

SUPREME COURT OF LOUISIANA

**No. 2014-C-256**

John Oleszkowicz  
*Plaintiff-Respondent*

versus

Exxon Mobil Corporation, Exxon Mobil Oil Corporation, Humble Incorporated,  
and Intracoastal Tubular Services, Inc.  
*Defendants-Applicants*

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

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***AMICI CURIAE* BRIEF OF  
NFIB SMALL BUSINESS LEGAL CENTER,  
LOUISIANA ASSOCIATION OF BUSINESS AND INDUSTRY,  
AMERICAN TORT REFORM ASSOCIATION,  
NATIONAL ASSOCIATION OF MANUFACTURERS,  
AND AMERICAN CHEMISTRY COUNCIL  
IN SUPPORT OF DEFENDANT EXXON MOBIL CORPORATION**

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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 Louisiana courts properly apply principles of res judicata to promote consistency, finality, and fairness in litigation. These values are heightened when a plaintiff is permitted to re-litigate a punitive damages claim after a jury in an earlier case finds that the same defendant's conduct did not warrant punishment.

The NFIB Small Business Legal Center, a nonprofit, public interest law firm established to protect the rights of America's small-business owners, is the legal arm of the National Federation of Independent Business (NFIB). NFIB is the nation's oldest and largest organization dedicated to representing the interests of small-business owners throughout all fifty states. The approximately 350,000 members of NFIB, including 4,300 members in Louisiana, own a wide variety of America's independent businesses from manufacturing firms to hardware stores.

The Louisiana Association of Business and Industry (LABI) is the largest business advocacy group in Louisiana. Its members include over 2,600 businesses, representing approximately 200,000 people, and 117 local chambers and trade associations. Over 80 percent of LABI's members are small businesses. LABI's mission is to foster a climate of economic growth by championing the principles of the free enterprise system and to represent the general interests of the business community through active involvement in the legislative, regulatory, and judicial processes.

The American Tort Reform Association (ATRA) is a broad-based coalition of approximately 170 businesses, corporations, municipalities, associations, and professional firms that have pooled their resources to promote reform of the civil justice system with the goal of ensuring fairness, balance, and predictability in civil litigation. For over two decades, ATRA has filed *amicus* briefs in cases that have addressed important liability issues.

The National Association of Manufacturers (NAM) is the largest manufacturing association in the United States, representing small and large manufacturers in every industrial sector and in all 50 states. Manufacturing employs nearly 12 million men and women, contributes more than \$1.8 trillion to the U.S. economy annually, has the largest economic impact of any major sector and accounts for two-thirds of private-sector research and

development. The NAM is the powerful voice of the manufacturing community and the leading advocate for a policy agenda that helps manufacturers compete in the global economy and create jobs across the United States.

The American Chemistry Council represents the leading companies engaged in the business of chemistry. The business of chemistry is a key element of the nation's economy, accounting for ten cents out of every dollar in U.S. exports. Chemistry companies invest more in research and development than any other business sector.

### **STATEMENT OF THE CASE**

*Amici* adopt and incorporate Defendant Exxon Mobil Corp.'s Statement of the Case.

### **INTRODUCTION AND SUMMARY OF THE ARGUMENT**

Res judicata promotes consistency, finality, and fairness in the civil justice system. Precluding parties from relitigating an issue fully considered and decided in an earlier proceeding serves several essential purposes. It maintains the respect for the judiciary by guarding against inconsistent decisions and avoids inefficient use of the court's resources. Res judicata operates as the civil equivalent to the bar on double jeopardy, preventing a plaintiff from repeatedly suing the same defendant until he or she obtains the desired result. These principles are embodied in R.S. 13:4231.

The importance of proper application of res judicata is heightened when the issue to be relitigated is imposition of punishment through punitive damages, a "quasi-criminal" remedy. Repeated imposition of punitive damages against a defendant for the same conduct raises significant due process issues. Allowing one jury to say "no" to punitive damages, only later to have another jury say "yes," is the very meaning of arbitrary punishment. In a case involving the same plaintiff, defendant, and conduct, res judicata, properly applied, addresses such concerns and avoids the need to consider constitutional issues.

Here, the question of whether Exxon Mobil "engaged in wanton or reckless conduct in the storage, handling or transportation of hazardous or toxic substances" that caused the plaintiff's workplace exposure to naturally occurring radioactive material (NORM) was fully litigated and decided when the plaintiff asserted a fear of cancer claim in 2010. After a six-week

trial, a jury answered “no.” Less than a year after the verdict, the plaintiff filed a second lawsuit against Exxon Mobil alleging that the same exposure to NORM led him to develop prostate cancer. After a ten-day trial in 2012, the jury answered “yes” to the same question. The jury awarded the plaintiff \$10 million in punitive damages, which the Court of Appeals reduced to \$2.37 million.

Avoidance of repeated litigation of the same issue, between the same parties, with inconsistent results is the very reason for res judicata. The Court should reverse the Court of Appeal’s judgment on the issue of res judicata and vacate the punitive damages award.

### **ARGUMENT**

#### **I. LOUISIANA RECOGNIZES THE IMPORTANCE OF RES JUDICATA TO THE FAIR AND EFFICIENT FUNCTIONING OF THE CIVIL JUSTICE SYSTEM**

In 1990, the Louisiana Legislature amended R.S. 13:4231, which codifies the doctrine of res judicata, to embrace issue preclusion, in addition to claim preclusion. *See* R.S. 13:4231, Comments-1990. The Legislature did so “to fully implement the purpose of res judicata which is to foster judicial efficiency and also to protect defendants from multiple lawsuits.” *Id.* The doctrine “prevents inefficient use of the courts’ resources, reduces the possibility of harassment through vexatious suits, and helps maintain respect for the judicial proceeds by guarding against inconsistent decisions.” *Terrebonne Fuel & Lube, Inc. v. Placid Refining Co.*, 95-0654 (La. 1/16/96); 666 So.2d 624, 632 (quoting John A. Dixon, Jr., et al., *Res Judicata in Louisiana Since Hope v. Madison*, 51 Tul. L. Rev. 611, 611 (1977), footnotes in quotation omitted). Since adoption of the 1990 amendment, this Court has recognized that “the purposes of both federal and state law on res judicata is essentially the same; to promote judicial efficiency and final resolution of disputes by preventing needless litigation.” *Id.*

Federal law similarly recognizes that res judicata “rests upon considerations of economy of judicial time and public policy favoring the establishment of certainty in legal relations.” *Comm’r of Internal Revenue v. Sunnen*, 333 U.S. 591, 597 (1948). Issue preclusion (also referred to as “collateral estoppel”) “stands for the extremely important principle in our adversary system of justice . . . that when an ultimate fact has once been determined by a valid

and final judgment, that issue cannot be litigated between the same parties in any future lawsuit.” *Ashe v. Swenson*, 397 U.S. 436, 443 (1970). While parties are “free to litigate points which were not at issue in the first proceeding,” such as whether exposure to NORM caused the plaintiff to develop prostate cancer, “matters which were actually litigated and determined in the first proceeding,” such as whether Exxon Mobil’s conduct met the standard for punitive damages, “cannot later be litigated.” *Sunnen*, 333 U.S. at 598. “Once a party has fought out a matter in litigation with the other party, he cannot later renew that duel.” *Id.* That is precisely what occurred with respect to the punitive damages claim before this Court.

Louisiana courts have interpreted res judicata broadly, while narrowly construing the statutory exceptions to the rule. *See Jackson v. N. Bank Towing Corp.*, 213 F.3d 885, 888-89 (5th Cir. 2000). Where party fully litigated an issue, as occurred in this case, it is a “textbook case” for res judicata. *Id.* Judicial discretion to make an exception to the rule is appropriate only in an “awkward factual or legal scenario” where the parties did not have their day in court on the issues. *See id.*; *see also Terrebonne Fuel*, 666 So. 2d at 635 (finding that res judicata should not apply where the party asserting a claim was, through no fault of his own, unable to adjudicate it in the first suit). While the plaintiff’s injury in this case may have changed over time, what cannot have changed is whether Exxon Mobil engaged in “highly unreasonable conduct, involving an extreme departure from ordinary care, in a situation where a high degree of danger is apparent,”<sup>1</sup> between 1979 and 1986 when the plaintiff worked at its pipeyard. Res judicata does not permit a plaintiff to “relitigate a factual issue raised at the time of his first claim, the circumstances of which did not (and could not) change over time.” *Chaisson v. Central Crane Serv.*, 2010-0112 (La. App. 1 Cir. 7/29/10); 44 So. 3d 883, 888.

## **II. THE IMPORTANCE OF PROPER APPLICATION OF RES JUDICATA IS HEIGHTENED WHEN THE ISSUE TO BE RELITIGATED IS THE IMPOSITION OF PUNITIVE DAMAGES, A QUASI-CRIMINAL PENALTY**

Punitive damages punish a defendant for wrongful conduct. *See Mosing v. Domas*, 2002-0012 (La. 10/15/02); 830 So. 2d 967, 978 (“Such damages... are given to the plaintiff over and

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<sup>1</sup> *Billiot v. B.P. Oil Co.*, 93-1118 (La. 9/29/94); 645 So. 2d 604, 613, *overruled on other grounds by Adams v. J.E. Merit Constr. Inc.*, 97-2005 (La. 5/19/98); 712 So. 2d 88.



above full compensation for his or her injuries for the purpose of punishing the defendant, of teaching the defendant not to do it again, and of deterring others from following the defendant's example...."). They serve as a quasi-criminal remedy. Courts<sup>2</sup> and scholars<sup>3</sup> have cautioned that repeated punitive damage awards against the same defendant for the same conduct in successive lawsuits by *different plaintiffs* raises serious due process concerns and may result in unconstitutionally excessive punishment. Proper application of res judicata in this case—which involves the *same* plaintiff and same defendant—avoids the need to decide such constitutional issues.

As the cases cited above show, courts have come close to the line of striking down multiple punitive damage awards imposed on the same defendant for the same conduct in litigation by different plaintiffs. Surely, that line must be crossed where, as here, the *same plaintiff* seeks to impose punitive damages on the *same* defendant for the *same* conduct that was litigated in a previous action. If such repeat claims are permitted, particularly in toxic tort litigation, each time a plaintiff develops a new condition or disease that he or she can allege stems from the same exposure, that plaintiff can again try to recover punitive damages. After seeking punitive damages stemming from a claim for increased risk of cancer, and again after

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<sup>2</sup> 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) ("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. S. 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 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 (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.").

<sup>3</sup> 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.").

developing prostate cancer, the same plaintiff could again seek to punish the defendant for the same conduct should he later develop lung cancer or another condition. 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 due process concerns.<sup>4</sup>

The U.S. Supreme Court has implicitly recognized that application of res judicata avoids this potentially unconstitutional, repetitive punishment when litigation involves the same plaintiff and defendant. When the Court ruled in *State Farm Mutual Automobile Insurance Co. v. Campbell*, 538 U.S. 408 (2003), that punitive damages may not be calculated based upon the hypothetical claims of individuals other than the plaintiff, the Court 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.*” *Id.* at 423 (emphasis added). Parties to the litigation, however, are so bound. Res judicata provides the basis for precluding relitigation of punitive damages in such cases.

### **III. RES JUDICATA IS AKIN TO DOUBLE JEOPARDY, MAKING ITS PROPER APPLICATION PARTICULARLY CRITICAL IN A CASE SEEKING, FOR A SECOND TIME, TO IMPOSE PUNISHMENT**

While double jeopardy does not apply in litigation between private parties, its close linkage with res judicata underscores the importance of applying res judicata in the punitive damages context. Courts have underscored that “[d]ouble jeopardy is the criminal counterpart of the civil doctrine of res judicata. . . .” *Kennedy v. Washington*, 986 F.2d 1129, 1133 (7th Cir. 1993) (Posner, J.).

The two doctrines serve the same goals. *See Crist v. Bretz*, 437 U.S. 28, 33 (1978) (stating that the primary purpose of double jeopardy is to preserve the finality of judgments, and

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<sup>4</sup> Louisiana law's requirement of express statutory authorization of punitive damage awards, *see McCoy v. Ark. Natural Gas Co.*, 175 La. 487, 143 So. 383, 385-86 (La. 1932), and its strict construction of punitive damages statutes, *see Int'l Harvester Credit Corp. v. Seale*, 518 So. 2d 1039, 1041 (La. 1988), reflects the Court's unease with expansive punitive damages liability and also weighs in support of broad application of res judicata in the punitive damage context.

that this purpose is the same as that of the doctrines of res judicata and collateral estoppel). Double jeopardy prevents “both successive punishment and successive prosecution.” *Witte v. United States*, 515 U.S. 389, 395-96 (1995). “[I]t surely protects a man who has been acquitted from having to ‘run the gantlet’ a second time.” *Ashe*, 397 U.S. at 445-46 (quoting *Green v. United States*, 355 U.S. 184, 190 (1957)). In fact, issue preclusion originated in civil litigation and only later became embodied in the Double Jeopardy Clause of the Fifth Amendment. *See id.* at 442-43.

As Professor Thomas Colby has observed, “In the civil law, where the Double Jeopardy Clause has no application to litigation between private parties, the fear of multiple bites at the same apple generally finds expression in the doctrine of res judicata” because the policy underlying the rule is “the defendant’s interest in avoiding the burdens of twice defending a suit.” Thomas B. Colby, *Beyond the Multiple Punishment Problem: Punitive Damages as Punishment for Individual, Private Wrongs*, 87 Minn. L. Rev. 583, 597 (2003) (internal quotation and citation omitted). While res judicata “has no direct role to play where *different* plaintiffs are seeking the same punitive damages,” *id.* (emphasis added), where the parties are the same, res judicata can and must serve the critical purpose of not subjecting a defendant to punishment twice for the same conduct.

### **CONCLUSION**

For the reasons above, *amici curiae* urge this Court to reverse the Court of Appeal’s judgment on the issue of res judicata and vacate the award of punitive damages.

Respectfully submitted,

/s/ Iain Kennedy

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**CERTIFICATE OF SERVICE**

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