, however, the Court failed to provide clear guidance as to how the lower courts could achieve such lofty goals.

Procedural History

In *Phillip Morris*, the widow and representative of Jesse Williams, a lifelong smoker of Phillip Morris cigarettes, sued Phillip Morris in Oregon State Court on claims of negligence and fraud.⁴ In relevant part, the jury found in favor of Mr. Williams on the fraud claim, and awarded \$821,000 in compensatory damages and \$79.5 million in punitive damages.⁵ The trial court reduced the jury award to \$32 million, because it found the award excessive. Both sides appealed.⁶

The Oregon Court of Appeals restored the jury award, and the Oregon Supreme Court denied Phillip Morris’ application for review. Phillip Morris then filed a writ of certiorari in the United States Supreme Court.⁷ The Court, citing *State Farm Mut. Auto. Insur. Co. v. Campbell*, 540 U.S. 801; 124 S.Ct. 56 (2003), and without further comment, vacated the jury award and remanded to the Oregon Court of Appeals for further consideration.⁸

On remand, the Oregon Court of Appeals affirmed its prior ruling restoring the jury verdict. The Oregon Supreme Court, this time, granted Phillip Morris’ request for review.

Before the Oregon Supreme Court, Phillip Morris argued that the trial court erred in allowing the plaintiff’s attorney to argue that Phillip Morris’ actions had caused harm to

¹ Mr. Urquhart is a founding Member of Irwin Fritchie Urquhart & Moore, LLC in New Orleans, Louisiana, and practices the areas of products liability, toxic torts and general litigation.

² Mr. Trapolin is an associate at Irwin Fritchie Urquhart & Moore, LLC in New Orleans, Louisiana, and practices in the areas of products liability and general litigation.

³ No. 05-1256, 549 U.S. ____ (2007), at 1.

⁴ Id. at 1.

⁵ Id. at 2.

⁶ Id.

⁷ Id.

⁸ Id. at 2.

countless Oregonians, without also instructing the jury that it could not punish Phillip Morris for the harm to those same persons because they were not before the court.⁹ Phillip Morris also argued that, given the size of the jury award, the instruction that was given left open the possibility that the jury had, in fact, punished it for harm to others in violation of the Due Process Clause.¹⁰ Phillip Morris suggested that the award was unconstitutional, because the ratio between the compensatory damages award and the punitive damages award was so large that it bore no reasonable relationship to the harm suffered by the plaintiff, as instructed by the Court in *BMW North America, Inc. v. Gore*, 517 U.S. 559 (1996), and *State Farm*.¹¹

The Oregon Supreme Court rejected, in pertinent part, Phillip Morris' argument that the constitution prohibited a jury from punishing a defendant for harm to persons that are not parties.¹² That court then held that the nearly \$80 million jury punitive damages award was not "grossly excessive."¹³ The United States Supreme Court granted Philip Morris' writ of certiorari to consider whether "Oregon had unconstitutionally permitted it to be punished for harming nonparty victims," and whether the Oregon court had ignored the constitutional requirement that punitive damages awards be "reasonably related to the plaintiff's harm."¹⁴

Holding

Writing for the majority, Justice Breyer, joined by Chief Justice Roberts and Justices Kennedy, Souter, and Alito, recognized that states have the right to protect their citizens by punishing and deterring unlawful conduct.¹⁵ They must, however, also protect defendants' due process rights by shielding them from arbitrary punishments that are more a reflection of juror caprice than an "application of law."¹⁶ The Court also expressed concern that overly large jury awards could run the risk of affecting conduct and commerce in other states by indirectly imposing one state's or jury's policies on

⁹ Id. at 2-3 (The proposed jury instruction, in pertinent part, stated: "you may consider the extent of harm suffered by others in determining what [the] reasonable relationship is' between any punitive award and 'the harm caused to Jesse Williams' by Philip Morris' misconduct, '[but] you are not to punish the defendant for the impact of its alleged misconduct on other persons, who may bring lawsuits of their own in which other juries can resolve their claims. . . .").

¹⁰ Id. at 3 (The jury instruction given was, in pertinent part, "[p]unitive damages are awarded against a defendant to punish misconduct and to deter misconduct,' and 'are not intended to compensate the plaintiff or anyone else for damages caused by the defendant's conduct.'").

¹¹ Id. at 3. The *BMW* Court had instructed that punitive damages must reflect the reprehensibility of the defendant's conduct, a reasonable relationship to the harm suffered by the plaintiff, and the presence of sanctions for similar conducts. In addition, the *State Farm* Court had noted that reasonable ratios between the compensatory and punitive damages would pass constitutional muster, whereas a large ratio would be constitutionally suspect.

¹² Id. at 3-4.

¹³ Id. at 4.

¹⁴ Id.

¹⁵ Id. (Roberts, C.J., Kennedy, Souter, and Alito, J.J. joining)

¹⁶ Id. at 4 (citations omitted).

neighboring states.¹⁷ Thus, the Court recognized that the Constitution limits both the procedures for imposing and amounts of punitive damages.¹⁸

As explained by the Court, “the Due Process Clause prohibits a state from punishing an individual without first providing that individual with ‘an opportunity to present every available defense.’”¹⁹ Thus, a state may not punish a defendant for harm done to persons “who are strangers to the litigation.”²⁰ The Court reasoned that allowing liability to be imposed for harm to nonparties would “add a near standardless dimension to the punitive damages equation.”²¹ Consequently, the Court affirmed its prior holdings that directed the reasonableness of a punitive damage award to be determined solely “in light of the *potential* harm the defendant’s conduct could have caused . . . *the plaintiff*.”²²

The Court noted that a reviewing court should attempt to determine whether the punitive damages award was “error free” within the context of each particular case.²³ To do so, trial courts must attempt to assure that the jury asks the right questions in determining whether to award punitive damages as well as in setting quantum.²⁴ Thus, trial courts must provide jurors with “proper legal guidance.” Due Process requires that courts assure that jurors do not use harm to others to go beyond the reprehensibility analysis and to punishment for that same harm.²⁵ Accordingly, while a court may allow the plaintiff to show harm to others to prove the reprehensibility of the defendant’s conduct, it may not allow the jury to “use a punitive damages verdict to punish a defendant directly on account of harms it is alleged to have visited on nonparties.”²⁶

Turning to the issue of whether the Oregon Courts had imposed sufficient procedural protections to prevent Phillip Morris from being punished for harm caused to others, the Court concluded that the Oregon Supreme Court’s decision suggested that it had not.²⁷ In its holding, affirming the jury’s verdict, the Oregon Supreme Court stated that juries cannot base their damages award on dissimilar acts by the defendant, which the Supreme Court stated was an accurate reflection of the law.²⁸

The Oregon Supreme Court, however, had gone on to state that it could not understand how a jury could be allowed to consider such harm, while also precluding its use in meting out punishment or in its ultimate “punishment calculus.”²⁹ The United States Supreme Court took issue with the Oregon Court’s confusion, and affirmed its prior holdings that the only reason a jury may consider harm to others is where it is

¹⁷ Id. at 5 (citing BMW, at 571-2).

¹⁸ Id. (citations omitted).

¹⁹ Id. at 5(citation omitted).

²⁰ Id.

²¹ Id. at 6.

²² Id. at 6 (citations omitted and emphasis original).

²³ Id. at 6-7(citation omitted).

²⁴ Id. at 7.

²⁵ Id. at 7-8.

²⁶ Id. at 7.

²⁷ Id. at 8.

²⁸ Id. at 9.

²⁹ Id. at 9 (citations omitted).

determining the reprehensibility of the defendant's conduct.³⁰ The Court reiterated that trial courts must protect against the risk that a jury will be confused about the role harm to nonparties may play in their punitive damages deliberations.³¹

The Court, thus ultimately, vacated the Oregon Supreme Court's decision and remanded for that Court to "apply the standard" it set forth.³² Acknowledging that the Oregon Supreme Court may not be able to assure an "error free" award, the Court opined that a new trial may be needed to reach the issue.³³ Because the Court found a potential that the Oregon Court had allowed punishment for harm to nonparties, the Court did not reach the issue of whether the quantum of the award was unconstitutional under a *State Farm* type analysis.³⁴

The dissenters found that the Oregon Supreme Court had correctly applied the High Court's jurisprudence, and there was no basis for the Court's intrusion into, much less its reversal of, the State court decision. Echoing the Oregon Supreme Court, the dissent wrote that allowing harm to nonparties to be considered in determining reprehensibility, while also disallowing its use in punishing the defendant, was confusing. In Justice Stevens' words, it was "a nuance" that eluded him. Justice Thomas went further and criticized the Court for creating a line of "punitive damages jurisprudence [] 'insusceptible of principled application.'"³⁵ The dissent also opined that the Court had failed to provide adequate guidance to the lower courts as to how to assure an "error free" verdict.³⁶

Conclusion and Strategic Considerations

Whether *Phillip Morris* will guide courts towards constitutionally "error free" verdicts or whether it will create greater confusion on the issue of punitive damages is yet to be seen. What is clear is that the case did not change the law on punitive damages.

Phillip Morris, however, illustrates the importance for defense attorneys to remain ever vigilant to attempts by the plaintiffs' bar to expand punitive damages beyond their constitutional limits and into stratospheric amounts. It also suggests that defense counsel should continue to develop and to insist on jury instructions that clearly and unambiguously instruct juries on the law regarding punitive damages and the limited role that harm to others may play in a jury's deliberations. Furthermore, defense counsel should look for opportunities during the trial to remind both judge and jury that punitive damages are not to be imposed because of harm the defendant may have caused to persons that are not before the court. Perhaps through vigilance, determination, and

³⁰ Id.

³¹ Id. at 9-10.

³² Id. at 10.

³³ Id.

³⁴ Id.

³⁵ Id.

³⁶ No. 05-1256, 549 U.S. ____ (2007)(Stevens, J. and , Thomas, J. dissenting; Ginsburg, J., dissenting, with Thomas, J., and Scalia, J., joining).

education, the risk of unconstitutional jury verdicts will be lessened and the potential for success in reducing such verdicts on appeal will be increased.