

SUPREME COURT OF LOUISIANA

No. 2014-C-256

John Oleszkowicz
Plaintiff-Respondent

versus

Exxon Mobil Corporation
Defendant-Applicant

On Application for Writ of Certiorari or Review From the Court of Appeal, Fifth Circuit,
Parish of Jefferson, the Honorable Marc E. Johnson, Judge Presiding

**AMICI CURIAE BRIEF OF LOUISIANA ASSOCIATION OF BUSINESS AND
INDUSTRY, AMERICAN TORT REFORM ASSOCIATION, NATIONAL
ASSOCIATION OF MANUFACTURERS, AND AMERICAN CHEMISTY COUNCIL
IN SUPPORT OF DEFENDANT EXXON MOBIL CORPORATION'S
APPLICATION FOR WRIT OF CERTIORARI OR REVIEW**

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STATEMENT OF INTEREST

Amici are organizations that represent companies doing business in Louisiana. Accordingly, *Amici* have an interest in ensuring that, when awarding punitive damages, Louisiana courts follow due process safeguards developed by the Supreme Court of the United States that protect against arbitrary punishment. The lower courts' failure to apply these principles exposes defendants to unconstitutional punitive damages liability and requires reversal. *Amici* respectfully request that the Court grant the Application for a Writ of Certiorari or Review.

STATEMENT OF THE CASE

Amici curiae adopt and incorporate Applicant's Statement of the Case.

INTRODUCTION AND SUMMARY OF THE ARGUMENT

This appeal raises two due process issues of concern to *amici* that require reversal. First, the U.S. Supreme Court in *Philip Morris USA v. Williams*, 549 U.S. 346, 353 (2007), mandated that a trial court, upon request of a defendant, instruct the jury that it may not impose punitive damages for alleged harm to nonparties. The trial court refused to give such an instruction and therefore violated the Defendant's due process rights. Second, the lower courts allowed the jury to impose punitive damages after a jury in an earlier trial involving the *same* plaintiff and *same* defendant found that the *same* alleged conduct did not warrant such punishment. Such repeated exposure to punitive damage liability should be found to violate due process.

This punitive damage judgment before this Court departs from a core theme of the U.S. Supreme Court's punitive damages jurisprudence: punishment may not be imposed arbitrarily. Over the past two decades, the Supreme Court has recognized that punitive damages are subject to significant procedural and substantive safeguards. States must provide adequate judicial review of punitive damage awards.¹ Courts must apply a *de novo* standard to thoroughly review whether an award violates due process.² Punitive damage awards are subject to three, now familiar constitutional guideposts for evaluating whether punishment is unconstitutionally

¹ *Honda Motor Co. v. Oberg*, 512 U.S. 415, 420, 432 (1994).

² *Cooper Indus., Inc. v. Leatherman Tool Group, Inc.*, 532 U.S. 424, 433 (2001).

excessive.³ The punishment inflicted through a punitive damage award must be proportional to the harm that the defendant's bad conduct caused the plaintiff.⁴

A critical element to avoiding the risk of arbitrary, unconstitutional punishment is that courts adequately instruct juries so that they ask "the right question, not the wrong one" when considering punitive damages. *Williams*, 549 U.S. at 355. A judgment that imposes punitive damages on a defendant after a jury found that the defendant's conduct did not justify such punishment is clearly arbitrary and should be found to violate due process.

ARGUMENT

I. THE PUNITIVE DAMAGES JUDGMENT MUST BE REVERSED BECAUSE THE TRIAL COURT REFUSED TO FOLLOW UNITED STATES SUPREME COURT PRECEDENT AND INSTRUCT THE JURY THAT IT COULD NOT USE HARM TO NONPARTIES AS A BASIS FOR PUNITIVE DAMAGES

In *Williams*, the U.S. Supreme Court held that "the Constitution's Due Process Clause forbids a State to use a punitive damages award to punish a defendant for injury that it inflicts upon nonparties or those whom they directly represent . . ." 549 U.S. at 353. This Court should grant review to correct the trial court's failure to instruct the jury in this manner.

Focusing a jury that is considering punitive damages on the alleged harm to the plaintiff, and not harm that the plaintiffs' counsel claims the defendant caused others, is a crucial due process safeguard. Defendants cannot fully defend themselves against allegations involving people who are not present in the litigation. *See id.* When a plaintiff vaguely accuses a defendant of causing harm to nonparties, the lack of specific allegations, a showing of causation, and evidence of harm magnify due process concerns, including arbitrariness, uncertainty, and lack of notice. *See id.* at 354; *see also State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 420 (2003) (finding that the trial court improperly allowed plaintiffs to use the trial as "a platform to expose, and punish, the perceived deficiencies of State Farm's operations throughout the country . . . rather than for the conduct directed toward the Campbells").

³ *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 574-75 (1996).

⁴ *State Farm Mutual Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 425 (2003); *see also Exxon Shipping Co. v. Baker*, 554 U.S. 471, 499-500, 515 (2008) (under federal maritime law, using such proportionality as the most effective means reducing "the stark unpredictability of punitive damages" and "outlier cases").

Williams does not prevent juries from considering how a defendant's conduct hurt others in assessing the reprehensibility of the defendant's conduct, but "a jury may not go further than this and use a punitive damages verdict to punish a defendant directly on account of harms it is alleged to have visited on nonparties." 549 U.S. at 355. It is essential that juries understand this distinction before entering deliberations. For this reason, when a plaintiff presents evidence of harm to nonparties at trial, as occurred in this case, on the request of a defendant, a court must adequately instruct the jury that it cannot punish the defendant specifically for harm done to others. *See id.*

The Supreme Court could not have stated with greater clarity that the federal constitution mandates that state courts provide a jury instruction, when requested by a defendant, "to provide assurance that juries are not asking the wrong question, i.e., seeking, not simply to determine reprehensibility, but also to punish for harm caused strangers." *Id.* "[I]t is particularly important that States avoid procedure that unnecessarily deprives juries of proper legal guidance." *Id.* at 355. Due to the difficulty in peering behind the curtain of what occurs during jury deliberations, and the significant risk of misunderstanding or confusing the difference between punishing a defendant for alleged harm to nonparties and considering such allegations when assessing the reprehensibility of a defendant's conduct, the Court instructed that "a court, upon request, *must* protect against that risk." *Id.* at 357 (emphasis added).

Here, as *Williams* provides, the Defendant requested that the trial court give the required instruction to the jury as to how to consider the plaintiffs' accusations that the defendant had engaged in misconduct toward others. The trial court refused to give this instruction even though the plaintiff paraded before the jury accusations about the defendant's conduct that were unrelated to the plaintiff's alleged injury. The Court of Appeals wrote off this bright-line violation of federal due process, finding that "no special instruction was needed to ensure that the jury did not consider harm to nonparties when awarding punitive damages." Slip Op. at 22-23. Rather, the Court of Appeals held that a lengthy jury instruction on the purpose of, and standard for, punitive damages under former Article 2315.3, which did not reference harm to nonparties, was sufficient to satisfy *Williams*. *See id.* But it was precisely this type of vagueness in the

distinction between punishment for harm to nonparties and consideration of reprehensibility of conduct that the U.S. Supreme Court found unconstitutional. *See Williams*, 549 U.S. at 355-57.

**II. THIS COURT SHOULD RECOGNIZE THAT REPEATEDLY
SUBJECTING THE SAME DEFENDANT TO PUNITIVE DAMAGES
LIABILITY FOR THE SAME CONDUCT DIRECTED TOWARD THE
SAME PLAINTIFF VIOLATES DUE PROCESS**

This Court should also find that due process does not permit a court to award punitive damages after a jury in an earlier trial concluded, based on the *same* evidence, that the *same* defendant's conduct toward the *same* plaintiff did not rise to the level required for such punishment.⁵ Allowing one jury to say "no" to punitive damages, only later to have another jury say "yes" is the very meaning of arbitrary punishment. Such a practice, which involves repeated exposure to quasi-criminal punishment for the same actions,⁶ cannot be constitutionally permissible.

In January 2010, a jury awarded the plaintiff in this case, Mr. Oleszkowicz, as well as several other individuals, compensatory damages for developing an increased risk of cancer. In that trial, the jury found Exxon Mobil Corp. did not engage in wanton or reckless conduct in the storage, handling or transportation of hazardous or toxic substances and did not award exemplary damages. Less than a year later, after the plaintiff was diagnosed with prostate cancer, he brought a second claim seeking compensatory damages and again seeking to impose punitive damages on Exxon Mobil for the same conduct.

Courts⁷ and scholars⁸ have recognized that repeated punitive damage awards against the same defendant for the same conduct in successive lawsuits by *different plaintiffs* raises serious

⁵ *Amici* also support Defendant's position that the punitive damage award is precluded by Louisiana's *res judicata* principles.

⁶ *Cooper Indus.*, 532 U.S. at 432 (recognizing that punitive damages, "which have been described as 'quasi-criminal,' operate as 'private fines' intended to punish the defendant and to deter future wrongdoing." (citing *Pacific Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1, 54 (1991) (O'Connor J., dissenting))).

⁷ *See King v. Armstrong World Indus., Inc.*, 906 F.2d 1022, 1031 (5th Cir. 1990) ("It must be said that a strong arguable basis exists for applying the due process clause. . . to a jury's award of punitive damages in a mass tort context."); *Racich v. Celotex Corp.*, 887 F.2d 393, 398 (2d Cir. 1989) ("[M]ultiple imposition of punitive damages for the same course of conduct may raise serious constitutional concerns, in the absence of any limiting principle."); *Roginsky v. Richardson-Merrell, Inc.*, 378 F.2d 832, 839 (2d Cir. 1967) (Friendly, J.) ("We have the gravest difficulty in perceiving how claims for punitive damages in such a multiplicity of actions throughout the nation can be so administered as to avoid overkill."); *Morse v. Southern Union Co.*, 38 F. Supp. 2d 1120, 126 n.12 (W.D. Mo. 1998) ("While the Missouri courts seem not to have considered whether the likelihood of multiple claims should limit punitive

due process concerns and may result in unconstitutionally excessive punishment. Courts have come close to the line of striking down punitive damage awards on this basis. Surely, that line must be crossed where, as here, the *same plaintiff* repeatedly seeks to impose punitive damages on the *same* defendant for the *same* conduct. If such claims are permitted, particularly in toxic tort litigation, each time a plaintiff develops a new condition or disease stemming from the same alleged conduct, he or she could again try to recover punitive damages. After seeking punitive damages stemming from a claim for increased risk of cancer, and again after developing prostate cancer, the same plaintiff could again seek to punish the defendant for the same conduct should he later develop lung cancer. Due process allows plaintiffs to have one bite at the punitive damage apple, but should not give them two or three. Once a plaintiff has litigated a claim that a defendant's conduct toward him or her warrants punitive damages, further litigation of that issue should be precluded. Retrying a plaintiff's allegation that a defendant's conduct warrants quasi-criminal punishment, over and over, raises significant constitutional concerns.

The Supreme Court has recognized that application of *res judicata* avoids unconstitutional, repetitive punishment when litigation involves the same plaintiff and defendant. When the Court ruled in *Campbell* that punitive damages may not be calculated based upon the hypothetical claims of individuals other than the plaintiff, it recognized that "[p]unishment on these bases creates the possibility of multiple punitive damage awards for the same conduct; for in the usual case *nonparties are not bound by the judgment some other plaintiff obtains.*" 538

damages recovery, I believe such a factor may be required by Due Process."); *McBride v. General Motors Corp.*, 737 F. Supp. 1563, 1570 (M.D. Ga. 1990) ("[D]ue process may place a limit on the number of times and the extent to which a defendant may be subjected to punishment for a single course of conduct."); *In re "Agent Orange" Prod. Liab. Litig.*, 100 F.R.D. 718, 728 (E.D.N.Y. 1983) ("There must, therefore, be some limit, either as a matter of policy or as a matter of due process, to the amount of times defendants may be punished for a single transaction."); *In re N. Dist. of Calif. "Dalkon Shield" IUD Prod. Liab. Litig.*, 526 F. Supp. 887, 899 (N.D. Cal. 1981) ("A defendant has a due process right to be protected against unlimited multiple punishment for the same act."), *vacated and remanded on other grounds*, 693 F.2d 847 (9th Cir. 1982); *Magallanes v. Superior Ct.*, 167 Cal. App. 3d 878, 888, 213 Cal. Rptr. 547, 554 (1985) ("It is also fair to ask whether a defendant who has been punished with punitive damages when the case is first tried should be punished again when the second, or the tenth, or the hundredth case is tried.").

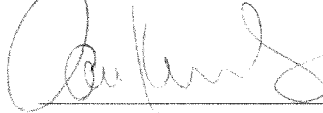
⁸ See, e.g., Dan D. Dobbs, *Law of Remedies*, § 3.11(8) (2d ed. 1993) ("If the first verdict for punitive damages . . . represents the appropriate level of punishment, it may be seriously unfair to inflict additional punishment in all subsequent cases. Besides the unfairness, such awards may destroy a valuable business and may exhaust its assets so that later victims of the same tort collect nothing at all.").

U.S. at 423 (emphasis added). The lower courts' failure to apply *res judicata* to the punitive damages claim in this case led to arbitrary, unconstitutional punishment that must be reversed.

CONCLUSION

For the reasons above, *amici curiae* urge this Court to grant the Defendant's Application for Writ of Certiorari or Review.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Brief has been served via postage-paid

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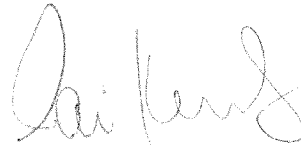
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A handwritten signature in black ink, appearing to read "Iain Kennedy", written over a horizontal line.

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