

## CASE STUDY PREPARED FROM ORIGINAL PUBLISHED OPINION

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### *Bullock v Philip Morris USA, Inc. (1/30/08)*

#### **Products Liability; Punitive Damages; Error in Jury Instructions**

After smoking cigarettes for 45 years, Plaintiff sued Philip Morris in April 2001 seeking to recover damages for personal injuries based on products liability and fraud, among other counts. The jury returned a special verdict in September 2002, finding there was a defect in design, that the cigarettes were negligently designed, that the defendant failed to warn of the dangers of smoking before 1969, that it intentionally and negligently misrepresented material facts and made a false promise, and that its misconduct was a cause of plaintiff s injury. Philip Morris was found guilty of oppression, fraud, or malice with respect to each count. The jury awarded plaintiff \$850,000 in compensatory damages, and later awarded her \$28 billion in punitive damages.

The court denied defendant s JNOV motion. The court granted its new trial motion as to excessive damages, with the condition the court would deny the new trial motion if Bullock consented to reduce the punitive damages award to \$28 million. Plaintiff consented and judgment was entered. Philip Morris appealed. Plaintiff died in February 2003.

In a 60 page opinion, the Second District Court of Appeals, Division Three upheld each of the theories of recovery against the defendant. The Appellate Court then turned to the claim by the defendant that the punitive damages award was excessive and a new trial was warranted.

The trial court s decision to order a remittitur and deny the new trial motion was a proper alternative remedy under CCP section 662.5. The Due Process Clause of the Fourteenth Amendment prohibits grossly excessive or arbitrary punishment of a tortfeasor and therefore limits the amount of punitive damages that a state court can award. (*State Farm Mut. Automobile Ins. Co. v Campbell* (2003) 538 U.S. 408).

A court reviewing a punitive damages award under the due process clause must consider three constitutional guideposts: "(1) the degree of reprehensibility of the the defendant s misconduct, (2) the disparity between the actual or potential harm suffered by the plaintiff and the punitive damages award, and (3) the difference between the punitive damages awarded by the jury and the civil penalties authorized or imposed in comparable cases. (Campbell, at p. 418).

It should be presumed a plaintiff has been made whole for his injuries by compensatory damages, so punitive damages should only be awarded if the defendant s culpability, after having paid compensatory damages, is so *reprehensible* as to warrant the imposition of further sanctions to achieve punishment or deterrence.

A defendant should be punished for the conduct that harmed the plaintiff, not for being an unsavory individual or business. Due process does not permit courts, in the calculation of punitive damages, to adjudicate the merits of other parties hypothetical claims against a defendant under the guise of the reprehensibility analysis. Punishment on these bases creates the possibility of multiple punitive damages awards for the same conduct.

A State Court may not award punitive damages for the purpose of punishing a defendant for harm caused to non-parties to the litigation. (*Philip Morris v Williams* (2007) 127 S. Ct. 1057). A defendant would have no meaningful opportunity to defend against a charge of injury caused to others and that the jury would have to speculate as to the nature and extent of such injuries. A jury may consider evidence of harm caused to others to determine the degree of reprehensibility of the conduct that harmed the plaintiff, but not for purposes of punishing the defendant.

Here, Philip Morris sought a jury instruction that provided: "You are not to impose punishment for harms suffered by persons other than the plaintiff before you." The trial court declined to give this instruction. Since this instruction is a correct statement of the law under *Williams*, it was error not to give it.

Evidence was presented at trial of Philip Morris s nationwide publicity campaign designed to mislead the public as to the adverse health effects of smoking cigarettes. Evidence was also presented as to the number of smokers in California who have died as a result of smoking cigarettes. Plaintiff s counsel emphasized that point in closing argument, and stated that, "... for

each lawsuit against Philip Morris for smoking-related illnesses years, 28,000 Californians have died from smoking in the past 40 years." The \$28 billion in punitive damages awarded by the jury was equivalent to \$1 million for each of the purported 28,000 deaths.

In light of this record, and the failure of the trial court to give the requested instruction, the appellate court found the error prejudicial. Since the Justices could not determine how the instructional error affected the amount of the punitive damages award, and could not substitute their own judgement for that of the jury, they ruled that a new trial limited to the amount of punitive damages is required.

There normally is no need to retry general damages to guard against an excessive punitive damages award. The jury is obligated to maintain the reasonable relation between general and punitive damages without having to determine for itself the amount of general damages. (*Torres v Automobile Club of So. California* (1997) 15 Cal. 4<sup>th</sup> 771).

Here, since the jury in the new trial must consider the degree of reprehensibility of Philip Morris conduct that harmed plaintiff that provides sufficient assurance the award of punitive damages will be based on the same course of conduct on which the first jury based its finding of oppression, fraud, or malice. The trial court should admit evidence relevant to determining the amount of punitive damages in the same manner that a trial court in a new trial limited to the amount of compensatory damages should admit evidence relevant to determining that amount.

The judgment is reversed as to the amount of punitive damages and affirmed in all other respects.